

No. 25-

IN THE
Supreme Court of the United States

CALIFORNIA SPORTFISHING PROTECTION
ALLIANCE, FRIENDS OF THE RIVER,
SAN FRANCISCO CRAB BOAT OWNERS
ASSOCIATION, INC., AND FELIX SMITH,

Petitioners,

v.

ADAM NICKELS, ACTING REGIONAL DIRECTOR
OF THE U.S. BUREAU OF RECLAMATION, U.S.
BUREAU OF RECLAMATION, SAN LUIS &
DELTA-MENDOTA WATER AUTHORITY
AND GRASSLANDS WATER DISTRICT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Clean Water Act exempts from its National Pollutant Discharge Elimination System (“NPDES”) permitting program “discharges composed entirely of return flows from irrigated agriculture” as the statute expressly provides (33 U.S.C. § 1342(l)(1)), or instead exempts “irrigation return flows that do not contain additional point source discharges from activities unrelated to crop production,” as the Ninth Circuit interpreted the exemption to mean in this case? (App. 21-a.)

2. Whether the Clean Water Act’s exemption from its NPDES permitting program of “discharges composed entirely of return flows from irrigated agriculture” (33 U.S.C. § 1342(l)(1)) exempts dispersed pollutants from non-farm sources that are collected and commingled with agricultural return flows before their discharge to waters of the United States?

3. Whether this Court’s ruling that under the NPDES permit program “a point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters’” (*South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004)) applies to the Clean Water Act’s exemption of “discharges composed entirely of return flows from irrigated agriculture”?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 14.1(b)(ii), Plaintiffs, Appellants and Petitioners California Sportfishing Protection Alliance, et al. (collectively, “Plaintiffs”) submit the following disclosure statement.

Plaintiffs California Sportfishing Protection Alliance, Friends of the River, and San Francisco Crab Boat Owners Association, Inc., are non-profit organizations, and do not have parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad. Plaintiff Felix Smith is an individual.

LIST OF RELATED PROCEEDINGS

- *Pacific Coast Federation of Fishermen's Associations, et al., v. Ernest A. Conant, et al.*, No. 2:11-cv-02980-DAD-CKD, U.S. District Court for the Eastern District of California. Judgments entered Aug. 31, 2017 and Feb. 21, 2023.
- *Pacific Coast Federation of Fishermen's Associations, et al., v. Donald R. Glaser, et al.*, No. 17-17130, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Sep. 6, 2019.
- *Pacific Coast Federation of Fishermen's Associations, et al., v. Adam Nickels, et al.*, No. 23-15599, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Sep. 5, 2025.

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**CITATIONS TO THE
OPINIONS AND ORDERS BELOW**

The Opinion of the Court of Appeals (App. 1a-30a) is reported at 150 F.4th 1260 (2025). The Order denying rehearing (App. 81a-82a) is unreported. The District Court's Order denying Plaintiffs' motion for summary judgment and granting in part and denying in part Defendants' motions for summary judgment (App. 32a-80a) is reported at 657 F.Supp.3d 1341 (2023).

The earlier opinions of the Court of Appeals are reported at 937 F.3d 1191 (2019) and 945 F.3d 1076 (2019) (amended on rehearing). The District Court's Orders denying the parties' motions for judgment on the pleadings, denying Plaintiffs' motion for summary judgment and granting in part and denying in part Defendants' motion for summary judgment, and denying Plaintiffs' motion for reconsideration are not published in the Federal Supplement but are available at 2013 WL 5230266, 2016 WL 6648731, and 2017 WL 3421910, respectively.

**STATEMENT OF THE BASIS FOR
JURISDICTION IN THE SUPREME COURT**

The Judgment of the Court of Appeals was entered September 5, 2025. Plaintiffs timely filed their Petition for En Banc Rehearing on October 20, 2025. Plaintiffs timely filed this Petition for Writ of Certiorari within 90 days after the Ninth Circuit denied Plaintiffs' Petition for En Banc Rehearing on November 18, 2025 (App. D). This Court has jurisdiction under the United States Constitution, Article III, §§ 1 and 2, and 28 U.S.C.

§ 1254(1). The District Court had jurisdiction under 33 U.S.C. § 1365(a) and 28 U.S.C. §§ 1331, 1346, 1361, and 2201-2202. Plaintiffs timely appealed the District Court’s Judgment (App. B) filed February 21, 2023 on April 19, 2023. The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294(1) over Plaintiffs’ appeal from the District Court’s final Judgment.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

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STATEMENT OF THE CASE

I. INTRODUCTION

Plaintiffs seek a judgment directing Defendants to secure a discharge permit under the National Pollution

Discharge Elimination System (“NPDES”) established by section 402 (33 U.S.C. § 1342) of the Clean Water Act (33 U.S.C. § 1251 et seq.; “CWA” or “Act”) for the San Luis Drain – a point source – that discharges commingled wastewater collected by Defendants’ Grassland Bypass Project (“Project”) from both farmed and unfarmed lands to waters of the United States.

Defendants contend the Drain’s discharge of wastewater collected from dispersed activities on unfarmed lands commingled with wastewater from irrigated farmland requires no NPDES permit because it falls within the exemption for “discharges composed entirely of return flows from irrigated agriculture” in 33 U.S.C. § 1342(l)(1). The District Court and the Ninth Circuit agreed with Defendants, ruling that no permit is required because a point source must be the original source of the pollution, and the Drain’s commingled pollutants from unfarmed lands were collected from dispersed sources rather than from “point sources.” (App. 21a, 30a; App. 58a-60a, 76a-77a.)

Plaintiffs contend the Ninth Circuit erred because the Drain is a point source and its commingled discharges are not “composed entirely of return flows from irrigated agriculture” as the statute expressly requires for exemption. (33 U.S.C. § 1342(l)(1).)

II. LEGAL BACKGROUND

Congress passed the CWA in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by replacing water quality standards with point source effluent limitations. (33 U.S.C. § 1251(a);

County of Maui, Hawaii v. Hawaii Wildlife Fund (“*County of Maui*”), 590 U.S. 165, 170-171 (2020); *South Florida Water Management Dist. v. Miccosukee Tribe of Indians* (“*Miccosukee*”), 541 U.S. 95, 102 (2004).) The Act prohibits the “discharge of any pollutant by any person” unless in compliance with the Act. (33 U.S.C. § 1311(a).)

Under the CWA, the “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” (33 U.S.C. § 1362(12); *County of Maui*, 590 U.S. at 171; *Miccosukee*, 541 U.S. at 102.) An addition occurs when a point source introduces a pollutant into navigable waters that would not exist in the same form or concentration but for the discharge. (*Rybachek v. EPA*, 904 F.2d 1276, 1285-1286 (9th Cir. 1990); *U.S. v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000).)

“A cornerstone of the Clean Water Act is that the ‘discharge of any pollutant’ from a ‘point source’ into navigable waters of the United States is unlawful unless the discharge is made according to the terms of an NPDES permit obtained from either the United States Environmental Protection Agency (‘EPA’) or from an authorized state agency.” (*Ass’n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res.*, 299 F.3d 1007, 1009 (9th Cir. 2002).) The CWA thus creates a strict liability scheme that “categorically prohibits any discharge of a pollutant from a point source without a permit,” regardless of whether the receiving water is unduly affected. (*Committee to Save the Mokolumne River v. East Bay Municipal Utility Dist.* (“*Mokolumne*”), 13 F.3d 305, 309 (9th Cir. 1993).)

“To establish a violation of the CWA, ‘a plaintiff must prove that defendants (1) discharged, i.e., added

(2) a pollutant (3) to navigable waters (4) from (5) a point source.” (*Pacific Coast Federation of Fishermen’s Associations v. Glaser* (“*Glaser*”) 945 F.3d 1076, 1083 (9th Cir. 2019) (quoting *Mokelumne*, 13 F.3d at 308).) As noted, CWA section 402 requires an NPDES permit for the discharge of pollutants from point sources into navigable waters. (33 U.S.C. §§ 1342(a)(1), 1362(14) (defining “point source”); 40 C.F.R. § 122.2 (defining “point source”).)

While the CWA exempts irrigated agriculture return flows from the NPDES permit program (33 U.S.C. § 1362(14); 40 C.F.R. § 122.3(f)), it only exempts “discharges composed *entirely* of return flows *from* irrigated agriculture. . . .” (33 U.S.C. § 1342(l)(1) (emphasis added).) Congress thereby declared its intent not to exempt conveyances discharging pollutants to waters of the United States other than those composed entirely of return flows of water used to irrigate crops. (*Id.*) “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.” (*Northern California River Watch v. City of Healdsburg* (“*River Watch*”), 496 F.3d 993, 1001 (9th Cir. 2007), citing *U.S. v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986).)

The District Court initially recognized – before its rulings later strayed – that “[t]he exemption does not cover . . . commingled discharges” – discharges composed of *both* exempt agricultural return flows and “additional discharges.” (Ninth Circuit First Excerpts of Record, Volume 1, pages 100-101 (“1FER100-101”).)

III. STATEMENT OF FACTS

This case concerns Defendants' operation of their Grassland Bypass Project ("Project"), which is located

"in California's Central Valley [and] jointly administered by Defendants-Appellees Adam Nickels (Acting Regional Director of the U.S. Bureau of Reclamation), the U.S. Bureau of Reclamation, the San Luis & Delta-Mendota Water Authority ('SLDMWA'), and the Grassland Water District. Implemented in 1996, the Project comprises an extensive underground tile drainage system beneath the Grassland Drainage Area ('Drainage Area'), serving 97,400 acres of land within the Delta-Mendota sub-basin of the San Joaquin Valley."

* * *

"This Drainage Area is composed of active, fallow, and retired farmland as well as non-irrigable land used for public infrastructure, residences, and businesses."

(App. 13a-14a.)

"After the water leaves the Drainage Area, it enters the Grassland Bypass Channel ("Bypass") that conveys it further into the San Luis Drain ("Drain"). The Drain is owned by the Bureau of Reclamation and operated by SLDMWA. The Drain spans approximately 28 miles and was built with expansion joints and

weep valves to prevent damage to its concrete lining from the pressure of surrounding groundwater. Nonetheless, the Drain has accrued some damage over time. Due to its perforated design and accumulated damage, surrounding groundwater seeps into the Drain.

Sediments containing concentrations of pollutants like selenium have also accumulated in the Drain, requiring monitoring, occasional physical removal, and certain reductions in flow rates. At its terminus, the Drain discharges its contents into the Mud Slough wetland, a navigable water of the United States, which feeds into the San Joaquin River and lies adjacent to numerous national- and state-protected wildlife areas.”

(App. 15a.)

In 1996 Defendants obtained an NPDES permit allowing operation of the Project. (Ninth Circuit Excerpts of Record, Volume 3, pages 512-513 (“3ER512-513”).) After it expired in 1997, Defendants failed to seek its renewal. Consequently, since 1997, Defendants have operated the Project without an NPDES permit. (App. 14a.)

In addition to receiving Grassland Drainage Area (“GDA”) wastewater from the Bypass, the Drain receives substantial wastewater from adjacent lands along its 28-mile length, most of which are used for non-agricultural purposes. (3FER603; 7FER1601, 1603.) Consequently, its flow increases up to 31% between the Bypass and Mud Slough. (2FER227; 2ER294-302, 305-309, 312 (map), 314 (table).)

The Drain discharges substantial quantities of selenium, boron and other pollutants into Mud Slough. (2FER400 (Table C-26).) These quantities are recorded by the San Francisco Estuary Institute (“Estuary Institute”), and show high levels of toxic selenium and boron. When this litigation commenced in 2011, the average selenium concentration discharged into Mud Slough was 29.8 micrograms per liter (“ug/L”), nearly 6 times higher than the maximum 4-hour average concentration allowed under the Regional Water Board’s Basin Plan, 5.0 ug/L. (5FER1076 (Table III-1), 1079 (Table 2a); 10FER2318.) Such “high concentrations of selenium” (3FER465; 10FER2326-2327; 11FER2389-2391) harm human health and aquatic life (10FER2318).

Mud Slough is an ecologically sensitive waterway and wetland that passes through or adjoins numerous national and state wildlife refuges, including the San Luis National Wildlife Refuge Complex and the Merced National Wildlife Refuge. (2FER378-379 (Figure 7-1).) Due to the Drain’s polluted discharges, Mud Slough has elevated levels of salinity, selenium and boron. (2FER36.) Its selenium levels regularly exceed applicable water quality objectives. (2FER281.)

Contamination of Mud Slough also pollutes the San Joaquin River downstream. “Exceedances of drinking water standards have occurred since the Project began either in the San Joaquin River . . . or [farther downstream] in the Bay-Delta.” (10FER2332.) “Laboratory and field research has demonstrated that elevated water-borne and/or dietary concentrations of several trace elements in the San Joaquin Valley drain waters are toxic to fish and wildlife. Se[elenium] is the most toxic of these.” (2FER378 (quote); 10FER2332-2333.)

A. SEEPAGE FROM NON-FARM LAND INTO SAN LUIS DRAIN

The Drain discharges pollutants from three primary sources. The most direct source is contaminated groundwater from lands through which the Drain passes. (3FER603, 692; 4FER719; 5FER1032, 1039, 1046, 1052, 1059, 1066; 7FER1598, 1603-1605.) The vast majority of these lands are unfarmed. (*Id.*; 2FER226-228; 7FER1604-1605; 2ER291, 298-302 (discussing 2ER279-281, 286, 307-309, 312 (map), 314 (chart)); 3ER497-499.)

The quantity of pollutants entering the Drain from these adjacent lands is determined by comparing the volume at the Drain's upstream end (Station A) where it receives wastewater from the Bypass, with the volume at Station B, 26 miles downstream and two miles upstream from Mud Slough. (*Id.*) The Estuary Institute's monthly, quarterly and annual water quality and toxicity reports of the pollutants collected at Stations A and B, and in Mud Slough (2FER245; 3FER419; 4FER723-725, 5FER1032-1066, 11FER2391) show that the increases in the Drain's wastewater from seepage from adjacent lands ranged up to 52%. (5FER1051-1054, 1039-1040.) Defendants' modeling shows that seepage adds an additional 5,801 acre-feet of wastewater flow, 181 pounds of selenium, and 20,840 tons of salts discharged to Mud Slough each year. (2FER396-399 (Table C-23 (flow), Table C-24 (selenium), and Table C-25 (salt).)

To remedy the inflow of contaminated groundwater from unfarmed lands, Reclamation has considered building a new drain or enclosed pipeline that would "convey only agricultural drainage and discharge it directly to

the San Joaquin River,” but did not pursue this option. (2FER334 (Alternative 9: Construct New Channel), 335-337 (Alternatives 13 and 14: Construction of Pipeline or New Drain).) Construction of a wastewater treatment plant was also considered and discarded. (3ER389-391.) Consequently, the Drain continues to discharge selenium and other pollutants collected from adjacent unfarmed lands into Mud Slough. (*Id.*)

B. DISCHARGE FROM THE GRASSLAND BYPASS CHANNEL

The Drain’s second major source of contamination is wastewater from the Bypass, which drains both farmed lands and unfarmed lands within the roughly 97,400 acres of the GDA. (1FER21-44; 2FER235; 351; 5FER1211-6FER1377; 7FER1555, 1598-1610.)

C. SCOURING OF SEDIMENT STORED IN SAN LUIS DRAIN

The Drain’s third major source of pollutants is accumulated and highly seleniferous sediment. (5FER980-1011; 7FER1605-1606 (Bond Expert Report citing 4FER696 (Estuary Institute 2012 Annual Report)).) Some selenium deposits are nearly 8 feet deep and exceed hazardous waste criteria. (2FER263-287, 367; 5FER980-1011, 1013-1026; 7FER1604.) As of 2015, the Drain had over 274,000 cubic yards of sediment. (4FER743.)

The Drain’s sediments “are resuspended into the water column when water is released into the [Drain]” from the Bypass. (7FER1598-1599, 1606 (citing expert’s photographs showing that “sediment deposits [have] been

scoured and reworked by flowing water” and “selenium is thereby discharged to Mud Slough and the San Joaquin River;”); 10FER2195-2197, 2208-2213 (expert’s photos of eroding sediment).) Mobilization of stored sediment occurs when the Drain’s flow rises and erodes the caked sediment as shown in the photos. (*Id.*; 2FER374.)

The Estuary Institute’s testing showed the average selenium concentration in Drain sediments is two orders of magnitude (i.e., 100 times) greater than background soils. (4FER732-752; 7FER1605 (Bond Expert Report (citing 5FER980-1011, 1013-1026)).) The Institute expressed concern regarding “excess sediment loading and accumulation in the Drain and scour of previously accumulated sediment from the Drain into the receiving waters due to high water velocities.” (2FER380; 4FER696-718, 753-757.)

D. THE PROJECT DISCHARGES POLLUTANTS FROM A POINT SOURCE

Based on Plaintiffs’ evidence that the Project discharged pollutants to Mud Slough, a navigable water, without an NPDES permit, the District Court ruled that Plaintiffs had proved a violation of the Act. (App. 52a.) However, the court ruled the Drain’s discharges exempt as return flows from irrigated agriculture. (App. 76a-77a.)

IV. PROCEDURAL HISTORY

A. PLAINTIFFS FILED THIS CASE IN 2011

On June 8, 2011, Plaintiffs gave notice under 33 U.S.C. § 1365(b)(1)(A) of Defendants’ ongoing CWA violations

and requested their compliance by securing an NPDES permit. (11FER2363-2370.) After Defendants failed to take corrective action, Plaintiffs filed suit on November 9, 2011. (11FER2396.)

B THE DISTRICT COURT DISMISSED IN 2017

In March 2017 the District Court issued a Final Pre-Trial Order that exempted most commingled flows, dismissed Plaintiffs' seepage and sediment claims, and required Plaintiffs to prove that an industrial use comprised the *majority* of all the Project's discharges. Plaintiffs stipulated to dismissal to expedite appellate review. Judgment for Defendants was entered on August 31, 2017. (1FER1-5.)

C. THE NINTH CIRCUIT REVERSED AND DECIDED FOUR PIVOTAL ISSUES IN 2019.

In 2019 the Ninth Circuit reversed. (*Glaser*, 937 F.3d 1191 (9th Cir. 2019) (original ruling); *Glaser*, 945 F.3d 1076 (amended on denial of rehearing).) It decided four pivotal issues of law. First, it reversed the District Court's ruling that "Plaintiffs bore the burden of demonstrating that the discharges at issue were not exempt from the CWA's permitting requirement pursuant to [33 U.S.C.] § 1342(l) (1)." (945 F.3d at 1083.) Citing *Mokelumne*, 13 F.3d at 308, it held that "[a]fter a plaintiff establishes" the five elements for requiring an NPDES permit – i.e., "that defendants (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source, . . . the defendant carries the burden to demonstrate the applicability of a statutory exception to the CWA." (945 F.3d at 1083, citing *River Watch*, 496 F.3d at 1001.)

Second, the Court determined the meaning of the exemption's term "irrigated agriculture," and adopted the definition of agriculture in *Webster's Third New International Dictionary* 44 (2002): "the science or art of cultivating the soil, harvesting crops, and raising livestock." (945 F.3d at 1084.)

Third, the Court reversed the District Court's "holding that § 1342(l)(1) exempts discharges from the CWA's permitting requirement unless a 'majority of the total commingled discharge' is unrelated to crop production." (945 F.3d at 1085.) The Court reasoned that "[a]lthough 'entirely' is not defined by the statute, we begin by considering its 'ordinary, contemporary, common meaning . . . wholly, completely, fully.'" (*Id.*, quoting *Webster's Third New International Dictionary*.) Hence, "[t]he text demonstrates 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." (*Id.* (emphasis added).)

Fourth, the Court reversed the District Court's orders striking Plaintiffs' claims that the Project's discharges were not exempt because they included flows into the Drain from nonfarm sources including "the Vega [Solar] Project," "discharges from highways, residences, seepage into the [Drain] from adjacent lands, and sediments from within the [Drain]." (945 F.3d at 1086.) It ruled Plaintiffs adequately "alleged that the Drain discharged 'polluted groundwater . . . originating from parcels where no farming occurs,' that "the Drain picked up seepage from non-irrigated land on its way to the Mud Slough, and because the Drain discharged pollutants from seepage and sediment within the Drain." (*Id.* at 1087 (emphasis added).)

D. ON REMAND, PLAINTIFFS CARRIED THEIR BURDEN OF PROOF

The District Court ruled that “Plaintiffs have established a violation under the Act” by showing “the addition of water containing pollutants stemming from the Project being dispensed into Mud Slough without an NPDES permit, as required.” (App. 52a.)

Plaintiffs then *exceeded* their burden of proof by establishing through Defendants’ own monthly monitoring reports and admissions by Defendants’ expert, as well as Plaintiffs’ expert opinion based on the record evidence, that the Project’s commingled discharges included “polluted groundwater . . . originating from parcels where no farming occurs” including where “the Drain picked up seepage from non-irrigated land on its way to the Mud Slough.” (*Glaser*, 945 F.3d at 1087; 2ER287-288, 294-302, 305-309, 312 (map), 314 (table); 3ER492-521; 2FER226-228; 7FER1598-1609.) Plaintiffs also proved the Drain received pollutants from other non-exempt sources, including approximately 30,000 acres of unfarmed lands within the GDA, and seleniferous sediment stored within the Drain. (2ER233-239 (citing 3ER494-505, 512-516), 294-302; 2FER226-228; 7FER1582-1593, 1598-1609.)

E. ON REMAND, DEFENDANTS FAILED TO CARRY THEIR BURDEN OF PROOF

Defendants, by contrast, did not meet their burden. They failed to show that the Project’s discharges of pollutants from the Drain into Mud Slough were “composed entirely of return flows from irrigated agriculture.” (*Glaser*, 945 F.3d at 1085, quoting 33 U.S.C.

§ 1342(l)(1).) Their expert Mr. Ortega conceded that the majority of the lands along the Drain's 28-mile length from which polluted groundwater seeps into the Drain are *not* irrigated farmland. (2ER279-281, 286 (only 6 of 38 land segments' classification disputed).) Plaintiffs' expert, retired Regional Water Board engineer Mr. Bond, had shown that 87% of the lands adjacent to and draining into the Drain were not irrigated agriculture. (2ER307-309, 312 (map), 314 (table).)

Moreover, Defendants' own monthly reports between September 10, 2006 and July 31, 2015 – the period relevant to the District Court's ruling (1ER12, citing 3ER317) reveal that substantial quantities of contaminated wastewater from those unfarmed – and thus, *non-exempt* – lands along the Drain seep into the Drain. (3FER603, 692; 4FER719; 5FER1032, 1039, 1046, 1052, 1059, 1066; 7FER1598, 1603-1605; 3ER494, 496, 502-504, 508, 519.) Defendants' modeling shows contaminated seepage adds an estimated 5,801 acre-feet per year. (2FER396-399; 3ER504-505.) That quantity of polluted water is sufficient to inundate 640 acres – one square mile – to a depth of 9 feet ($5,801 \div 640 = 9.064$).

Because Defendants' own reports documenting years of discharging polluted seepage from unfarmed lands precluded them from meeting their “burden of establishing that the Project's discharges were ‘composed entirely of return flows from irrigated agriculture’” (*Glaser*, 945 F.3d at 1083), they invented a novel theory that Plaintiffs must additionally prove that *each of the original sources* of the Drain's commingled waste stream must also be a point source requiring an NPDES permit. (2ER262-263.)

F. THE DISTRICT COURT DISMISSED AGAIN IN 2023

On February 21, 2023 the District Court decided the parties' cross-motions for summary judgment. (App. C.) It granted summary judgment (App. B) to Defendants, ruling: "the alleged sources of pollution are, on this evidence of record, *nonpoint sources* or stem from activities related to crop production. *Therefore* they are all covered under the § 1342(l)(1) exception." (App. C., 77a (emphases added).)

The District Court disregarded much of Plaintiffs' evidence on the grounds their Response to Defendant's Separate Statement of Facts either "fail[s] to address the particular fact at issue," or is entirely missing. (App. 35a, n.2.) This is incorrect. Excepting only Plaintiffs' objections to several of Defendants' "undisputed" facts as immaterial, Plaintiffs provided extensive and specific citations and quotations with detailed parenthetical explanations. (App. 35a, n.2; 2ER185, 189-191, 193, 197-202, 205-210, 212-213 (citing, *e.g.*, expert testimony, independent and agency reports, the Project Environmental Impact Report, and other probative evidence).)

G. THE NINTH CIRCUIT AFFIRMED AND DISMISSED

On April 19, 2023, Plaintiffs appealed the District Court's Judgment, and on September 5, 2025, a different Ninth Circuit panel issued its Opinion affirming the Judgment. (App. 1a-30a.) On October 20, 2025, Plaintiffs filed a Petition for Rehearing En Banc, which the Court denied on November 18, 2025. (App. 81a-82a.)

ARGUMENT

I. INTRODUCTION

This Court's review is needed because the Opinion's rewriting of the exemption's plain language creates profound conflicts with the CWA, with rulings of this Court, rulings of other Circuits, and the governing EPA regulations. Unless corrected, the Opinion's misinterpretation of the exemption for discharges composed entirely of return flows from irrigated agriculture will allow non-agricultural dischargers to evade permitting under the CWA by commingling their dispersed wastewater with farm discharges, defeating the Act's purposes.

II. THE OPINION INVENTS AN EXTRA-STATUTORY EXEMPTION CONTRARY TO THE CLEAN WATER ACT

Section 402 of the CWA establishes the NPDES permit program, and empowers the EPA Administrator (or a delegated state) to issue permits allowing the discharge of pollutants from point sources to navigable waters. (33 U.S.C. § 1342.) Pursuant to 33 U.S.C. § 1342(a)(1), the EPA Administrator promulgated detailed regulations implementing the NPDES permit program. (40 C.F.R. Parts 122, 123, and 124.)

Congress exempted from the NPDES permit requirement "discharges composed entirely of return flows from irrigated agriculture." (33 U.S.C. § 1342(l)(1).) This exemption states:

“The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any state to require such a permit.”

(Id.)

The Act defines this exemption’s principal terms as follows:

- “The term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.” (33 U.S.C. § 1362(16).)
- “The term ‘discharge of a pollutant’ and the term ‘discharge of pollutants’ each means (A) any addition of any pollutant to navigable waters from any point source. . . .” (33 U.S.C. § 1362(12).)
- “The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged. The term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” (33 U.S.C. § 1362(14).)

The plain language of section 1342(l)(1), elucidated by the Act’s foregoing definitions, is unambiguous: “Discharge” means the “discharge of pollutants.” “Discharge of pollutants” means “[a]ny addition of any pollutant to navigable waters from any point source.” (33 U.S.C. §§ 1362(16), 1362(12), and 1362(14).)

Applying these straightforward statutory definitions, it follows that discharges from the San Luis Drain – which all parties agree and the District Court ruled is a “point source” – to Mud Slough are “discharges of pollutants” to Mud Slough – which all parties agree and the District Court ruled is a “navigable water.” That being the case, the sole question posed here is whether the Drain’s “discharges are composed entirely of return flows from irrigated agriculture.” If they are, then the Judgment below must be affirmed. But if they are not, then it must be reversed.

Deciding this question is likewise straightforward. The term “entirely” means, as *Glaser* observed, “wholly, completely, fully.” (945 F.3d at 1085.) Applying this definition, the question must be answered “no,” because not all of the Drain’s discharges are “return flows from irrigated agriculture.” It is undisputed that the Drain collects substantial pollutants from adjacent lands along its entire 28-mile length; both Defendants’ expert Mr. Ortega and Plaintiffs’ expert Mr. Bond agreed that most of those lands are unfarmed. (2ER226-228, 279-281, 286 (only 6 of 38 land segments disputed), 294-302; 307-309, 312 (map), 314 (table) (87% of adjacent land not irrigated agriculture); 3ER427, 494, 496, 508, 519; 7FER1582-1593, 1598-1609; 10FER2316-2317, 2336-2337; App. 14a (map).)

Both the District Court and the Ninth Circuit ruled that unless the non-farm sources of the Drain’s polluted discharges were themselves point sources, then the Drain’s commingled discharges were exempt from NPDES regulation. (App. 21a, 30a; App. 76a.) They did so based on their understanding that “there must still be a *point source* from which the pollutants *originate*.” (App.

59a (emphasis added), citing “*County of Maui*, 140 S.Ct. at 1177” [*sic*, probably 1477] [590 U.S. at 185].) Because they misunderstood the exemption’s meaning, they ruled that the Drain’s commingled discharges were exempt because their pollutants from unfarmed lands did not *originate* from point sources.

Their rulings conflict with two controlling points of law.

First, under the CWA’s plain language, the Drain is a point source. It does not matter whether it is the original source of the pollutants, because as this Court held in *Miccossukee*, “a point source need not be the original source of the pollutant, it need only convey the pollutant to . . . ‘waters of the United States.’” (541 U.S. at 105.) Therefore, unless *its* discharges are “composed entirely of return flows from irrigated agriculture,” the exemption does not apply and its discharges require an NPDES permit. (33 U.S.C. § 1342(l)(1).) Since its discharges include pollutants from unfarmed lands that are not “return flows from irrigated agriculture,” the exemption does not apply and an NPDES permit is required.

Second, under the NPDES regulations, the Drain’s discharge of dispersed, or “nonpoint,” pollutants that it collects from adjacent unfarmed lands along its 28-mile length triggers the NPDES permit requirement. These regulations direct:

“Discharge of a pollutant means:

- (a) Any addition of any ‘pollutant’ . . .
to ‘waters of the United States’
from any ‘point source,’

* * *

This definition includes *additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man. . . .*

(40 C.F.R. § 122.2 (“Discharge of a pollutant,” emphasis added).) The *Mokelumne* Court quoted this regulation in requiring an NPDES permit for an agency’s collection and discharge to the Mokelumne River of polluted surface runoff. (13 F.3d at 308.) Consequently, the Drain’s collection and discharge of dispersed pollutants from unfarmed lands is fully embraced within the established NPDES permit system. Nothing in § 1342(l)(1) states that the collection and discharge from a point source (like the Drain) of dispersed pollutants from unfarmed lands is exempt from the NPDES.

The Opinion’s summary of its ruling is instructive. It stated:

“we agree with the district court in concluding that the exemption applies to irrigation return flows that do not contain additional *point source* discharges from activities unrelated to crop production.”

(App. 21a (emphasis added).) This ruling misstates the language of § 1342(l)(1). This section does not state that the exemption only excludes discharges from activities unrelated to crop production if they are *also* from “point source[s],” as the Opinion asserts. (App. 21a.)

Indeed, § 1342(l)(1) never mentions the term “point source.” Yet the Opinion’s entire rationale for judicially rewriting the section to expressly exclude only “point sources” of non-farm pollution from exemption is to achieve Congress’ supposed intent. (App. 21a-24a.)

Had Congress actually intended to exclude only “point sources” of non-farm pollutants from the exemption – an intent that would be contrary to the statutory and regulatory scheme, and create a loophole since sequential point sources are physically impossible as discussed below – it would have adopted language saying that.

The fact that Congress did *not* mention the word “point source” in § 1342(l)(1) is never addressed by the Opinion. Yet this absent term is given controlling prominence in the Opinion’s interpretation. Its absence would ordinarily be deemed persuasive, if not dispositive, of Congress’ intent *not* to expand the exemption in that way, for “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” (*Connecticut Nat. Bank v Germain* (“*Germain*”), 503 U.S. 249, 253-254 (1992).) The Opinion’s central reliance on a term that does not even appear in this section is fatal.

In contrast to the Opinion, section 1342(l)(1)’s actual language uses different words with meanings different from the absent words on which the Opinion constructs its interpretive house of cards. The actual language of this section exempts a class of “*discharges*” – not classes of “return flows from irrigated agriculture” as the Opinion would have it read. And, the actual language of this section exempts only that class of “discharges” that is “composed entirely of return flows from irrigated agriculture.” (33 U.S.C. § 1342(l)(1).)

The discharges at issue in this case that the Opinion asserts are exempted are demonstrably *not* “composed entirely of return flows from irrigated agriculture.” As discussed, the vast majority of the polluted water that the Drain collects along its 28-mile length and then discharges into Mud Slough is from unfarmed lands, as Plaintiffs’ expert Mr. Bond proved (2ER298; 307-309, 312 (map), 314 (chart); 3ER497-499) and Defendants’ expert Mr. Ortega admitted (2ER279-281, 286). The annual quantity of this pollution is enormous – equal to one square mile nine feet deep. (3ER500, 502-505.) Its selenium kills salmon and deforms birds, and threatens human health. (2FER378; 10FER2332-2333.)

In summary, the Opinion impermissibly usurps Congress’ legislative power. The judiciary’s role is to interpret language adopted by Congress, not change that language to support a different meaning. (*Germain*, 503 U.S. at 254; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (when “the statute’s language is plain, ‘the sole function of the courts’” – at least where the disposition required by the text is not absurd – “is to enforce it according to its terms.”)) The Opinion rewrote the statutory language to achieve a different result, exactly what the judicial branch is forbidden from doing. (*Charboneau v. Davis*, 87 F.4th 443, 454 (9th Cir. 2023) (Courts “cannot rewrite the statute to insert an additional restriction that Congress omitted”).)

III. THE OPINION CONFLICTS WITH THIS COURT’S RULINGS

The Opinion is contrary to this Court’s ruling in *Miccosukee*. There, this Court rejected the mistaken view

repeated by the District Court here that to trigger the NPDES permit requirement, “there must still be a *point source* from which the pollutants *originate*.” (App. 59a (emphasis added).) This Court explained why:

“A point source is, by definition, a ‘discernible, confined, and discrete conveyance,’ § 1362(14) (emphasis added). That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters,’ which are, in turn, defined as ‘the waters of the United States.’ § 1362(7).”

(541 U.S. at 105 (emphasis added).)

Justice O’Connor elaborated:

“Tellingly, the examples of ‘point sources’ listed by the Act include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them. § 1362(14). In addition, one of the Act’s primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants. . . . [Such plants] *discharge pollutants added to water by others*.”

(*Id.* (emphasis added).)

Contrary to *Miccosukee*, the District Court excused Defendants’ violation of the Act on the grounds

“the alleged sources of pollution are, on this evidence of record, nonpoint sources or stem from activities related to crop production. Therefore they are all covered under the ‘1342(l)(1) exception.”

(App. 77a (emphases added).) The exemption, however, does not state or imply that only “point sources” of pollution from unfarmed lands are exempted. (33 U.S.C. § 1342(l)(1).) And, EPA’s controlling regulations refute this mistaken view, as discussed below.

The District Court also found persuasive that “the Ninth Circuit pointed in this case to one legislator’s statement that ‘an NPDES permit would not be required for ‘a vast irrigation basin that collects all of the waste resident of irrigation water in the Central Valley and places it in [the San Luis Drain] and transport[s] it . . . [to] the San Joaquin River.’” (App. 78a, quoting *Glaser*, 945 F.3d at 1084 (citing *Northwest Environmental Defense Center v. Brown* (“*Brown*”), 640 F.3d 1063 (9th Cir. 2011); *rvsd. and rem. on other gds. sub nom. Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013).)

The District Court failed to realize, however, that the *Glaser* Court was mistaken. It had overlooked the fact that “Congressman Roncalio’s attempt to expand the CWA’s ‘return flows from irrigated agriculture’ exemption to include the Drain was ‘rejected on the House floor.’” (Appellants’ Petition for Rehearing En Banc, Dkt. 64 (“Rehg. Ptn.”) at 15, citing *Brown*, 640 F.3d at 1072.) The fact that Congress rejected an amendment that would have exempted the Drain strongly supports Plaintiffs’ position that the Drain is not exempt, and undermines Defendants’

position that it is. (*Mohasco Corp. v. Silver*, 447 U.S. 807, 824 (1980) (rejecting respondents’ interpretation because Congress had “expressly rejected the language that would have mandated the exact result that respondent urges.”))

The Ninth Circuit ignored Plaintiff’s request that it address Congress’ rejection of Congressman Roncalio’s proffered amendment, and instead, it adopted the District Court’s rationale that “nonpoint” sources of pollution from unfarmed lands were exempted. (App. 21a, 26a; Reh’g. Ptn. at 15, citing *Brown*, 640 F.3d at 1072.)

The Opinion argues that *Miccosukee* is distinguishable because it did not interpret § 1342(l)(1), and merely held that a water pump could be a point source even though it did not originate the pollutants. (App. 24a-26a.) But *Miccosukee* conclusively construed the exact term that the Ninth Circuit seized upon as dispositive here even though it does not appear in § 1342(l)(1): “point source.” Therefore a proper understanding of what a point source is – and is not – is necessary to evaluate the Opinion’s holding that Congress intended to allow point sources like the Drain to discharge pollutants from unfarmed lands without an NPDES permit unless the pollutants originated from a second, upstream point source.

Three observations follow. First, the Drain is a “point source” even though it is “not . . . the original source of the pollutant,” since “it need only convey the pollutant to ‘navigable waters’” to be a point source. (*Miccosukee*, 541 U.S. at 105.) Since it is a point source, the Drain is not exempt from the NPDES unless its “discharges are composed entirely of return flows from irrigated

agriculture.” (33 U.S.C. § 1342(l)(1).) Since as shown they are not, it follows that an NPDES permit is required here, regardless of whether the “originating” sources of the pollutants collected by the Drain are also “point sources.” That point confirms the Opinion erred, since it erroneously assumed, as did the District Court (App. 62a-65a, 76a-77a), that the Drain was exempt unless its originating sources were themselves “point sources.”

Second, since *Miccossukee* held that a “point source” is defined as a “conveyance” of pollutants to navigable waters, it follows that for the “originating” sources of the Drain’s pollutants to also be point sources, they would have to convey pollutants to navigable waters. (541 U.S. at 105.) But that would be physically impossible, since if those originating point sources discharged pollutants to navigable waters, those pollutants would be discharged into and carried away by those navigable waters, beyond human control (such as conveyance to the Drain) and treatment.

Third, the exemption as rewritten by the Opinion would negate the restrictive term “entirely,” since the exemption would allow dischargers of dispersed wastewater from unfarmed lands to avoid NPDES scrutiny simply by including some irrigation return flow in their discharge stream. “[A]n interpretation that would facilitate ‘evasion of the law’” should be avoided, not embraced. (*County of Maui*, 590 U.S. at 179 (quotation omitted).)

The Opinion conflicts with *County of Maui*. There, this Court required an NPDES permit for an agency’s discharge of wastewater to the ocean via a known and well-defined underground channel, holding the CWA

“requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.” (*Id.* at 183-184.) It did so partly out of respect for EPA’s “longstanding regulatory practice” (despite its recent abandonment) to include discharges to groundwater that had a “direct hydrological connection” to navigable waters (*id.* at 177), and partly to prevent “evasion of the law” by dischargers who might otherwise sidestep NPDES permitting by discharging pollutants just short of navigable waters (*id.* at 178-179).

So too here, Plaintiffs ask this Court to accord great weight to EPA’s “longstanding regulatory practice” of requiring an NPDES permit for the discharge to navigable waters of pollutants collected from nonpoint sources (see *infra*) and to construe the CWA in a manner that discourages rather than rewards evasion of its purposes.

Contrary to *County of Maui*, the Opinion invites evasion of the NPDES by construing § 1342(l)(1) to exempt point source dischargers that collect dispersed wastewater from unfarmed lands, and ignores Plaintiffs’ repeated citation to the longstanding EPA regulation, 40 C.F.R. § 122.2, which states that “point sources” “include[] additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man” – exactly what the Drain does here. (Appellants’ Opening Brief, Dkt. 14 (“AOB”) at 3, 26, 28, 32, 36; Appellants’ Reply Brief, Dkt. 43 (“ARB”) at 2, 10, 13, 15, 29; Rehg. Ptn. at 2-5, 11-13, 15-16.)

IV. THE OPINION CONFLICTS WITH THE GOVERNING EPA REGULATION

The Opinion holds that the Drain’s point source discharge of pollutants collected from unfarmed lands is exempt from NPDES permitting because those pollutants originate from non-point sources. (App. 18a, 27a, 30a.) This holding conflicts with EPA’s governing regulation, 40 C.F.R. § 122.2, which as explained, rejects the Opinion’s erroneous premise that to trigger NPDES permitting, a point source discharge (like the Drain) must originate its pollutants, stating:

“This definition [of ‘Discharge of a pollutant’] includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man. . . .”

(*Id.* (emphasis added); quoted in *Mokelumne*, 13 F.3d at 308.)

Surface runoff is obviously a non-point source, but if it is collected and discharged through a point source, it requires an NPDES permit, as *Mokelumne* held. This regulation directs contrary to the Opinion that the CWA’s “definition [of ‘discharge of pollutants’ triggering NPDES permitting] includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man” – exactly the situation here.

EPA’s long-standing NPDES regulation is entitled to “great deference.” (*Udall v. Tallman*, 380 U.S. 1, 16 (1965); *cf. Maui*, 590 U.S. at 177-178.) In *Sierra Club v. Union Oil Co. of California* (“*Union Oil*”) 813 F.2d 1480

(9th Cir. 1987) (*vac. and rem. on other gds. sub nom. Union Oil Co. of California v. Sierra Club*, 485 U.S. 931 (1988)); reinstated, 853 F.2d 667 (9th Cir. 1988)), the court held that 40 C.F.R. Part 122 governs the NPDES permit program. (813 F.2d at 1490-1491.) In *Mokelumne*, the court applied § 122.2 to require NPDES permitting for the collection and discharge of contaminated surface runoff to a navigable water – precisely the circumstance here. (13 F.3d at 308.)

V. THE OPINION CONFLICTS WITH THE RULINGS OF OTHER CIRCUIT COURTS OF APPEAL

The Opinion creates a conflict between the Circuits as to whether the CWA's exemption of "discharges composed entirely of return flows from irrigated agriculture" from the Act's NPDES permit program (33 U.S.C. § 1342(l)(1)) also exempts non-exempt pollutants that originated on non-agricultural properties but became commingled with agricultural runoff before their discharge through a point source. The Opinion holds that the point source discharge of pollutants collected from nonpoint sources on unfarmed lands is exempt from the NPDES program. (App. 21a-30a.)

The Eleventh Circuit ruled to the contrary in *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.* ("*Closter Farms*"), 300 F.3d 1294, 1298 (11th Circuit 2002) that "[a]ny pollutants that originated in the non-agricultural properties . . . obviously do not fall within the agricultural exemptions." However, unlike here, in *Closter Farms* an NPDES permit was not required because the evidence "established that discharges from [the unfarmed adjoining properties]

are either the subject of existing NPDES permits or are exempted from NPDES permitting.” (*Id.*)

The Tenth Circuit likewise ruled to the contrary in *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005) that “the collecting and channeling of surface runoff” for discharge to navigable waters is subject to NPDES permitting. (*Id.*, paraphrasing *Mokelumne*, 13 F.3d at 308.)

The Opinion conflicts with these rulings by exempting the Drain’s collection and discharge through a point source of nonpoint pollutants from unfarmed lands (which are not exempt) because they did not originate from a second, upstream point source.

VI. THE OPINION SUBORDINATES THE EXEMPTION’S PLAIN LANGUAGE TO THE OPINION’S MISREADING OF AN INNOCUOUS PASSAGE FROM A SENATE REPORT.

It is “well settled that ‘the starting point for interpreting a statute is the language of the statute itself.’” (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987) (quotation omitted).) Although the Opinion states that “[w]e begin with the text of the statute” (App. 19a), after reciting the exemption’s key phrase the Opinion never examines its meaning. Instead, it bypasses that essential task because *Glaser* had concluded the text did not “resolve ‘whether the discharges at issue [were] exempt.’” (App. 8a.) But resolution of that ultimate, mixed issue of law and fact must follow rather than precede the court’s first step: discerning the meaning of the statute’s words.

Had the Opinion simply paused to examine the statute's plain language, there would have been no need to examine legislative history for clues to unravel a supposed ambiguity. As discussed above, the plain language and meaning of § 1342(l)(1), elucidated by the Act's detailed definitions, is unambiguous: An NPDES permit is not required "for discharges composed entirely of return flows from irrigated agriculture," and the Drain's release of pollutants is indisputably a "discharge." (*Id.*; 33 U.S.C. § 1362(7), (12), (14), (16).) Perforce, the Drain's discharges are "discharges of pollutants" to Mud Slough, an undisputed "navigable water." Therefore, the only remaining question is whether the Drain's "discharges are composed entirely of return flows from irrigated agriculture." Since as shown they are not, the Judgment below must be reversed.

Departing from this settled rule of statutory construction, the Opinion erroneously elevated a single ambiguous passage in a Senate Conference Report to supersede and displace both the statute's plain language as discussed above, and the fact that Congress specifically rejected an amendment to the CWA that would have greatly expanded the scope of the exemption of return flows from irrigated agriculture to include all discharges from the San Luis Drain, which is exactly what the Opinion accomplishes despite Congress' rejection of that very result.

But close examination of the conference report refutes the Opinion's interpretation. The two paragraphs on which the Opinion relies state:

"Testimony in field hearings suggested that effluent limits based on technological

methods may not be appropriate for control of return flow pollutants and the committee determined that these sources were practically indistinguishable from any other agricultural runoff, which may or may not involve a similar discrete point of entry into a watercourse. All such sources, regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F).

In exempting discharges composed ‘entirely’ of return flows from irrigated agriculture from the requirements of section 402 the committee did not intend to differentiate among return flows based upon their content. The word ‘entirely’ was intended to limit the exception to only those flows which do not contain additional discharges from activities unrelated to crop production.”

(App. 11a-12a, 21a.)

This passage supports Plaintiffs, not Defendants. The first paragraph states that return flows are “practically indistinguishable” from other agricultural runoff and therefore best regulated under § 208 of the Act. That, of course, is why they are being exempted. Nothing in this paragraph conflicts with the exemption’s plain language and meaning.

The first sentence of the second paragraph states, again consistent with the statutory text, that § 1342(l)(1)

“exempt[s] discharges composed ‘entirely’ of return flows from irrigated agriculture from the requirements of section 402.” (*Id.*) It repeats without alteration and thereby confirms the plain meaning of the exemption’s text. This supports Plaintiffs, not Defendants. But instead of setting forth and addressing this first sentence to ensure the full text of this passage is considered, the Opinion omits any mention of it. (App. 21a.) That omission is plain error, since the first sentence explains the meaning of the second. (*Richards v. United States*, 369 U.S. 1, 11 (1962) (statutory interpretation “must not be guided by a single sentence or member of a sentence”).)

The second sentence of the second paragraph does not depart from the first sentence’s confirmation of the exemption’s plain meaning. To the contrary, it explains and elaborates on the statement at the end of the first sentence that “in exempting discharges composed entirely of return flows, the committee did not intend to differentiate among return flows based on their content.” In other words, all discharges composed entirely of return flows are exempted, regardless of the content of the return flows they contain. But, as the second sentence hastens to explain, those return flows must not *themselves* include any discharges from activities (presumably, on the farmed lands drained by the return flows) that are unrelated to crop production. That is why the second sentence includes the admonition that the “flows” themselves must not contain “discharges” from “activities unrelated to crop production.” This “nesting doll” clarification is entirely consistent with the statutory text.

Nothing in this second sentence suggests that it is retracting the first sentence, let alone rewriting

the statutory language itself. Yet that is exactly the interpretation on which the Opinion is premised. Such a reading is not just extreme, but absurd. Why in the world would the committee that carefully drafted the clear and forceful language of the statutory exemption then bury in a committee report their real intent to eviscerate what they had accurately articulated in the statute? The answer is that there is no reason why they would do that, and they certainly did no such thing here.

The correct interpretation of the committee report laid out above is the most natural reading of the report. It reasonably harmonizes the two paragraphs with each other, and with the statutory text. As this Court ruled over 150 years ago:

“The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.”

(United States v. Hartwell, 73 U.S. 385, 396 (1867).)

Rather than respect this settled interpretive rule, the Opinion went out of its way to selectively construe a phrase in the committee report in isolation, and in a

manner hostile to § 1342(l)(1)'s plain language. (App. 21a.) Consequently, the Opinion exempts a discharge that is not “composed entirely of return flows from irrigated agriculture,” contrary to the exemption’s stated terms and defeating Congress’ express limitation that only discharges composed “entirely” of return flows be exempted.

Moreover, there is nothing in this passage that suggests that the Conference Committee intended to exempt discharges containing pollutants from unfarmed lands unless they originated from “point sources” – a term not even mentioned in the report. The Committee’s use of the term “discharge” in its “every day meaning” is also neither unusual nor fraught with deeper meaning. (*County of Maui*, 590 U.S. at 179 (acknowledging this practice).)

Equally untenable, the Opinion’s insistence that to trigger NPDES permitting, discharges of agricultural return flows to navigable waters (such as the Drain’s discharges) must have as their source other, upstream “point source discharges” is devoid of any textual, factual or logical basis. Under the Act’s definitions, a “point source discharge” requires a discharge of pollutants to navigable waters. (33 U.S.C. §§ 1362(12) (“discharge of a pollutant”); 1362(14) (“point source”); and 1362(16) (“discharge”).) Therefore, any “point source discharge” upstream of the discharge in question (*e.g.*, the Drain here) would have to discharge its wastestream to navigable waters *rather than* to the downstream discharger (such as the Drain).

The Opinion's rewriting of § 1342(l)(1) is thus premised on two impossibilities. First, there are no navigable waters upstream of the Drain into which these upstream sources might discharge in order to be considered "point sources." Second, even assuming *arguendo* that there were, there is no means by which the discharged wastewater could be recovered from the navigable waters into which it had been discharged in order to be redirected to the Drain to be discharged a second time to navigable waters.

This factual and logical impossibility exists not just with the Drain, but with every other discharge of wastewater to navigable waters. Once discharged the first time, the wastewater escapes the control of the discharger, and becomes an inseparable part of the receiving waters. Consequently, the Opinion's rewriting of the statutory exemption not only usurps Congress' exclusive power to legislate, it is based on a hydrological construct that defies both the factual universe and the rules of logic.

Worse, the Opinion's counter-factual premise negates the exemption's restriction to discharges composed "entirely" of return flows. As *County of Maui* observed, "[w]e do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act." (590 U.S. at 178 (quotation omitted).)

Finally, the Opinion's exemption of the Drain despite its discharge of pollutants from unfarmed lands cannot be squared with the fact that Congressman Roncalio's attempt to expand the CWA's "return flows from irrigated agriculture" exemption to expressly include the Drain was "rejected on the House floor."

(*Brown*, 640 F.3d at 1072.) The Opinion never addresses Congress' rejection of an amendment proposing what the Opinion wrought instead by rewriting § 1342(l)(1) to exempt the Drain from NPDES permitting, even though Plaintiffs repeatedly brought this probative legislative history to the Court's attention. (ARB at 14, 18; Rhg. Ptn. at 15.)

In summary, the Opinion's failure to respect the language selected by Congress and to rely instead on a misreading of its legislative history yielded a ruling that departs not just from the statutory language Congress adopted, but from common sense and the environmental restoration purpose of the Act.

VII. THE OPINION INVENTS A "STRAW MAN"

Plaintiffs have never advanced the claim – incorrectly attributed to them by the Opinion – that an NPDES permit is required because the Project discharges “windblown dust and algae.” (App. 5a, 23a-24a.) Although Defendants' descriptions of their Project's discharges have routinely mentioned the presence of “windblown dust and algae” (2FER388), Plaintiffs have never pleaded their presence in the Drain's discharges as a basis for requiring an NPDES permit. (2ER98, 174, 235.)

Likewise, the appellate hearing transcript does not support the Opinion's claim that Plaintiffs' counsel admitted their claims were based on “wind-blown dust and algae” contamination of Defendants' discharge, or that this contamination was “inevitable.” (App. 5a-6a, 23a-24a.) To the contrary, Plaintiffs consistently argued, at trial and in both appeals, that Defendants' Project

collects and discharges pollutants from four human activities unrelated to crop production that fall outside the exemption: (1) drainage of contaminated groundwater from unfarmed lands along the Drain (2ER288-314, 3ER497-499, 7FER1599-1604), (2) resuspension and discharge of toxic concentrations of seleniferous sediment up to 7.8 feet thick aggregating 274,000 cubic yards caused by improper maintenance of the Drain (3ER499-501; 7FER1598-1599, 1606; 10FER2195-2197, 2208-2213 (expert photographs) (*see Rybachek*, 904 F.2d at 1285-1286); (3) tile drainage of seleniferous groundwater beneath the Vega solar facility operated to avoid flooding its electrical facilities (6FER515, 1316), and (4) drainage of seleniferous wastewater from lands neither farmed nor irrigated (2ER288-314; 3ER497-499, 7FER1599-1604). (*Glaser*, 945 F.3d at 1086 (allowing these claims); 2ER7983, 94102, 172180, 232240.)

Unfortunately, the Opinion omits mentioning that Defendants declined to build alternative drain/pipe or treatment options to address the Drain's collection and discharge of pollutants from unfarmed lands. (2FER334-337, 389-391.)

The Opinion's exemption of thousands of acre-feet of polluted wastewater because the Project also collected and discharged background levels of "wind-blown dust and algae" that the Court deemed "inevitable" is analogous to exculpating a bank robber because the \$10,000 in stolen funds in his possession is offset by the \$1 in his pocket he did not steal. *Union Oil* held such "aggregative" evasion of the NPDES foreign to our jurisprudence. (813 F.2d at 1491.)

CONCLUSION

The Opinion conflicts sharply with the CWA, its regulations and case law. This Court’s review will assure fidelity to Congress’ command “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. §1251(a).) “[C]ompliance with NPDES permitting requirements” will help protect and restore the San Joaquin River’s imperiled water quality, fish and wildlife. (*Na Kia’i Kai v. Nakatani*, 401 F.Supp.3d 1097, 1110 (D. Hawaii 2019).)

Accordingly, this Petition should be granted.

Dated: February 17, 2026

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED SEPTEMBER 5, 2025**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**No. 23-15599
D.C. No. 2:11-cv-02980-DAD-CKD**

**PACIFIC COAST FEDERATION OF FISHERMEN’S
ASSOCIATIONS, INC.; CALIFORNIA
SPORTFISHING PROTECTION ALLIANCE;
FRIENDS OF THE RIVER; SAN FRANCISCO
CRAB BOAT OWNERS ASSOCIATION, INC.;
THE INSTITUTE FOR FISHERIES RESOURCES;
FELIX SMITH,**

Plaintiffs-Appellants,

v.

**ADAM NICKELS*, ACTING REGIONAL DIRECTOR
OF THE U.S. BUREAU OF RECLAMATION;
UNITED STATES BUREAU OF RECLAMATION;
SAN LUIS & DELTA MENDOTA WATER
AUTHORITY,**

Defendants-Appellees,

and

GRASSLAND WATER DISTRICT,

Intervenor-Defendant-Appellee.

* Under Federal Rule of Appellate Procedure 43(c)(2), Acting Regional Director Adam Nickels is substituted for Ernest Conant as his successor.

Appendix A

Appeal from the United States District Court
for the Eastern District of California

Dale A. Drozd, District Judge, Presiding

Argued and Submitted October 21, 2024
San Francisco, California

Filed September 5, 2025

Before: Richard R. Clifton, Jennifer Sung,
and Gabriel P. Sanchez, Circuit Judges.

Opinion by Judge Sanchez

OPINION

SANCHEZ, Circuit Judge:

The Clean Water Act (“CWA”) generally prohibits the discharge of pollutants into navigable waters of the United States without a permit under the National Pollutant Discharge Elimination System (“NPDES”) program. *See* 33 U.S.C. §§ 1311(a), 1342(a)(1). In 1977, Congress carved out an exemption to this permit requirement for “discharges composed entirely of return flows from irrigated agriculture” and entrusted the regulation of such discharges to the States. *Id.* § 1342(l)(1). Under this exemption, the Grassland Bypass Project (“Project”) in California’s Central Valley has operated without an NPDES permit since 1997. The Project comprises an expansive drainage system that takes in water used for irrigation from across 97,400 acres of land and transports that “return flow” over 28 miles through a canal before its ultimate discharge into the Mud Slough wetland.

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At issue in this appeal is whether the statutory exemption for irrigation return flows has been wrongly applied to the Project because diffuse “nonpoint source” pollution—such as pollution from rainwater runoff or windblown dust and algae—commingles with the Project’s return flows prior to discharge into waters of the United States. We agree with the district court that the Project’s exempt status should be upheld and reject Plaintiffs’ contention that the commingling of any amount of nonpoint source pollution from a non-agricultural source forecloses the exemption. To adopt Plaintiffs’ position would contravene the text, purpose, and structure of the Clean Water Act and render the exemption for irrigated agriculture a dead letter. Accordingly, we affirm the district court’s partial grant of summary judgment.

I. BACKGROUND**A. Clean Water Act**

In 1972, Congress passed the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). One “central provision” of the Act is that “individuals, corporations, and governments secure National Pollutant Discharge Elimination System (NPDES) permits before discharging pollution from any point source into the navigable waters of the United States.” *Decker v. Nw. Env’t Def. Ctr.*, 568 U.S. 597, 602, 133 S. Ct. 1326, 185 L. Ed. 2d 447 (2013) (citing *id.* §§ 1311(a), 1362(12)). While the CWA “banned . . . discharges from point sources” without NPDES permits, the “discharge of pollutants from

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nonpoint sources—for example, the runoff of pesticides from farmlands—was not directly prohibited.” *Or. Nat. Desert Ass’n v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998) (quoting *Nat. Res. Def. Council v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990)). This differential treatment of “point sources and nonpoint sources is an organizational paradigm of the [CWA].” *Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008).

The CWA defines key terms such as “point source,” “pollutant,” “discharge of a pollutant,” and “discharge” in service of that regulatory distinction. A “point source” is defined in the statute as:

[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). The term “pollutant” is defined as:

[D]redged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

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Id. § 1362(6). “[D]ischarge of a pollutant” and “discharge” are defined as:

(12) The term “discharge of a pollutant” [means] any addition of any pollutant to navigable waters from any point source

(16) The term “discharge” when used without qualification includes a discharge of a pollutant

Id. § 1362. Because “discharge of a pollutant” is necessarily “from any point source,” *id.* § 1362(12), the term “discharge” refers specifically to a point source discharge of a pollutant. *See Dombeck*, 172 F.3d at 1096.

The CWA does not define “nonpoint source pollution,” but “it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source.” *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). “The most common example of nonpoint source pollution is the residue left on roadways by automobiles,” such as “[s]mall amounts of rubber” that are “worn off of the tires of millions of cars” or the “minute particles of copper dust from brake linings” that eventually “wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean.” *Id.*; *see also Dombeck*, 172 F.3d at 1095 (“Other pollution sources, such as runoff from agriculture or in this case, animal grazing, are nonpoint sources.”). Because nonpoint source pollution “arises in such a diffuse way, it is very difficult

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to regulate through individual permits.” *Forsgren*, 309 F.3d at 1184.

Nonpoint source pollution lies outside the federal NPDES permit scheme and is “not regulated directly by the [CWA].” *Dombeck*, 172 F.3d at 1096. Rather, the CWA indirectly regulates nonpoint source pollution through “federal grants for state wastewater treatment plans” under Section 208, codified under 33 U.S.C. § 1288. *Id.* The CWA “envisions EPA’s role in managing nonpoint source pollution . . . as limited to studying the issue, sharing information with and collecting information from the States, and issuing monetary grants.” *Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 175, 140 S. Ct. 1462, 206 L. Ed. 2d 640 (2020). As the Supreme Court explained in *Maui*, “the structure of the [CWA] indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States.” *Id.* at 174. Indeed, the regulation of nonpoint source pollution falls within States’ “traditional regulatory authority.” *Id.* at 175.

Although the CWA’s direct regulation of pollution is limited to point source discharges, the Environmental Protection Agency (“EPA”) nevertheless “found it difficult to process permit applications from countless owners and operators of point sources throughout the country.” *Decker*, 568 U.S. at 602. One year after the passage of the CWA, the EPA promulgated regulations to exempt several kinds of point source discharges from the NPDES permit system, including discharges from irrigated agriculture. *Nw. Env’t Def. Ctr. v. Brown*, 640 F.3d 1063, 1073 (9th Cir. 2011), *rev’d and remanded sub nom. Decker*, 568 U.S. 597.

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The EPA acknowledged “that the exempted categories of sources are ones which fall within the definition of point source,” but concluded that these sources “[were] ill-suited for inclusion in a permit program.” *Id.* at 1073-74 (citation omitted). The agency explained that “while some point sources within the excluded categories may be significant contributors of pollution . . . , it would be administratively difficult if not impossible, given Federal and State resource levels, to issue individual permits to all such point sources.” *Id.* at 1074 (quoting 40 Fed. Reg. 56932 (Dec. 5, 1975)).

The EPA’s attempt to exempt certain categories of point source discharges from NPDES permitting was rejected in *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 186 U.S. App. D.C. 147 (D.C. Cir. 1977). The D.C. Circuit held that the EPA “does not have authority to exempt categories of point sources from the permit requirements” and that “[e]ven when infeasibility arguments were squarely raised, the legislature declined to abandon the permit requirement” because the CWA was designed to be a “tough law.” *Id.* at 1375-77. What the EPA could not do by regulation, Congress accomplished through legislation. In 1977, Congress amended the CWA to establish a statutory exemption for irrigated agriculture from NPDES permit requirements. *Brown*, 640 F.3d at 1073. The exemption provides:

- (l) Limitation on permit requirement
 - (1) Agricultural return flows
The Administrator shall not require a permit under this section for discharges composed entirely of return flows from

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irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

33 U.S.C. § 1342(l)(1). While “return flows from irrigated agriculture” was not defined by statute, Congress relied on the EPA’s definition at the time of the amendment, which was “conveyances carrying surface irrigation return as a result of the controlled application of water by any person to land used primarily for crops.” S. Rep. No. 95-370, 35 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4360.

In establishing the irrigated agriculture exemption, Congress sought to accomplish three aims. First, Congress intended “to alleviate EPA’s burden in having to issue permits for every agricultural point source.” *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Glaser*, 945 F.3d 1076, 1084 (9th Cir. 2019) (quoting *Brown*, 640 F.3d at 1073). As one member of Congress explained, “[t]he problems of permitting every discrete source or conduit returning water to the streams from irrigated lands is simply too burdensome to place on the resources of [the] EPA.” 123 Cong. Rec. 38956 (Dec. 15, 1977) (statement of Rep. Roberts). Second, the exemption “promote[d] equity of treatment among farmers who depend on rainfall to irrigate their crops and those who depend on surface irrigation which is returned to a stream in discreet [sic] conveyances.” *Glaser*, 945 F.3d at 1084 (quoting 123 Cong. Rec. 26702 (Aug. 4, 1977) (statement of Sen. Stafford)); *see Forsgren*, 309 F.3d at 1189 (explaining that the “statutory

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exemption for agricultural return flows” reflected “the need for parity of regulation between irrigated and non-irrigated agriculture”). As one Congressman explained, the exemption “correct[ed] what has been a discrimination against irrigated agriculture Farmers in areas of the country which were blessed with adequate rainfall were not subject to permit requirements on their rainwater run-off, which in effect . . . contained the same pollutants.” 123 Cong. Rec. 39210 (Dec. 15, 1977) (statement of Sen. Wallop).

Finally, the irrigated agriculture exemption was prompted because of the technological difficulties in determining whether pollutants commingled within an irrigation return flow could be traced to particular upstream sources. As the Senate Committee Report on the 1977 amendments to the CWA explained:

Testimony in field hearings suggested that effluent limits based on technological methods may not be appropriate for control of return flow pollutants and the committee determined that these sources were practically indistinguishable from any other agricultural runoff, which may or may not involve a similar discrete point of entry into a watercourse. All such sources, regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F).

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S. Rep. No. 95-370, 35. In other words, Congress determined that return flows from irrigated agriculture were best managed under Section 208 as nonpoint source pollution because it proved difficult, if not impossible, to determine whether a given pollutant entered the waterway through a point or nonpoint source. Pollutants from irrigated agriculture “were practically indistinguishable” from nonpoint sources such as agricultural runoff. *Id.* As one Congressman described in a previously failed attempt to adopt the exemption, it is “virtually impossible to trace pollutants to specific irrigation lands, making these pollutants a nonpoint source in most cases.” 118 Cong. Rec. 10765 (Mar. 29, 1972) (statement of Rep. Roncalio); *see Brown*, 640 F.3d at 1072.

Congress thus chose to regulate return flows from irrigated agriculture under Section 208 as though they were nonpoint sources of pollution. S. Rep. No. 95-370, 9. State-managed treatment plans under Section 208 involve procedures to “(i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects . . . and (ii) set forth procedures and methods . . . to control to the extent feasible such sources.” 33 U.S.C. § 1288(b)(2)(F). Consistent with this understanding, the definition of “point source” under the CWA provides that “[t]his term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” *Id.* § 1362(14). With this background in mind, we turn to the facts of this case.

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B. FACTUAL BACKGROUND

The Grassland Bypass Project (“Project”) in California’s Central Valley is jointly administered by Defendants- Appellees Adam Nickels (Acting Regional Director of the U.S. Bureau of Reclamation), the U.S. Bureau of Reclamation, the San Luis & Delta-Mendota Water Authority (“SLDMWA”), and the Grassland Water District. Implemented in 1996, the Project comprises an extensive underground tile drainage system beneath the Grassland Drainage Area (“Drainage Area”), serving 97,400 acres of land within the Delta-Mendota sub-basin of the San Joaquin Valley.

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This Drainage Area is composed of active, fallow, and retired farmland as well as non-irrigable land used for public infrastructure, residences, and businesses. On part of the retired land is the Vega Solar Project, an array of solar panels that occupies 178.3 acres of formerly irrigated land. The Drainage Area is designed to remove the contaminated irrigation water delivered by the Central Valley Project and used by farmers. *Glaser*, 945 F.3d at 1080. “Irrigation and drainage are inherently linked” because “[a]ny water project that brings fresh water to an agricultural area must take the salty water remaining after the crops have been irrigated away from the service area.” *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 571 (9th Cir. 2000).

After the water leaves the Drainage Area, it enters the Grassland Bypass Channel (“Bypass”) that conveys it further into the San Luis Drain (“Drain”). The Drain is owned by the Bureau of Reclamation and operated by SLDMWA. The Drain spans approximately 28 miles and was built with expansion joints and weep valves to prevent damage to its concrete lining from the pressure of surrounding groundwater. Nonetheless, the Drain has accrued some damage over time. Due to its perforated design and accumulated damage, surrounding groundwater seeps into the Drain.

Sediments containing concentrations of pollutants like selenium have also accumulated in the Drain, requiring monitoring, occasional physical removal, and certain reductions in flow rates. At its terminus, the Drain discharges its contents into the Mud Slough wetland, a

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navigable water of the United States, which feeds into the San Joaquin River and lies adjacent to numerous national- and state-protected wildlife areas.

Since 1997, Defendants have operated the Project as a nonpoint source without an NPDES permit under the exemption for “discharges composed entirely of return flows from irrigated agriculture.” 33 U.S.C. § 1342(l)(1). In place of NPDES permit requirements, the Project’s discharges have been subject to state and local environmental regulations that set water quality standards for pollutants, require certain monitoring practices, and establish best practices requirements.

C. Procedural History

Plaintiffs initiated this action in 2011 alleging that Defendants’ operation of the Project violated the CWA by discharging pollutants unrelated to irrigated agriculture into navigable waters without an NPDES permit.¹ After years of litigation, the district court in 2016 granted in part Defendants’ motion for summary judgment. Plaintiffs then brought their first appeal to this court. We resolved that appeal in *Pacific Coast Federation of Fishermen’s Associations v. Glaser*, concluding that the district court erred in three respects. 945 F.3d 1076 (9th Cir. 2019).

First, the district court erred by placing the burden on Plaintiffs to demonstrate that the statutory exemption to

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

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NPDES permitting for irrigated agriculture return flows did not apply, rather than on Defendants to establish that it did apply. *Id.* at 1083. Second, we concluded that the district court erred in its interpretation of the exemption “for discharges composed entirely of return flows from irrigated agriculture” under 33 U.S.C. § 1342(l)(1), by construing “entirely” to mean “majority.” *Id.* at 1085. Third, we disagreed with the district court’s decision to strike certain theories of liability on pleading grounds and remanded those stricken claims to be reconsidered under the correct interpretation of § 1342(l)(1). *Id.* at 1086-87. However, we upheld the district court’s broad interpretation of the term “irrigated agriculture” to encompass “all activities related to crop production.” *Id.* at 1083-85.

On remand, and following cross-motions for summary judgment, the district court reconsidered Plaintiffs’ claims predicated on four alleged sources of pollutants: “(1) groundwater originating from beneath ‘non-irrigated’ land adjacent to the Drain which seeps into the Drain through cracks and weep holes; (2) sediment that has settled out over time in the Drain from the waters it carries and which is purportedly discharged into Mud Slough ‘when it is scoured and reworked by flows in the Drain’; (3) water transported into tile drains underneath the retired agricultural land occupied by the Vega Solar Project; and (4) flows of polluted water in the Drainage Area that allegedly stem from ‘highways, residences and other non-irrigated lands.’”

The district court began by reconsidering “the scope of the agricultural return flows exception provided

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by § 1342(l)(1)” following our decision in *Glaser*. The district court first concluded that the exemption covered “discharges that ‘do not contain additional discharges from activities unrelated to crop production.’” The district court reasoned that “additional discharges” must mean discharges that are “[a]dded, extra, or supplementary to what is already present or available.” Consequently, “to qualify for the exception[,] defendants must establish that plaintiffs’ alleged four sources of pollutants are not added to the Project from an extra or supplementary *point source*.” Next, the district court concluded that an activity is “related to crop production” so long as it “is related to the function and operation of the overall drainage plan.”

Putting these pieces together, the district court concluded that, to qualify for the irrigated agriculture exemption, “defendants must establish that plaintiffs’ alleged sources of pollutants . . . are not added from an extra or supplementary point source that is unrelated to the Project’s overall drainage function.” The district court concluded that Defendants carried their burden of establishing that the irrigated return flow exemption applied because each alleged pollutant was either added from a nonpoint source or was added from a point source that related to the Project’s overall drainage function. The district court granted in part Defendant’s motion for summary judgment.² This appeal followed.

2. The district court denied Defendants’ motion for summary judgment challenging Plaintiffs’ Article III standing and declined to reach Defendants’ argument that the so-called water transfer rule (40 C.F.R. § 122.3(i)) exempted the Project from permitting requirements.

*Appendix A***II. DISCUSSION**

We review the district court’s grant of summary judgment and its interpretations of the CWA de novo. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc) (summary judgment); *Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 905 (9th Cir. 2018) (CWA). We agree with the district court that Plaintiffs failed to raise a genuine dispute of material fact as to whether the irrigated agriculture return flow exemption applies to the Project. We conclude that the exemption applies because the alleged pollutants are either added to the Project via nonpoint sources or via a point source related to crop production.

A.

Although Defendants have operated the Project without an NPDES permit since 1997, Plaintiffs seek to undo the Project’s exempted status on the ground that the Project’s discharge into the Mud Slough contains pollutants that are not related to irrigated agriculture. To that end, Plaintiffs interpret the language of the exemption in 33 U.S.C. § 1342(l)(1) to require that the exemption “appl[ies] only to *pollutants* that originated ‘entirely’ from irrigated agriculture.” In Plaintiffs’ reading, if an irrigation return flow commingles to any degree with pollutants unrelated to irrigated agriculture, then an NPDES permit is required for its discharge. To hold otherwise, according to Plaintiffs, would “effectively repeal[] the term ‘entirely,’ and preclude[] permit regulation of commingled discharges.” We disagree.

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Plaintiffs’ theory does not follow from the text and is inconsistent with the purpose and structure of the CWA, and as a practical matter would render the irrigated agriculture exemption a dead letter. One of “our longstanding canons of statutory construction” is that “we must normally seek to construe Congress’s work ‘so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant.’” *Ysleta del Sur Pueblo v. Texas*, 596 U.S. 685, 698-99, 142 S. Ct. 1929, 213 L. Ed. 2d 221 (2022) (quoting *Corley v. United States*, 556 U.S. 303, 314, 129 S. Ct. 1558, 173 L. Ed. 2d 443 (2009)).

We begin with the text of the statute. The irrigation return flow exemption applies to “discharges composed entirely of return flows from irrigated agriculture.” 33 U.S.C. § 1342(l)(1). This is not the first time we address the meaning of this provision. In *Glaser*, we approached the text in two pieces. We began by noting that the “plain meaning of the statutory text” did not resolve “whether the discharges at issue [were] exempt from the CWA’s permitting requirement.” *Glaser*, 945 F.3d at 1084. Accordingly, we relied on the legislative history of § 1342(l)(1) to broadly interpret the term “irrigated agriculture” as encompassing “all activities related to crop production.” *Id.* at 1084-85. Turning next to the word “entirely,” we observed that it was not defined by the statute and considered its ordinary meaning to conclude that “[e]ntirely” is defined as “wholly, completely, fully.” *Id.* at 1085 (quoting *Webster’s Third New International Dictionary* 758 (2002)).

The text does not dictate, however—and we did not decide in *Glaser*—whether “entirely” requires every

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pollutant within a return flow to be from irrigated agriculture or every discharge within a return flow to be from irrigated agriculture. In other words, the statute's use of the word "entirely" is ambiguous because the statute does not clarify the category of objects that "entirely" is meant to exclude. Consider the following analogy illustrating this ambiguity: If someone were to say, "My wallet is filled entirely with twenties," we might accept that statement as true even if the wallet also contained, say, a family photo, because the person presumably meant only that the wallet does not contain other denominations of money. Similarly, the text of § 1342(l)(1) can be read as applying to discharges composed entirely of return flows *as opposed to non-agricultural discharges*.

Given the ambiguity in the text, we turn to a highly probative piece of legislative history for guidance, as we did in *Glaser*. See *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1180-81 (9th Cir. 2013) ("Where the statutory text is ambiguous . . . we may 'look to other interpretive tools, including the legislative history' in order to determine the statute's best meaning." (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005))). Specifically, we quoted the Senate Committee Report's explanation that "[t]he word 'entirely' was intended to limit the exception to only those flows which do not contain additional discharges from activities unrelated to crop production."³ S. Rep. No. 95-370, 35; see *Glaser*, 945 F.3d at 1084 (quoting this

3. Plaintiffs concede that *Glaser* stated that the text of § 1342(l)(1) "meant discharges that 'do not contain additional discharges from activities unrelated to crop production.'"

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language). It is fair to presume that the Report, which was “written by the same legislators that authored the exemption and which accompanied the proposed language in an effort to explain the language’s meaning to the other members of the Senate and House,” *Pac. Coast Fedn. of Fishermen’s Ass’ns v. Glaser*, No. CIV S-2:11-2980-KJM, 2013 U.S. Dist. LEXIS 132240, 2013 WL 5230266, at *11 (E.D. Cal. Sept. 16, 2013), *rev’d and remanded on other grounds*, 945 F.3d 1076 (9th Cir. 2019), used key statutory terms as they were defined by the statute. *Cf. Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984) (“In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill . . .”). Under the CWA, the term “discharge” necessarily presumes a point source. *See* 33 U.S.C. § 1362(12), (16); *see also Dombeck*, 172 F.3d at 1097 (holding that “[t]he term ‘discharge’ in § 1341 is limited to discharges from point sources”). Applying the statutory definitions in the context of the exemption’s legislative history, we agree with the district court in concluding that the exemption applies to irrigation return flows that do not contain additional point source discharges from activities unrelated to crop production.

Such a reading is consistent with the purpose and structure of the CWA and Congress’s enactment of the irrigated agriculture exemption. As discussed above, “[n]onpoint source pollution is not regulated directly by the [CWA].” *Dombeck*, 172 F.3d at 1096. Indeed, the CWA “uses the ‘threat and promise’ of federal grants to the states to accomplish this task.” *Id.* at 1097 (quoting

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Shanty Town Assocs. Ltd. P'ship v. EPA, 843 F.2d 782, 791 (4th Cir. 1988)). Leaving nonpoint source pollution to the States, the CWA's NPDES permitting scheme focuses on pollution from point sources, "presumably because they could be identified and regulated more easily than nonpoint source polluters." *Id.* at 1096 (quoting *Nat. Res. Def. Council v. EPA*, 915 F.2d at 1316); *see also U.S. Forest Serv.*, 550 F.3d at 780 ("Congress primarily focused its regulation under the [CWA] on point sources, which tended to be more notorious and more easily targeted . . .").

As we explained above, Congress established the irrigated agriculture exemption to address three primary concerns. Congress sought to lessen the EPA's burden in having to issue permits to an excessive number of point source discharges related to irrigated agriculture. *See* 123 Cong. Rec. 38956 (Dec. 15, 1977) (statement of Rep. Roberts). The exemption was also designed to address the unequal treatment between farmers who depend upon rainfall to irrigate their crops and were not subject to federal permitting requirements, and other farmers who relied on surface irrigation and were subject to NPDES permitting. *See* 123 Cong. Rec. 39210 (Dec. 15, 1977) (statement of Sen. Wallop); *see also Glaser*, 945 F.3d at 1084. Finally, the irrigated agriculture exemption reflected the technical difficulties of regulating return flow pollutants through the permitting scheme because it was practically impossible to determine whether agricultural pollutants were originally from point or nonpoint sources. *See* S. Rep. No. 95-370, 35. In enacting the exemption, Congress determined that return flows from irrigated agriculture were best managed under Section 208 as

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nonpoint sources of pollution, through direct regulation by the States. *Id.*

If Plaintiffs' theory were correct that for the exemption to apply, irrigation return flows cannot contain *any* amount of nonpoint source pollution unrelated to irrigated agriculture, then all three of Congress's aims would be thwarted. The EPA would again face the heavy burden of issuing permits for an inordinate amount of irrigation return flows. *See Glaser*, 945 F.3d at 1084. Farmers reliant on surface irrigation for their crops would be disproportionately burdened with NPDES permit requirements relative to farmers blessed with abundant rainfall for their crops. *Id.* And the EPA would be saddled with the "virtually impossible" task of disentangling commingled pollutants, tracing them back to specific irrigated lands, and imposing permit requirements for point source discharges on those farms. 118 Cong. Rec. 10765 (Mar. 29, 1972) (statement of Rep. Roncalio).

Plaintiffs' interpretation of the CWA would also render the irrigation return flow exemption a dead letter. As Plaintiffs' counsel conceded at oral argument, some amount of nonpoint source pollution unrelated to irrigated agriculture will inevitably commingle with irrigation return flows. For example, one nonpoint source pollutant Plaintiffs seek to regulate through the NPDES permit is "windblown dust." Under Plaintiffs' reading of the statute, an irrigation system would have to ensure that *no* windblown dust ever enters the return flow conveyance for the return flow to qualify under the statutory exemption—a scientific impossibility. We cannot adopt a

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statutory reading which we know will sap the interpreted provision of all practical significance.

The same would apply for other nonpoint sources of pollution within an agricultural district such as runoff from highways and roads, groundwater seepage containing pollutants, or sediment that encroaches upon return flow conveyances. *See Forsgren*, 309 F.3d at 1184. Setting aside the difficult question of determining when a nonpoint source pollutant is “related to crop production,” Plaintiffs have not been able to explain how any irrigated agriculture system would ever qualify for the exemption under their interpretation of § 1342(l)(1).

B.

Plaintiffs contend that their reading of the CWA is mandated by Supreme Court and Ninth Circuit precedents, which hold that an NPDES permit is required whenever nonpoint source pollutants are “ultimately discharged through a point source.” Because the record here establishes a point source discharge of pollutants into navigable waters—effluent flows from the Drain into the Mud Slough—that is sufficient to require a permit under the CWA and to foreclose the irrigated agriculture exemption. Plaintiffs primarily rely on two cases, *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004) and *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993).

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In *Miccossukee*, the defendants operated a water pump—a point source—that pumped polluted water from a canal into a navigable water. 541 U.S. at 100-01. The defendants argued that the pump’s operation did not require an NPDES permit because the pollutants it discharged did not originate from the pump itself. *Id.* at 104. The Supreme Court rejected this argument and explained that “a point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters.’” *Id.* at 105. Put differently, “a point source is not exempt from the [NPDES] permit requirement merely because it does not itself add pollutants to the water it pumps.” *Id.* at 112 (Scalia, J., concurring in part and dissenting in part).

In *Mokelumne*, the defendants operated a dam that discharged water into the Mokelumne River, a navigable water. 13 F.3d at 306-07. Commingled within this discharged water was surface runoff from an abandoned mining site that was channeled and then collected in the dam reservoir prior to discharge. *Id.* at 307. Similar to the defendants in *Miccossukee*, the defendants argued that the dam’s discharges were not subject to NPDES permit requirements because the dam did not itself “add” any pollutants to a navigable water. *Id.* at 308. We disagreed and found the dam’s discharge to be a point source discharge of pollutants because “the source of pollution added to the Mokelumne River is ‘surface runoff that is collected or channelled by’ defendants from the abandoned mine site.” *Id.* *Mokelumne* thus held that a point source that channels “surface runoff” is subject to the permit requirement because the CWA “categorically prohibits

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any discharge of a pollutant from a point source without a permit.” *Id.* at 309.

Miccosukee and *Mokelumne* are inapposite because neither case involved the statutory exemption for irrigated agriculture under 33 U.S.C. § 1342(l)(1). In the absence of the exemption, Plaintiffs are correct that a point source that conveys a pollutant—even if it does not generate that pollutant—is subject to the NPDES permitting scheme. *Miccosukee*, 541 U.S. at 105. But Congress carved out an exemption to the NPDES permit requirement for certain discrete conveyances, including “discharges composed entirely of return flows from irrigated agriculture.” 33 U.S.C. § 1342(l)(1). The fact that irrigation return flows are ordinarily point source discharges is precisely why Congress carved out the exemption in the first place. *See Brown*, 640 F.3d at 1073-74. Therefore, the analysis in *Miccosukee* and *Mokelumne* about the kinds of discharges that are subject to NPDES permitting provides no answer to the distinct question here—how we should interpret and apply the statutory exemption for return flows from irrigated agriculture.⁴

4. We reject Plaintiffs’ contention that “it is impossible to have two separate point sources in sequence, because by definition, a ‘point source’ discharges to a water of the United States.” In *Mauui*, the Supreme Court rejected the view that a point source must be the “immediate” source of a pollutant’s addition into navigable waters. 590 U.S. at 172, 181 (holding that “pollution that reaches navigable waters only through groundwater” may still constitute “pollution that is ‘from’ a point source”). The Court reasoned that “[t]here is nothing unnatural about such a construction” of the CWA, as it “does not say ‘directly’ from or ‘immediately’ from.” *Id.* at 182. “Indeed, the expansive language of the provision—*any* addition from *any* point source—strongly suggests its scope is not so limited.” *Id.*

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In conclusion, we hold that the exemption for “discharges composed entirely of return flows from irrigated agriculture” under 33 U.S.C. § 1342(l)(1) applies so long as the return flow does not contain additional point source discharges from activities unrelated to crop production.

C.

Having established the scope of the irrigation return flow exemption, we now turn to Plaintiffs’ four alleged sources of pollution commingled in the Project’s return flow: (1) seepage into the Drain from groundwater beneath non-irrigated land adjacent to the Drain; (2) groundwater seepage and runoff from “highways, residences and other non-irrigated lands” in the Drainage Area; (3) sediment that the Drain carries and discharges into the Mud Slough; and (4) runoff and groundwater from retired agricultural land occupied by the Vega Solar Project in the Drainage Area.

Plaintiffs contend that each of these sources of pollutants invalidates the Project’s exempt status. We disagree. To reiterate, the irrigated agriculture exemption applies to discharges that do not contain additional point source discharges from activities unrelated to crop production. This means that for the exemption to apply here, Defendants bear the burden of demonstrating that the Project’s discharged pollutants are either from a nonpoint source or from an additional point source that is related to crop production. *See Glaser*, 945 F.3d at 1083-85. Here, the district court correctly concluded that no

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genuine dispute of material fact exists as to whether any of these alleged pollutants originated from an additional point source that was unrelated to crop production.⁵

First, groundwater seepage into the Drain from adjacent non-irrigated and unfarmed lands is not a point source discharge. It is well-established that groundwater seepage is a type of nonpoint source pollution. Unlike a point source that is a “confined and discrete conveyance” like a “pipe, ditch, [or] channel,” 33 U.S.C. § 1362(14), groundwater seepage is diffuse. *See also Maui*, 590 U.S. at 169 (indicating without explanation that groundwater is a nonpoint source). Because groundwater seepage is not a point source discharge, Plaintiffs’ evidence that “contaminated groundwater . . . seeps into the Drain” fails to create a genuine dispute of material fact.

Second, groundwater seepage and runoff from “highways, residences, and other non-irrigated lands” in the Drainage Area do not constitute point source discharges. Runoff is another quintessential example of nonpoint source pollution. We have explained that “the term ‘runoff’ describes pollution flowing from nonpoint sources.” *Dombeck*, 172 F.3d at 1098 (“Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants.” (citation omitted)). Accordingly, the runoff and seepage here do not constitute additional

5. Plaintiffs’ counsel conceded at oral argument: “In this case, we identified four categories of pollutants that were *nonpoint source in nature* but were contributing to the pollutants in the waste stream discharged by the Drain.”

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point source discharges that would potentially foreclose application of the statutory exemption.

Third, accumulated and remobilized sediment in the Drain is not an additional point source discharge from activities unrelated to crop production. According to Plaintiffs, sediment in the Drain comes from either “dust, wind-blown plant debris, algae, and cattails” or from the return flow from the Bypass discharged into the Drain. Dust and other wind-blown particles do not originate from a discrete conveyance and thus do not constitute point source discharges. The discharge from the Bypass into the Drain *is* a discrete point source discharge, but the Bypass’s conveyance of the Project’s irrigation return flow to the Drain is clearly part of the Project’s overall function and operation and is related to crop production. Therefore, pollution from sediment accumulated and remobilized in the Drain does not raise a genuine dispute of material fact because it originates from nonpoint sources or from a point source related to crop production.

Lastly, runoff and groundwater from the land occupied by the Vega Solar Project do not constitute point source discharges. The alleged runoff is based on rainwater falling onto the site and water from solar panel washing. The alleged groundwater seepage involves natural upwelling of “older and deeper groundwater” into the tile drain system underneath the Vega site.⁶ As discussed, both runoff and groundwater seepage are nonpoint

6. The tile drain system underneath the Vega site long predates the Vega Solar Project and continues to serve adjacent farmland.

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sources of pollution. In addition, runoff from the Vega site does not create a genuine dispute of material fact because Defendants' uncontroverted evidence establishes that the runoff could not have penetrated eight feet into the ground to reach the Project's subsurface tile drains. Defendants' expert testified that between the Vega solar panel washings and rainfall, runoff flows penetrated less than an inch into the soil. Defendants also presented evidence of model simulations demonstrating that during the relevant period—that is, after the Vega site was converted from its previous agricultural use to its solar use—rainwater and surface runoff would not have percolated deep enough. Plaintiffs' expert failed to rebut this evidence. In short, Plaintiffs failed to dispute Defendants' evidence that there was no point source discharge of a pollutant from the Vega Solar Project.

We agree with the district court that no genuine dispute of material fact exists as to whether the four sources of pollutants “constitute nonpoint sources or whether they stem from ‘activities related to crop production.’”

III. CONCLUSION

The CWA exempts “discharges composed entirely of return flows from irrigated agriculture” from the NPDES permitting scheme. 33 U.S.C. § 1342(1)(1). We hold that the irrigated agriculture exemption applies when return flows do not contain additional point source discharges from activities unrelated to crop production. In the absence of a genuine dispute of material fact, we affirm the district

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court's conclusion that Defendants have met their burden of establishing that the irrigation return flow exemption under 33 U.S.C. § 1342(l)(1) of the CWA applies to the Project.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA, FILED FEBRUARY 21, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO: 2:11–CV–02980–DAD–CKD

PACIFIC COAST FEDERATION OF
FISHERMEN’S ASSOCIATIONS, *et al.*,

v.

UNITED STATES BUREAU
OF RECLAMATION, *et al.*,

JUDGMENT IN A CIVIL CASE

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT’S ORDER FILED ON 02/17/2023

ENTERED: February 21, 2023

**APPENDIX C — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF CALIFORNIA, FILED FEBRUARY 21, 2023**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:11-cv-02980-DAD-CKD

PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS, *et al.*,

Plaintiffs,

v.

ERNEST A. CONANT, *et al.*,

Defendants,

and

GRASSLAND WATER DISTRICT,

Intervenor Defendant.

Filed February 21, 2023

**ORDER DENYING PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND GRANTING IN
PART AND DENYING IN PART DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT**

This matter came before the court on January 31, 2023
for a hearing on three motions for summary judgment.

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The first motion was filed on behalf of defendants Ernest A. Conant (the Regional Director of the U.S. Bureau of Reclamation),¹ and the U.S. Bureau of Reclamation (together, “federal defendants”). (Doc. No. 219.) The second motion was filed on behalf of defendant San Luis & Delta-Mendota Water Authority (“the Authority”) and intervenor defendant Grassland Water District (together, “local defendants”). (Doc. No. 221.) The third motion was filed on behalf of plaintiffs: the Pacific Coast Federation of Fishermen’s Associations, the California Sportfishing Protection Alliance, Friends of the River, San Francisco Crab Boat Owners Association, the Institute for Fisheries Resources, and Felix Smith (collectively, “plaintiffs”). (Doc. No. 226.) At the hearing, attorney Stephan Volker appeared on behalf of plaintiffs; attorney Martin McDermott appeared on behalf of federal defendants; and attorneys Julie Fieber, Ellen Wehr, and Diane Rathmann appeared on behalf of local defendants. For the reasons explained below, plaintiffs’ motion for summary judgment will be denied; local defendants’ motion for summary judgment will be granted in part and denied in part; and federal defendants’ motion for summary judgment will be granted in part.

1. Under Federal Rule of Civil Procedure 25(d), when a public official who has been sued in their official capacity ceases to hold office while the action is pending, the public officer’s successor is automatically substituted as a party. Thus, although the docket states that Donald R. Glaser is the Regional Director of the U.S. Bureau of Reclamation, the court will direct the Clerk of the Court to update the docket to reflect that Ernest A. Conant has been substituted as the current holder of the position of Regional Director of the U.S. Bureau of Reclamation. (Doc. No. 220 at 1 n.1.)

*Appendix C***BACKGROUND**

This case arises from a water project in California’s Central Valley that collects water used to irrigate agricultural land through an underground capture system and then moves the collected drainage water through a concrete-lined conveyance for many miles before it dispenses into a wetland.

“Irrigation and drainage are inherently linked. Any water project that brings fresh water to an agricultural area must take the salty water remaining after the crops have been irrigated away from the service area.” *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 571 (9th Cir. 2000). “Otherwise, irrigating the selenium and salt-rich soils causes pollutants to leach into groundwater.” *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Glaser*, 945 F.3d 1076, 1080 (9th Cir. 2019). The Grasslands Bypass Project (“Project”)—the subject of this litigation—was created for this purpose. *Id.* The Project, which is jointly administered by defendants, “is a tile drainage system that consists of a network of perforated drain laterals underlying farmlands in California’s Central Valley that catch irrigated water and direct[s] it to surrounding waters.” *Id.* (internal quotations omitted).

In this action, plaintiffs allege that defendants are discharging pollutants through the Project that end up in the San Joaquin River and ultimately the San Francisco Bay Delta without complying with the permit requirements under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.* (“Clean Water Act” or “the Act”). (Doc. No. 71 at ¶¶ 1–3.) To remedy this alleged violation, plaintiffs seek orders from this court declaring that defendants have failed to comply with the Act’s

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permitting system; granting injunctive relief requiring defendants' compliance with the Act; imposing civil penalties pursuant to the Act; and an award of costs, attorneys' fees, and expert fees. (*Id.* at ¶ 3.)

A. Undisputed Facts²

The Project drains the Grassland Drainage Area ("Drainage Area"). (Doc. No. 228-1 at ¶ 1.) The Drainage

2. As an initial matter, in plaintiffs' response to local defendants' statement of undisputed facts (which federal defendants joined), plaintiffs purport to dispute nearly all of the facts put forth by defendants in that statement. (*See* Doc. Nos. 220 at 6; 228-1.) In several instances (e.g., Doc. No. 228-1 at ¶¶ 17, 26, 32, 37, 38), plaintiffs purport to dispute a fact without citing any evidence at all, thereby failing to satisfy the requirements of Federal Rule of Civil Procedure 56(c). In even more instances (e.g., Doc. No. 228-1 at ¶¶ 6, 23, 27, 44), the evidence cited by plaintiffs is not "sufficiently specific from which to draw reasonable inferences about other material facts" or fails to constitute "significantly probative evidence tending to" dispute the particular fact asserted. *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221–22 (9th Cir. 1995); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("If evidence is merely colorable or is not significantly probative, summary judgment may be granted.") (internal citations omitted). Frequently, plaintiffs put forth two different, lengthy string citations of evidence to dispute facts throughout their response to defendants' statement of undisputed facts, but those string citations often fail to address the particular fact at issue. (*See, e.g.*, Doc. No. 228-1 at ¶¶ 6, 11, 22, 23, 25, 35, 36.) In other instances, the court has narrowed a fact asserted to the portion that is undisputed. (*See, e.g., id.* at ¶¶ 46, 47.) The court has closely scrutinized the evidence put forth by defendants and plaintiffs for genuine disputes and thus finds the following facts used in this order are undisputed unless otherwise noted.

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Area includes approximately 97,400 acres located in Merced and Fresno counties on the west side of the San Joaquin River within the Delta-Mendota sub-basin of the San Joaquin Valley. (*Id.*) At least 30,800 acres within the Drainage Area have subsurface agricultural tile drainage systems. (*Id.* at ¶ 3.) Water that is collected through the subsurface tile drains in the Drainage Area is conveyed through the Grassland Bypass Channel (“Bypass”), then into the San Luis Drain (“Drain”), where it travels 27 miles until it ultimately flows into a wetland referred to as “Mud Slough.” (*Id.* at ¶¶ 2, 3.) Mud Slough is a wetland adjacent to national and state wildlife refuges and is a water of the United States. (Doc. No. 229-2 at ¶¶ 9, 67.) Mud Slough empties into the San Joaquin River, which, in turn, flows into the Sacramento-San Joaquin River Delta, and ultimately into the San Francisco Bay. (*Id.* at ¶ 8.) The water conveyed from the Drainage Area and into Mud Slough contains pollutants, such as selenium and salt, that are naturally present in the area soils. (Doc. Nos. 228-1 at ¶ 2; 229-2 at ¶ 65.) The Project does not have a National Pollutant Discharge Elimination System (“NPDES”) permit. (Doc. No. 229-2 at ¶ 97); *see also Env’t Def. Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 841 (9th Cir. 2003) (noting that NPDES permit are issued under the Act and require “dischargers to comply with technology-based pollution limitations”).

The land in the Drainage Area consists of active farmland, retired farmland, and non-irrigable land used for public infrastructure, businesses, and residences (among other uses); however, there are no lands within the Drainage Area that have never been irrigated. (Doc.

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Nos. 228-1 at ¶ 6; 229-1 at ¶ 119.) For example, the Vega Solar Project—completed in the summer of 2015—sits upon 139 acres³ of retired farmland within the Drainage Area that had previously been irrigated until 2014. (Doc. No. 228-1 at ¶ 15.) The tile drains beneath the Vega Solar Project are eight feet below the surface and also serve surrounding farmland. (*Id.*) This is representative of how the tile drains operate more generally; the drains are not limited to particular fields but extend across multiple fields, land use types, and land ownerships and collect all of the captured water into common sumps. (Doc. Nos. 228-1 at ¶¶ 3, 16; 229-2 at ¶ 121.) After the collected water leaves the Drainage Area, there are no sumps, pumps, culverts, pipes, or similar facilities that discharge surface water to the Drain. (Doc. No. 228-1 at ¶ 23.)

The 27-mile-long Drain is a concrete lined canal that was intentionally designed with “weep” holes or valves on its bottom surface to alleviate below-ground hydrostatic pressure that would otherwise damage or destroy it by popping up or cracking the concrete lining. (*Id.* at ¶ 34.) The more-than-50-year-old Drain also has areas where the concrete lining is cracked or buckled thereby allowing additional interface with the surrounding groundwater table. (*Id.*) Typically, seepage of groundwater travels into the Drain in the winter when the groundwater table is high,

3. Although plaintiffs fully admit this fact, in another portion of their response to defendants’ statement of undisputed facts, plaintiffs contend that the Vega Solar Project occupies 178.3 acres of retired farmland. (Doc. No. 228-1 at ¶ 6.) The court notes this potential dispute but does not find that it is material for purposes of resolving the pending motions.

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and out of the Drain in the summer when the groundwater table is low. (*Id.* at ¶ 27.) This groundwater seepage into the Drain is the result of passive groundwater flow. (*Id.*) Groundwater seepage also is not unique to the Drain. Most agricultural drainage channels are built into the ground and, whether concrete lined or not, have some interface with the groundwater table via seepage. (*Id.* at ¶¶ 26, 38.) In other words, seepage is inevitable for agricultural drains. (*Id.* at ¶ 26.) Most importantly, none of the seepage into the Drain comes from adjacent industrial activities, nor does it contain pollution from industrial dischargers. (*Id.* at ¶ 32.) Between 1997 and 2015, seepage into the Drain accounted for some of the selenium pollution in the Drain. (*Id.* at ¶ 29.) In addition to seepage, the Drain also has been accumulating sediments since it was originally constructed. (Doc. No. 229-2 at ¶ 38.) These sediments come from dust, wind-blown plant debris, algae, cattails, and suspended sediments in the return flows. (*Id.*) This sediment is periodically removed from the Drain. (Doc. No. 228-1 at ¶ 48.)

B. Procedural Background

Plaintiffs initiated this action pursuant to the citizen suit enforcement provision of the Act on November 9, 2011. (Doc. Nos. 1, 2.) On September 16, 2013, following cross-motions for judgment on the pleadings by federal defendants and plaintiffs, the court dismissed plaintiffs' complaint with leave to amend. (Doc. No. 70.) On October 7, 2013, plaintiffs filed the operative first amended complaint ("FAC"). (Doc. No. 71.) The FAC asserts a single claim for relief alleging violation of the Act based on several theories of liability. (*Id.* at ¶ 41.)

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Shortly thereafter, federal defendants and the Authority each filed a motion to dismiss plaintiffs' FAC and the court granted those motions, in part, on March 28, 2014. (Doc. No. 87.) Specifically, the court found that plaintiffs had pled sufficient facts to state a claim for a violation of the Act based on the allegation that the Project operated by defendants collects and discharges a substantial quantity of contaminated groundwater from fallow land, which is land retired from agricultural use. (Doc. No. 87 at 7.) However, the court struck all remaining allegations in the FAC that pertained to plaintiffs' other theories of liability. (Doc. Nos. 87 at 8; 138 at 13.)

On October 16, 2015, the parties filed cross-motions for summary judgment. (Doc. Nos. 109, 111, 112.) On September 2, 2016, the court issued an order denying plaintiffs' motion for summary judgment and granting in part defendants' motions for summary judgment. (Doc. No. 138.) The court also denied subsequent motions by plaintiffs to amend their FAC and for reconsideration of its order ruling on the summary judgment motions. (Doc. Nos. 162, 175). On August 31, 2017, plaintiffs dismissed their only remaining theory of liability before trial because plaintiffs conceded that as a result of the court's rulings they were "unlikely to succeed" on that claim at trial. (Doc. No. 182 at 3.) Once judgment was entered, plaintiffs filed a notice of appeal to the Ninth Circuit on October 18, 2017. (Doc. No. 184.)

A little less than two years later, on September 9, 2019, the Ninth Circuit issued a decision reversing this district court's order on summary judgment and

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remanding the case back to this court. (Doc. Nos. 188, 189, 190.) The Ninth Circuit held that this district court had erred, in part, in its interpretation of an exception to the Act’s NPDES permitting requirement “for discharges composed entirely of return flows from irrigated agriculture.” (Doc. No. 190 at 10–17) (quoting 33 U.S.C. § 1342(l)(1)). The Ninth Circuit also disagreed with this court’s decision to strike plaintiffs’ alternative theories of liability. (*Id.* at 19–20.) The Ninth Circuit found that this court had erred “by striking [plaintiffs’] theories of liability ‘based on discharges from highways, residences, seepage into the [Drain] from adjacent lands, and sediments from within the [Drain]’ from Plaintiffs’ motion for summary judgment” because those claims were in fact encompassed by the allegations in the FAC under Federal Rule of Civil Procedure 8’s pleading standard. (*Id.* at 19.) As a result, the Ninth Circuit remanded these stricken claims along with an additional claim that plaintiffs had voluntarily dismissed—regarding the Vega Solar Project—to be reconsidered by this court under the correct interpretation of § 1342(l)(1). (*Id.* & n.3.)

In this court’s first post-remand order, on April 7, 2020, the court authorized a discovery plan in anticipation of the parties “re-litigating the original summary judgment motions” and limiting discovery to the time period of September 10, 2006 to July 31, 2015. (Doc. No. 197 at 2.) Several months later, on October 13, 2020, the court granted Grassland Water District’s motion to intervene as a defendant in this action. (Doc. No. 204.)

Finally, on March 3, 2022, federal defendants and local defendants each filed their own motions for summary

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judgment. (Doc. Nos. 219, 221.) On May 27, 2022, plaintiffs separately filed a motion for summary judgment and a single opposition addressing both of the two pending motions for summary judgment filed on behalf of the defendants. (Doc. Nos. 226, 228.) On July 22, 2022, federal defendants and local defendants each filed their own briefs that served both as oppositions to plaintiffs' pending motion for summary judgment and replies in support of their own pending motions. (Doc. Nos. 229, 230.) On September 9, 2022, plaintiffs filed two separate reply briefs thereto. (Doc. Nos. 236, 237.) After this case was reassigned to the undersigned on August 25, 2022, the hearing on the pending cross-motions for summary judgment was specially set for January 31, 2023. (*See* Doc. Nos. 232, 239).

LEGAL STANDARD

Summary judgment is appropriate when the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

In summary judgment practice, the moving party “initially bears the burden of proving the absence of a genuine issue of material fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The moving party may accomplish this by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations

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(including those made for purposes of the motion only), admissions, interrogatory answers, or other materials,” or by showing that such materials “do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(A), (B). When the non-moving party bears the burden of proof at trial, “the moving party need only prove that there is an absence of evidence to support the non-moving party’s case.” *Oracle Corp.*, 627 F.3d at 387 (citing *Celotex*, 477 U.S. at 325); *see also* Fed. R. Civ. P. 56(c)(1)(B). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. *See Celotex*, 477 U.S. at 322. “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 322–23. In such a circumstance, summary judgment should be granted, “so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment . . . is satisfied.” *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is

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required to tender evidence of specific facts in the form of affidavits or admissible discovery material in support of its contention that the dispute exists. *See* Fed. R. Civ. P. 56(c)(1); *Matsushita*, 475 U.S. at 586 n.11; *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) (“A trial court can only consider admissible evidence in ruling on a motion for summary judgment.”). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the non-moving party, *see Anderson*, 477 U.S. at 250; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’” *Matsushita*, 475 U.S. at 587 (citations omitted).

“In evaluating the evidence to determine whether there is a genuine issue of fact,” the court draws “all inferences supported by the evidence in favor of the

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non-moving party.” *Walls v. Cent. Contra Costa Cnty. Transit Auth.*, 653 F.3d 963, 966 (9th Cir. 2011). It is the opposing party’s obligation to produce a factual predicate from which the inference may be drawn. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff’d*, 810 F.2d 898, 902 (9th Cir. 1987). To demonstrate a genuine issue, the opposing party “must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (citation omitted).

Finally, where, as here, “parties submit cross-motions for summary judgment, [e]ach motion must be considered on its own merits.” *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (citation omitted); *see also Tulalip Tribes of Wash. v. Wash.*, 783 F.3d 1151, 1156 (9th Cir. 2015). “In fulfilling its duty to review each cross-motion separately, the court must review the evidence submitted in support of each cross-motion.” *Riverside Two*, 249 F.3d at 1136. The parties’ assertions that there are no disputed issues “does not vitiate the court’s responsibility to determine whether disputed issues of material fact are present. A summary judgment cannot be granted if a genuine issue as to any material fact exists.” *Id.* (quoting *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978)).

ANALYSIS

The court will first address local defendants’ challenge to plaintiffs’ Article III standing to maintain this action.

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The court will then turn to the merits of plaintiffs' Clean Water Act claim.

A. Standing

To establish Article III standing, “plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016); *see also Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). The redressability prong requires that plaintiff to show that the relief sought is both substantially likely to redress the claimed injuries and within the district court’s power to award. *See Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020). “[A] plaintiff must demonstrate standing separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 185, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); *see also Bates*, 511 F.3d at 985.

Local defendants argue that plaintiffs have not satisfied the redressability requirement of Article III standing. (Doc. No. 221-1 at 10–11.) Specifically, local defendants contend that the Project is regulated under a “waste discharge requirement order (‘WDR’) issued by the State of California pursuant to the [Act],” and due to the WDR, an order by this court “[r]equiring an NPDES permit would achieve nothing more” than what the WDR already achieves. (*Id.* at 6–7, 11.) Local defendants also maintain that under a use agreement governing

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the operations of the Project, “all agricultural related subsurface discharges through the Drain terminated December 31, 2019” and “since April 2015, all discharges into the Drain have been limited to those related to storm events.” (*Id.* at 11.) Thus, local defendants maintain that plaintiffs’ claim is now “moot.” (Doc. No. 229 at 9.)

The court is unpersuaded and finds that local defendants’ argument in this regard is unavailing for several reasons. First, even with the cessation of “all agricultural related subsurface discharges,” local defendants do not contend that *all* discharges into the Drain have ceased dispensing into Mud Slough. Yet, plaintiffs seek an order requiring that an NPDES permit be obtained for any discharge from the Drain into Mud Slough, i.e., the bases underlying plaintiffs’ allegation that the Act is being violated do not depend on the discharge into Mud Slough containing “agricultural related subsurface discharges.” (*See* Doc. No. 71 at 17.) As plaintiffs argue in their reply brief, an NPDES permit “would remedy the Drain’s continuing discharge of pollutants from lands *not* used for irrigated agriculture into Mud Slough” by imposing water quality limits on the pollutants stemming from non-agricultural sources. (Doc. No. 236 at 7) (emphasis added). If this court were to agree with plaintiffs and find that the discharges from the Drain are non-agricultural, then there would be a substantial likelihood that an NPDES permit would remedy the alleged injury of unpermitted discharges of pollutants into Mud Slough. *See Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1158–59 (9th Cir. 2021) (finding redressability satisfied under the Act when

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plaintiffs sought to compel compliance with a permit, which plaintiff “interpret[ed] as requiring compliance with particular water quality criteria,” despite defendant’s contention that plaintiff had “not explained what available relief would improve water quality”).

Second, when evaluating whether the Article III standing elements are satisfied, the court must look at the facts as they existed at the time the complaint was filed. *See Nat. Res. Def. Council v. U.S. Env’t Prot. Agency*, 38 F.4th 34, 56 (9th Cir. 2022). Here, there is no dispute that plaintiffs’ claim was redressable when the operative complaint in this action was filed, and the voluntary cessation of certain discharges into the Drain does not negate plaintiffs’ explicit right to enforce the Act’s requirements. *See S.F. Baykeeper v. City of Sunnyvale*, 627 F. Supp. 3d 1102, 2022 U.S. Dist. LEXIS 164056, 2022 WL 4138648, at *9 (N.D. Cal. Sept. 12, 2022) (rejecting the defendants’ challenge to redressability where plaintiffs were seeking injunctive relief regarding remediation and the defendants contended that they were in the process of implementing a proposed remedial plan); *see also Nat. Res. Def. Council*, 38 F.4th at 56 (holding that the organizational plaintiff’s Endangered Species Act claim satisfied redressability even though the EPA had issued a biological evaluation during litigation because when plaintiff filed suit, it was unclear how the EPA would respond, and the plaintiff’s current ability to seek a more aggressive deadline was sufficient to establish standing). Here, the local defendants’ challenge is also ineffectual in light of this court’s order limiting the relevant time period for the pending motions to September 10, 2006 to July 31,

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2015, (Doc. No. 197 at 2), a fact local defendants did not dispute at the hearing.

Finally, as plaintiffs contended at the hearing on the pending motions, their underlying claim seeking that an NPDES permit be required is still redressable notwithstanding local defendants' contractual agreements or the WDRs because an NPDES permit provides certain procedural safeguards that have not otherwise been imposed. *See, e.g.*, 33 U.S.C. § 1342(b) (requiring that NPDES permits must be preceded by public notice and an "opportunity for a public hearing"); *see also* 40 C.F.R. § 123.25 (imposing various procedural requirements on state-run permit programs). This is also an adequate basis to establish redressability for a claim brought under the Act. *See Or. Nat. Desert Ass'n v. Dombek*, 172 F.3d 1092, 1094 (9th Cir. 1998) (holding that a "procedural right of certification under [33 U.S.C.] § 1341" was sufficient to establish redressability for a Clean Water Act claim).⁴

4. Defendants also rely on the district court's decision in *Coal. for a Sustainable Delta v. Carlson*, No. 1:08-cv-00397-OWW-GSA, 2008 U.S. Dist. LEXIS 63394, 2008 WL 2899725 (E.D. Cal. July 24, 2008) in support of their contention that plaintiffs have not established redressability. (Doc. No. 221-1 at 10.) However, the decision in *Carlson* is distinguishable from this case. There, the district court found that plaintiffs lacked standing as to their Endangered Species Act claim because the relief they sought (the invalidation of fishing regulations) was insufficient on its own to redress the alleged harm (that listed species were being harmed). 2008 U.S. Dist. LEXIS 63394, 2008 WL 2899725 at *10. The district court in *Carlson* identified other critical factors that were unconnected to the specific relief sought by the plaintiffs in that case, such as water deliveries being monitored in a separate

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In addition to plaintiffs' requested relief of requiring defendants to obtain an NPDES permit for the Project, plaintiffs also seek the imposition of civil penalties and an injunction requiring remedial activities. (*See* Doc. No. 71 at 17.) At the hearing, local defendants did not dispute plaintiffs standing to pursue those remedies, which are all within the court's power to grant under the Act. *See* 33 U.S.C. § 1365(a); *Friends of the Earth*, 528 U.S. at 188 (holding that a citizen suit brought under the Act satisfies the redressability requirement as to civil penalties "for violations that are ongoing at the time of the complaint and that *could continue* into the future if undeterred") (emphasis added).

Accordingly, the court concludes that plaintiffs have satisfied their "relatively modest" burden of establishing the redressability requirement for Article III standing to seek an order requiring compliance with the Act, including its NPDES permit program. *Deschutes River All.*, 1 F.4th at 1159 (citation omitted); *see also Juliana*, 947 F.3d at 1170 ("Redress need not be guaranteed, but it must be more than 'merely speculative.'") (citation omitted).

court action and non-party federal agencies changing their conclusions regarding the status of listed species. 2008 U.S. Dist. LEXIS 63394, [WL] at *9. Here, by contrast, if plaintiffs obtain an order requiring that defendants secure an NPDES permit for the Project, the effectiveness of that permit would not be limited by the WDRs; rather, the discharge from the Drain into Mud Slough would be the subject of additional regulation and related procedural safeguards associated with that regulation (the relief plaintiffs seek). Thus, the court finds that the decision in *Carlson* is inapposite.

*Appendix C***B. Clean Water Act**

Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” through limiting pollution from “point sources.” *Nw. Env’t Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011), *rev’d on other grounds sub nom. Decker v. Nw. Env’t Def. Ctr.*, 568 U.S. 597, 133 S. Ct. 1326, 185 L. Ed. 2d 447 (2013). “A cornerstone of the Clean Water Act is that the ‘discharge of any pollutant’ from a ‘point source’ into navigable waters of the United States is unlawful unless the discharge is made according to the terms of an NPDES permit obtained from either the United States Environmental Protection Agency (“EPA”) or from an authorized state agency.” *Ass’n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res.*, 299 F.3d 1007, 1009 (9th Cir. 2002).

The Act defines the terms used in its provisions as follows. “Discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). A “pollutant” is defined broadly, including, *inter alia*, “heat, . . . rock, sand, cellar dirt . . . and agricultural waste discharged into water.” 33 U.S.C. § 1362(6). “Navigable waters” means “the waters of the United States.” 33 U.S.C. § 1362(7). A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure . . . [but] does not include agricultural stormwater discharges and return

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flows from irrigated agriculture.”⁵ 33 U.S.C. § 1362(14). In addition to this definitional exclusion of irrigated agriculture return flows from the term “point source,” Congress incorporated a nearly identical exception under its NPDES permitting provisions, which provides that “[t]he Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture” 33 U.S.C. § 1342(l)(1).⁶

The Act can be enforced through a citizens suit’s provision, which allows lawsuits to be initiated by “a person or persons having an interest which is or may be adversely affected.” 33 U.S.C. §§ 1365(a), (g). These citizen suits can impel future compliance with the Act by obtaining relief from district courts, including injunctive relief and civil penalties payable to the United States Treasury. *See Friends of the Earth*, 528 U.S. at 173 (citing 33 U.S.C. § 1365(a)). To establish a violation of the Act,

5. Although not defined in the Act, “nonpoint source pollution is . . . widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits.” *League of Wilderness Defs. v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002).

6. Although not defined in the Act, “nonpoint source pollution is . . . widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits.” *League of Wilderness Defs. v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002).

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a plaintiff in a citizen suit “must prove that defendants (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source.” *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Glaser*, 945 F.3d 1076, 1083 (9th Cir. 2019) (“*PCFFA*”), (citation omitted); *see also* 33 U.S.C. § 1311(a). If a plaintiff carries their initial burden of establishing the elements of a violation under the Act, then the defendant bears the burden of proving that an exception provided for in the Act applies. *See PCFFA*, 945 F.3d at 1083.

Here, based on the evidence before the court on summary judgment, plaintiffs have established a violation under the Act. The specific violation identified by plaintiffs is the addition of water containing pollutants stemming from the Project being dispensed into Mud Slough without an NPDES permit, as required. (Doc. Nos. 226-1 at 16–17; 228 at 11–12; 236 at 9.) First, the undisputed facts establish that the Project “conveys water from the [Drainage Area] through the [Bypass] to the [Drain] and then to Mud Slough,” which is considered a water of the United States. (Doc. Nos. 228-1 at ¶ 2; 229-2 at ¶¶ 8, 9.) It is also undisputed that the water conveyed by the Project and discharged into Mud Slough contains pollutants including selenium, salt, and boron. (Doc. No. 229-2 at ¶¶ 65, 67, 79.) Finally, it is undisputed that the Project, jointly administered by the defendant Authority and the federal defendants, does not have an NPDES permit. (Doc. Nos. 228-1 at ¶ 2; 229-2 at ¶ 97.) Thus, plaintiffs have shown that pollutants (selenium, salt, boron, among others) are being added to a navigable water (Mud Slough) from a point source (the Project, and specifically, the Drain).

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Accordingly, plaintiffs have established a violation of the Act.⁷

Defendants maintain that the violation is cured under the exception provided by the Act in § 1342(l)(1). (Doc. Nos. 220 at 13; 221-1 at 12.) As noted, § 1342(l)(1) is an exception to the Act's permitting requirements for discharges that are "composed entirely of return flows from irrigated agriculture." 33 U.S.C. § 1342(l)(1). Defendants contend that they have carried their burden of establishing that § 1342(l)(1) applies to the Project's discharges, thereby exempting the Project from the Act's permitting requirements.⁸ (Doc. Nos. 220 at 13; 221-1 at 12.)

7. The court acknowledges that it would appear that part of plaintiffs' burden to establish a violation of the Act is to establish that the Project is a "point source," which, in its statutory definition, requires that the Project "not include . . . return flows from irrigated agriculture." 33 U.S.C. § 1362(14). The district court previously interpreted this definitional exclusion and the related exception to the permitting requirement under § 1342(l)(1), as a burden borne by plaintiffs in establishing a violation of the Act. (*See* Doc. No. 138 at 15) ("The parties dispute only the fourth element of plaintiffs Clean Water Act claim: whether the Project is a point source or not."). However, in its order reversing this court's prior ruling on summary judgment, the Ninth Circuit rejected this interpretation of the burden of proof associated with the definitional exclusion and exception. (Doc. No. 190 at 11–12.) Accordingly, consistent with the Ninth Circuit's decision, the court now clarifies that defendants bear the burden of proof to establish that the exception under § 1342(l)(1) applies here.

8. Local defendants' pending motion primarily focuses on application of the § 1342(l)(1) exception to the Project. Federal defendants join in those arguments. (Doc. Nos. 220 at 6, 13–16, 21.)

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Plaintiffs counter that they have identified four separate discharges of pollutants that have “commingled” with the water collected in the Project and are ultimately discharged into Mud Slough. (Doc. Nos. 226-1 at 17–25; 228 at 15–19; 236 at 9.) Due to this commingling of polluted water streams, plaintiffs maintain that § 1342(l)(1) does not apply to the Project because the water in the Drain is no longer “composed *entirely* of return flows from irrigated agriculture.” 33 U.S.C. § 1342(l)(1) (emphasis added); (Doc. No. 236 at 8–9.)

Accordingly, to resolve the pending cross-motions for summary judgment, the court must first determine the scope of the agricultural return flows exception provided by § 1342(l)(1).

1. The Agricultural Return Flows Exception (33 U.S.C. § 1342(l)(1))

Under § 1342(l)(1), “[t]he Administrator shall not require a permit . . . for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.” 33 U.S.C. § 1342(l)(1). In its

The court assumes that the Grassland Water District is similarly situated to the Authority because these local defendants submitted a single motion for summary judgment. (Doc. No. 221-1.) Plaintiffs also do not purport to differentiate between any defendants in their pending motion. (*See* Doc. No. 226-1 at 7.) Thus, if the § 1342(l)(1) exception applies to the established violation here, all defendants will be free from liability under the Act with regard to the Project.

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order remanding this action, the Ninth Circuit provided guidance as to how this statutory exception should be construed. (*See* Doc. No. 190 at 11–17.)

First, although the Ninth Circuit found error with this court’s interpretative method, it nevertheless held “that the district court’s interpretation of the phrase [irrigated agriculture] was accurate” and “that Congress intended to define the term ‘irrigated agriculture’ broadly.”⁹ (Doc. No. 190 at 16.) Specifically, this court previously found that the phrase “discharges . . . from irrigated agriculture” in § 1342(l)(1) “meant discharges that ‘do not contain additional discharges from activities unrelated to crop production.’” (Doc. No. 190 at 12–13, 17) (“The text demonstrates 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.”); (Doc. No. 70 at 21) (explaining that “if pollutants from an industrial factory, for example, were added to the flows at issue here, they would disqualify the Project from the exemption”).¹⁰

9. Contrary to plaintiffs’ counsel’s insistence at the hearing, the Ninth Circuit squarely held in this case that the term “irrigated agriculture” as used in § 1342(l)(1)’s exception is defined “broadly,” notwithstanding the case law cited providing that, in general, exceptions to the Act are to be construed narrowly. (*See* Doc. No. 190 at 13–15.)

10. This example from this court’s prior order construing the § 1342(l)(1) exception was taken from the EPA’s Final Rule for NPDES Permit Application Regulations for Storm Water Discharges. (Doc. No. 70 at 21) (citing 55 Fed. Reg. 47996 (Nov. 16,

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Next, the Ninth Circuit rejected this court’s interpretation of “entirely” to mean “that § 1342(l)(1) exempts discharges from the [Act]’s permitting requirement unless a ‘majority of the total commingled discharge’ is unrelated to crop production.” (Doc. No. 190 at 16) (finding that the district court’s “majority rule interpretation misconstrued the meaning of ‘entirely,’ as used in § 1342(l)(1)”). Instead, the Ninth Circuit held that “[e]ntirely’ is defined as ‘wholly, completely, [or] fully’” and reasoned that because there are “many activities related to crop production that fall under the definition of ‘irrigated agriculture,’ Congress’s use of ‘entirely’ to limit the scope of the statutory exception thus makes perfect sense.” (*Id.*) (citation omitted).

The issue then for this court, is to determine whether defendants have carried their burden of establishing on summary judgment that the Project’s discharges “do not contain additional discharges from activities unrelated to crop production.” (Doc. No. 190 at 13.) Put another way, if any of the four sources of pollutants identified by plaintiffs do in fact exist and constitute an “additional discharge[] from [an] activit[y] unrelated to crop production,” (*id.*), then the Project’s discharges into Mud Slough would no longer be “composed *entirely* of return flows from

1990)). In response to a comment regarding the interplay between irrigation flows and stormwater discharges, the EPA explained that a discharge from an industrial facility that is “included in such ‘joint’ discharges may be regulated pursuant to an NPDES permit either at the point at which the storm water flow enters or joins the irrigation flow, or where the combined flow enters waters of the United States or a municipal separate storm sewer.” (*Id.*)

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irrigated agriculture.” 33 U.S.C. § 1342(l)(1) (emphasis added). If this were the case, the exception would *not* apply.

With this guidance in mind, the undersigned turns now to the specific terms used in the phrase “discharges that ‘do not contain additional discharges from activities unrelated to crop production.’” (Doc. Nos. 190 at 13; 70 at 21.) The phrase “additional discharges” means a “discharge” that is “[a]dded, extra, or supplementary to what is already present or available.” *Additional*, Oxford Dictionaries Online, Oxford University Press, https://premium.oxforddictionaries.com/definition/american_english/additional (last accessed on Feb. 16, 2023). Importantly, the meaning of the word “discharge” under the Act presumes the existence of a point source which, as mentioned previously, is limited to a discernible, confined, and discrete conveyance. *See Dombeck*, 172 F.3d at 1096–97 (“The term “discharge” in § 1341 is limited to discharges from point sources.”); *see also* (Doc. No. 70 at 3) (“The term ‘discharge’ is a term of art under the [Act] that presumes the presence of a ‘point source.’”). It follows then, as the Ninth Circuit has reasoned, that the term “discharge” does not include within its scope nonpoint sources of pollutants. *See Dombeck*, 172 F.3d at 1096, 1098–99 (holding that the term “discharge” under the Act did not apply to nonpoint sources of pollutants including, for example, the grazing of cattle); *see also Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (“[W]hile Congress could have defined a ‘discharge’ to include generalized runoff as well as the more obvious sources of water pollution, . . . it chose to

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limit the permit program’s application to the latter [point source] category.”) (citation omitted). Thus, to qualify for the exception defendants must establish that plaintiffs’ alleged four sources of pollutants are not added to the Project from an extra or supplementary *point source*.

The court is also mindful of recent guidance from the Supreme Court regarding the relationship between a “discharge” under the Act and a “point source.” *See Cnty. of Maui, Haw. v. Haw. Wildlife Fund*, ___ U.S. ___, 140 S. Ct. 1462, 1468, 206 L. Ed. 2d 640 (2020). In *County of Maui*, the Supreme Court found that when pollutants originate from a point source, but are conveyed through a nonpoint source into a navigable water—for example, “a sewage treatment plant discharges polluted water into the ground where it mixes with groundwater, which, in turn, flows into a navigable river”—an NPDES permit is required for the addition of the pollutants into the groundwater if it constitutes “the functional equivalent of a direct discharge from a point source into navigable waters.” *Id.* “An emission of polluted water is therefore a ‘discharge’ for [Clean Water Act] purposes only ‘when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.’” *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 826, 836 (9th Cir. 2021), *cert. denied*, ___ U.S. ___, 142 S. Ct. 1444, 212 L. Ed. 2d 538 (2022) (quoting *County of Maui*, 140 S. Ct. at 1476). The Supreme Court went on to explain that “[w]hether pollutants that arrive at navigable waters after traveling through groundwater are ‘from’ a point source depends upon how similar to (or different from) the particular discharge is to a direct

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discharge.” *County of Maui*, 140 S. Ct. at 1476. In applying this approach, the Supreme Court listed some factors “that may prove relevant (depending upon the circumstances of a particular case).” *Id.* Those factors included:

(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.

Id. at 1476–77. At bottom, however, in either situation involving a “discharge”—i.e., a “direct discharge” or the “functional equivalent of a direct discharge”—there must still be a point source from which the pollutants originate. *See County of Maui*, 140 S. Ct. at 1477.

Moreover, to overcome application of the § 1342(l) (1) exception, the “additional discharges” must come “from activities unrelated to crop production.” (Doc. No. 190 at 13.) “Activities” means “[a] thing that a person or group does or has done.” *Activity*, Oxford Dictionaries Online, Oxford University Press, https://premium.oxforddictionaries.com/definition/american_english/

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activity (last accessed on Feb. 16, 2023). This definition of “activities” indicates the “additional discharge” must come from something being done by a person,¹¹ which is consistent with the requirement that a discharge must come from a point source. *See Froebel v. Meyer*, 217 F.3d 928, 937–38 (7th Cir. 2000) (interpreting “point source” as “an artificial system for moving water, waste, or other materials” and “an artificial mechanism [which] introduces a pollutant”); *see also* 33 U.S.C. § 1311(a) (“[T]he discharge of any pollutant by *any person* shall be unlawful.”) (emphasis added).

Turning to whether certain activities are related or unrelated to crop production, the court is mindful of the Ninth Circuit’s confirmation “that Congress intended for ‘irrigated agriculture,’ as used in § 1342(1)(1), to be defined broadly.” (Doc. No. 190 at 16.) Consistent with this broad interpretation of “irrigated agriculture,” for an activity to “relate to” crop production, it must merely “[h]ave reference to” or “concern” crop production. *Relate*, Oxford Dictionaries Online, Oxford University Press, https://premium.oxforddictionaries.com/definition/american_english/rel+ate?q=relate+to (last accessed on Feb. 16, 2023). For example, the Ninth Circuit found in this case that water draining from beneath retired or fallow farmland fell within the exception’s scope. (*See* Doc. No. 190 at 15–16.) Thus, such drainage was found to be related to crop production, even though the retired

11. The Act defines “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. 1362(5).

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farmland itself was no longer used to produce crops. In reaching that conclusion, the Ninth Circuit reasoned that because defendants had been ordered by a court in separate litigation “to provide drainage ‘to lands receiving water through the San Luis Unit,’” it would lead to “contradictory and illogical results” if the court were “to require Defendants to provide a drainage plan that includes the retirement of farmland, on the one hand, and hold that those activities violate the [Act] absent a permit, on the other.” (*Id.*) In other words, so long as the activity producing the alleged source of pollutants is related to the function and operation of the overall drainage plan, it also relates to crop production.

This reading of the exception regarding whether an activity is related to crop production also draws support from the evidence in this case. As reflected in the evidence submitted to the court on summary judgment, it is undisputed that the Project was designed and operated for the discharge of agricultural return flows and serves an exclusively agricultural purpose. (Doc. No. 228-1 at ¶¶ 22, 35.)¹² Further, as a result of the Project’s design

12. Although plaintiffs purport to dispute the facts appearing in these paragraphs, the evidence they cite does not contradict the defendants’ evidence regarding what the Project was designed and operated to do, as well as the Project’s purpose. Indeed, the Ninth Circuit did not reverse this court’s previous findings that “the Project falls within the plain language of ‘irrigated agriculture’” and that “[t]he parties do agree the only reason the Project exists is to enable the growing of crops.” (Doc. No. 70 at 13–14.) As plaintiffs’ expert admitted in his deposition, the Project’s purpose “is to convey irrigation return flow out of the grassland area” and that the Project, the Drain, and tile drains all facilitate agricultural production. (Doc. No. 220-1 at 4–5.) Thus,

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and operating restrictions, it is undisputed that the Project remains isolated from any other type of discharge, including, for example, any inlet or discharges from industrial activities. (Doc. No. 228-1 at ¶ 22.) Indeed, according to federal defendants, the current state-imposed regulatory regime on the Project dictates that it does not “permit any discharges from activities other than those related to crop production.” (Doc. No. 220-1 at 12.) Thus, this court finds based upon the evidence before it on summary judgment that any alleged source of pollutant that concerns or relates to the Project’s operation or function falls under the broad scope of that “related to crop production.”

Therefore, based on the court’s close parsing of the Ninth Circuit’s guidance, in order to establish that the § 1342(1)(1) exception applies here, defendants must establish that plaintiffs’ alleged sources of pollutants, which are purportedly “commingling” with the Project’s return flows, are not added from an extra or supplementary point source that is unrelated to the Project’s overall drainage function.

2. Whether Plaintiffs’ Alleged Sources of Pollutants Prevent Application of the § 1342(1)(1) Exception

According to plaintiffs, the four alleged sources of pollutants that are commingling with the return

the court finds that plaintiffs have not created a genuine dispute of material fact regarding the Project’s function and operation or that it is exclusively serving an agricultural purpose.

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flows from irrigated agriculture in the Drain are: (1) groundwater originating from beneath “non-irrigated” land adjacent to the Drain which seeps into the Drain through cracks and weep holes; (2) sediment that has settled out over time in the Drain from the waters it carries and which is purportedly discharged into Mud Slough “when it is scoured and reworked by flows in the Drain”; (3) water transported into tile drains underneath the retired agricultural land occupied by the Vega Solar Project; and (4) flows of polluted water in the Drainage Area that allegedly stem from “highways, residences and other non-irrigated lands.” (Doc. No. 226-1 at 17–25.)

Defendants counter that these four sources of additional discharges are either (i) independently exempt under the Act as nonpoint sources, (ii) related to crop production, (iii) unproven in their existence, or a combination of all three.¹³ (Doc. Nos. 229 at 6; 230 at 12–14.)

As an initial matter, plaintiffs contend that their sources of alleged pollutants need not stem from point sources to prevent application of the § 1342(l)(1) exception, calling such an interpretation “wrong as a matter of law,” but citing no case law in support of that proposition.

13. Defendants contend, in the alternative, that the water transfer rule (40 C.F.R. § 122.3(i)) exempts the discharges of water from the Drain into Mud Slough from the Act’s permitting requirements. (Doc. No. 220 at 21–23; 230 at 5–11.) Local defendants join this argument. (Doc. No. 229 at 21–22.) However, the court need not reach this issue because it will find in defendants’ favor based on application of 33 U.S.C. § 1342(l)(1).

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(Doc. No. 236 at 9, 14, 16.) Indeed, plaintiffs have never squarely addressed, in their briefing or at the hearing on the pending motions, the Ninth Circuit’s holding that this court’s prior interpretation that “discharges . . . from irrigated agriculture” means “discharges that do not contain *additional discharges* from activities unrelated to crop production” was “accurate.” (Doc. No. 190 at 13–14, 16.) At most, plaintiffs maintained at the hearing that the decision in *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004) supported their position that their alleged sources did not need to be added to the Project from a point source. To be sure, the Supreme Court in *Miccosukee* held that the definition of “discharge of a pollutant” under the Act “includes within its reach point sources that do not themselves generate pollutants.” 541 U.S. at 105. The Supreme Court also rejected an argument that a point source is exempt from the Act when pollutants discharged from the point source originated from elsewhere and merely passed through the point source. *See id.* However, this court has hewed to the holding in *Miccosukee* because it has found that an initial violation of the Act occurred in this case based on the Drain’s discharges into Mud Slough regardless of where the pollutants within those discharges originated. Plaintiffs fail to explain how *Miccosukee* affects the Ninth Circuit’s decision interpreting the § 1342(l)(1) *exception* to the Act, as opposed to the finding of an initial violation of the Act, as was the case in *Miccosukee*. Here, the Ninth Circuit concluded that the § 1342(l)(1) exception requires an “*additional discharge*”—i.e., an extra or supplementary point source as this court found—to

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prevent its application. (Doc. No. 190 at 13–14) (emphasis added). Thus, the court finds plaintiffs argument in this regard unpersuasive.

Accordingly, below the court will address each of plaintiffs’ alleged sources of pollutants to determine if on summary judgment defendants have carried their burden of establishing that these sources do not constitute “additional discharges from activities unrelated to crop production.” (See Doc. No. 190 at 13–14.)

a. Seepage and Sedimentation

The first two sources of pollutants identified by plaintiffs as allegedly preventing application of the § 1342(l)(1) exception—seepage and sedimentation—both occur within the Drain.

First, plaintiffs contend that groundwater beneath “non-irrigated land” adjacent to the Drain seeps into the Drain through cracks and weep holes throughout its 27-mile length. (Doc. No. 226-1 at 18.) The parties do not dispute that the Drain’s concrete lining contains weeps holes or cracks, both of which allow groundwater to passively flow into or out of the Drain based on seasonal groundwater table changes. (Doc. No. 228-1 at ¶¶ 27, 34.) Because this seepage flows passively and stems from groundwater, defendants have established that the seepage into the Drain is diffuse and not traceable to any discrete source, meaning it is a nonpoint source. See *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 n.4 (10th Cir. 2005) (citing *Forsgren*, 309 F.3d at 1184) (“Groundwater

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seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting.”); *see also County of Maui*, 140 S. Ct. at 1477 (finding that pollution from groundwater may only require an NPDES permit when there is a discharge into groundwater from a point source). Moreover, defendants have established that the Drain’s purpose is to facilitate irrigated agriculture by moving returns flows from the Drainage Area to Mud Slough, and that the seepage occurring in the Drain is inherent to the Drain’s operation and common among agricultural canals generally. (Doc. No. 228-1 at ¶¶ 23, 26, 34, 38.) Specifically, defendants have established that weep holes relieve hydrostatic pressure that would—in their absence—cause the concrete lining of the Drain to pop out from the ground, and that cracks in the lining of the Drain are an unavoidable fact of working with concrete, which is the most common material used to line agriculture drainage canals in the world. (Doc. Nos. 228-1 at ¶¶ 34–38; 221-4 at 48.) Thus, the court finds that this undisputed evidence before it on summary judgment is sufficient to establish that the seepage into and out of the Drain is both a nonpoint source and related to crop production.¹⁴

14. In light of the court’s finding in this regard, the court need not address or resolve the parties’ vigorous dispute as to the nature of the land adjacent to the Drain, i.e., whether that land is “agricultural” or “non-agricultural.” (Doc. Nos. 221-1 at 19; 226-1 at 18; 236 at 12.) It is undisputed—because plaintiffs failed to cite evidence in support of their position as required under Federal Rule of Civil Procedure 56(c)—that none of the seepage into the Drain comes from adjacent industrial activities, nor does that seepage contain pollution from industrial dischargers. (Doc. No. 229-2 at ¶ 32.)

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Second, plaintiffs argue that accumulated sediment in the Drain is scoured or reworked by flows that remobilize selenium into the Drain's flow. (Doc. No. 226-1 at 20.) It is undisputed by the parties that there are sediment deposits containing selenium in the Drain, and that these sediment deposits come from a variety of sources, including suspended sediment contained within the return flows coming from the Bypass, dust, wind-blown plant debris, algae, and cattails. (Doc. No. 229-2 at ¶¶ 31, 38.) It is also undisputed that the Project is limited to a velocity of one foot per second to prevent sediments from mobilizing, that there is a monitoring program in place to measure sediment accumulation, and that sediment is periodically removed from the Drain. (Doc. No. 228-1 at ¶¶ 44–47.) Based on this evidence, the court readily concludes that sediment management and removal is undisputedly related to the Project's operation and function. It follows that sediments collected into the Drain and its potential remobilization are both related to crop production. Both of plaintiffs' theories regarding sediment—i.e., accumulation of sediment in the Drain or the remobilization of already-accumulated sediment—as a basis to prevent application of the § 1342(l)(1) exception also fail for additional reasons discussed below.

As to the accumulation of sediment in the Drain, defendants have established by the evidence presented on summary judgment that this sediment is either: (a) directly related to crop production because, as local defendants' counsel emphasized at the hearing, the sediment is suspended in return flows discharged into the Drain, making it directly related to the Drain's

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function and operation (Doc. Nos. 229-2 at ¶¶ 31, 38; 228-1 at ¶¶ 44–47); or (b) added from a nonpoint source, such as wind-blown dust, which are dispersed and cannot be traced to any single discrete source, and, thus, do not constitute a “discharge.” *See Forsgren*, 309 F.3d at 1184; *Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 224 (2d Cir. 2009) (holding that pollutants traveling as airborne dust did not constitute a discharge from a point source); *cf. Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152 (9th Cir. 2010) (“The text of [the Act] and the case law are clear that some type of collection or channeling is required to classify an activity as a point source.”).

As for the remobilization of sediment in the Drain, there is a dispute regarding whether any scouring or reworking of the sediment ever occurs and if it has resulted in an addition of selenium to Mud Slough, at least in 2015. (*See* Doc. No. 104-1 at 10–11) (plaintiffs’ expert opining that during a 2015 site visit he observed two locations where a sediment deposit appeared to have been scoured and reworked by flowing water and concluded that “selenium is discharged from the [Drain] into Mud Slough” based on this observation). Notwithstanding this disputed fact, defendants have established that—contrary to plaintiffs’ unsupported assertion otherwise (Doc. No. 229-2 at ¶ 46)—selenium deposits are not resuspended when water is released into the Drain from the Bypass due to, among other things, the controlled velocity rate. (Doc. Nos. 221-6 at 12–14; 228-1 at ¶¶ 44–45.)¹⁵ In addition,

15. Plaintiffs have also failed to cite competent evidence establishing that releasing water from the Bypass into the Drain results in remobilization of sediment. (*See* Doc. No. 229-2 at ¶ 46.)

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the only other source of a high flow that plaintiffs contend would mobilize sediment in the Drain would be from a “sufficiently strong rainfall event.” (Doc. No. 229-2 at ¶ 47.) Defendants maintain that although a “sufficiently strong rainfall event” is hypothetically possible, plaintiffs have presented no competent evidence suggesting what is “sufficiently strong,” whether such a rainfall event has ever occurred or will occur in the future, or whether such an event would in fact result in discharges of pollutants into Mud Slough. (*Id.*) The court agrees with defendants that there is no such evidence before the court on summary judgment and that plaintiffs’ expressed concern is purely hypothetical. Moreover, and even more importantly, even if plaintiffs’ contention in this regard was supported by any competent evidence, a “sufficiently strong rainfall event” does not constitute an “additional discharge” because here plaintiffs do not even allege that a hypothetical rainfall event would enter the Drain through a confined, discrete conveyance. *See Brown*, 640 F.3d at 1070 (“Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source as defined by § 502(14).”).

**b. Vega Solar Project and Highways,
Residences, and Other Non-Irrigated Land
Within the Drainage Area**

Plaintiffs next two sources of pollutants that allegedly prevent application of the § 1342(l)(1) exception—seepage and runoff from the Vega Solar Project and non-irrigated land—both purportedly occur within the Drainage Area

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before the collected drainage water is piped through the Bypass and into the Drain.

First, plaintiffs allege that subsurface tile drains beneath the Vega Solar Project collect rainwater falling onto the solar site, runoff from solar panel washing, and upwelling of groundwater from underneath the solar site, and that this “non-agricultural” water mixes with other water from irrigated agriculture collected throughout the Project. (Doc. No. 226-1 at 22.) However, defendants have established by evidence presented on summary judgment that neither rainwater nor water used to wash the solar panels at the Vega Solar Project can penetrate eight feet below ground to the subsurface tile drains below. (Doc. No. 228-1 at ¶ 17.)¹⁶ As for the natural upwelling of the groundwater into the subsurface tile drains beneath the Vega Solar Project site, this would fail to constitute an “additional discharge” because groundwater is typically a nonpoint source. *See County of Maui*, 140 S. Ct. at 1468 (concluding that no permit is required for the addition of pollutants through groundwater unless it amounts to “the functional equivalent of a direct discharge from a point source”).

Furthermore, the subsurface tile drains beneath the Vega Solar Project are not intended to protect it from groundwater, which is contrary to plaintiffs’ unsupported

16. Plaintiffs purport to dispute this fact by merely citing defendants’ own expert report and then explaining how defendants misread its import. (Doc. No. 228-1 at ¶ 17.) However, the court finds defendants’ description of the report to be entirely accurate and therefore finds this fact to be undisputed.

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contention that this was their purpose. (*See* Doc. Nos. 221-6 at 9–10, 14–15, 22; 229-2 at ¶ 106.) In fact, defendants have established on summary judgment that the tile drains underneath those 138 acres pre-existed the Vega Solar Project and still serve adjacent irrigated lands. (Doc. No. 228-1 at ¶ 16.) Aside from this factually incorrect contention, there is nothing in plaintiffs’ pending motion to suggest that the upwelling of groundwater is connected in any way to the above-the-ground Vega Solar Project itself. (*See* Doc. No. 226-1 at 23.) In other words, defendants have shown that any natural upwelling of groundwater captured by tile drains beneath the Vega Solar Project is related to the Project’s operation and function, and thus, is related to crop production. Lastly, to the extent plaintiffs contend that the upwelling groundwater underneath the Vega Solar Project defeats the § 1342(l)(1) exception because that land on which it sits is retired farmland and no longer supports irrigated agriculture, that argument was already squarely rejected by the Ninth Circuit. (*See* Doc. No. 190 at 15–16.)¹⁷

17. Federal defendants contend that plaintiffs’ notice of intent to sue issued pursuant to the Clean Water Act failed to include sufficient information regarding the Vega Solar Project. (Doc. No. 220 at 17.) The court finds that the notice of intent to sue provided adequate notice of the “activity alleged to constitute a violation” with respect to the Vega Solar Project. 40 C.F.R. § 135.3(a). Specifically, as described in the notice, the activity alleged to constitute a violation of the Act was the ordinary operation of the Project without an NPDES permit. (Doc. No. 71-1 at 6–8.) Moreover, plaintiffs asserted that the agricultural return flows exception did not apply to the Project’s activity because discharges from the Project were alleged to be “predominately contaminated groundwater, not just irrigation return flows” and not “composed

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There is an additional reason that plaintiffs' argument regarding the Vega Solar Project fails, which also serves to narrow the scope of their last remaining theory of liability. Defendants have established that before reaching the Project, drainage water from the Drainage Area is reused for irrigation on parcels of farmland within the San Joaquin River Improvement Project ("SJRIP"), which irrigate salt tolerant crops. (Doc. No. 228-1 at ¶ 11.) Some of the irrigation water in the SJRIP is further collected and re-used for irrigation within the SJRIP before those return flows are discharged into the Bypass and conveyed to the Drain. (*Id.*) Defendants have also established that from 2008 through 2015, the amount of water reused for irrigation within the SJRIP before being discharged to the Drain substantially exceeded the amount of water measured entering the Drain at "Site A," a location at the beginning of the Drain used as a measuring station for a state-required monitoring program. (Doc. No. 221-6

entirely of return flows from irrigated agriculture." (*Id.*) Defendants were thus put on notice that the alleged "contaminated groundwater" was captured by the Project's subsurface tile drains and ultimately pumped into Mud Slough. (*Id.* at 7.) Moreover, the Ninth Circuit rejected defendants' arguments that they lacked notice of plaintiffs' seepage, sedimentation, and non-agricultural land discharge theories as alleged in the FAC despite plaintiffs' failure to "specifically allege [those] . . . theories of liability" beyond a reference to "polluted groundwater." (Doc. No. 190 at 19–20) (noting that defendants conceded that they had notice of plaintiffs' theories of liability). Like the Ninth Circuit, this court rejects federal defendants very similar argument with respect to notice of plaintiffs' claim related to the Vega Solar Project, finding that plaintiffs complied with the Act's 60-day notice provision in this regard.

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at 12–15, 30). Plaintiffs have failed to offer any evidence on summary judgment disputing these facts for the time period established by defendants. (Doc. No. 236 at 17) (citing evidence showing that the amount of water recycled for irrigation through SJRIP was only 27 percent “between 2002 and 2007”). Through the evidence they have presented on summary judgment, defendants have established that between 2008-2015 all the water captured in the Drainage Area—to the extent it was not already used for irrigated agriculture in the Drainage Area—was used or reused to irrigate salt-tolerant crops in the SJRIP before being discharged from the Drainage Area into the Bypass. Because it is undisputed that the retired farmland was not converted to the Vega Solar Project until the summer of 2015, any runoff from the solar site would have been reused for irrigation in the SJRIP. (Doc. No. 228-1 at ¶ 15.) Moreover, any sources of pollutants purportedly originating from the Drainage Area that were not used for irrigation in the SJRIP would be limited to the time period September 10, 2006 to December 31, 2007. (*See* Doc. No. 197 at 2) (order issued after remand limiting the time period for discovery in this action regarding violations of the Act to September 10, 2006 to July 31, 2015). As a result, plaintiffs’ final theory of liability—that non-agricultural lands within the Drainage Area are contributing polluted water to the Project—is limited to that almost 15-month time period, which the court will turn to now.

Next, plaintiffs allege that discharges from highways, residences, and other non-irrigated lands in the Drainage Area is collected in the subsurface tile drains and commingles with the return flows collected from the

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irrigated agriculture activity and is ultimately dispensed into the Drain. (Doc. No. 226-1 at 24.) It is undisputed on summary judgment that the Drainage Area includes some non-irrigable land and that there are subsurface tile drains underneath some of those lands. (Doc. No. 229-2 at ¶¶ 119, 121.) However, plaintiffs specifically argue that the source of this alleged non-irrigation water entering the Project is either runoff from annual rainfall or seepage from unidentified, non-agricultural conveyances into groundwater, which is picked up in the subsurface tile drains and mixed with all the other water collected by the Project. (Doc. No. 226-1 at 24.) As defendants correctly point out (Doc. No. 229 at 19), plaintiffs failed to identify evidence of any specific point source for this alleged “additional discharge,” and it is undisputed that the Project is isolated from any other type of discharge and has no inlets to accept discharges.¹⁸ (Doc. No. 228-

18. To the extent plaintiffs generally contend that any of the unlined ditches and canals on or adjacent to non-agricultural land within the Drainage Area constitute a point source by collecting seepage and rainfall runoff and conveying it directly or indirectly into the Project’s tile drains, there is no evidence before the court on summary judgment supporting this theory of liability, nor any evidence suggesting that such sources are adding pollutants. (See Doc. Nos. 226-1 at 24–25; 229-2 at ¶¶ 133–35.) The court also notes that a very broad reading of the Ninth Circuit’s guidance on burden shifting would create some practical tension related to this particular characterization of plaintiffs’ theory of liability. (Doc. No. 190 at 11–12.) It seems counterintuitive, if not impracticable, to require a defendant to *disprove* a plaintiff’s vague allegations as to a theory of this nature by establishing, as would be required here, that all 130 miles of unlined ditches within the Project (Doc. No. 229-2 at ¶ 134) do *not* collect and convey *any*

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1 at ¶ 22.) As the court has concluded above, seepage is a nonpoint source, and rainfall or stormwater runoff (which is not collected, channeled, and conveyed) presents

non-agricultural water carrying pollutants without requiring plaintiffs to first identify with supporting evidence what specific ditches, canals, and non-agricultural land they are referring to. Relatedly, in this court’s view, plaintiffs’ theory here—that runoff or seepage from non-agricultural land is collected and conveyed into the tile drains within the Drainage Area—is actually better viewed as an allegation of a distinct violation of the Act requiring plaintiffs to satisfy their own initial burden. (Doc. No. 190 at 11–12.) In fact, plaintiffs’ theory appears more akin to the situation confronted in *County of Maui* where the Supreme Court found that pollutants discharged into groundwater that eventually made their way into navigable waters through groundwater seepage could require an NPDES permit if that initial discharge into the groundwater amounted to “the functional equivalent of a direct discharge” based on the application of several factors outlined in the Supreme Court’s decision. 140 S. Ct. at 1476–77. Here, it is true that the unlined canals and ditches allegedly collecting non-agricultural runoff or seepage could constitute a point source that adds pollutants to the tile drains within the Drainage Area. However, whether that would amount to the “functional equivalent of a direct discharge” into a navigable water—i.e., by traveling through the Project’s otherwise NPDES-exempt subsurface tile drains, then through the Bypass, into the Drain, and finally into Mud Slough—would depend on application of the *County of Maui* factors tracing that path of non-agricultural runoff and seepage. On the evidence before this court on summary judgment, there is no basis to conduct that analysis and plaintiffs have not carried their burden of coming forward with evidence of such a violation. For this reason as well, the court concludes that plaintiffs’ theory of seepage and runoff from non-agricultural lands also fails.

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a classic example of nonpoint source.¹⁹ See *Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 509 (9th Cir. 2013) (finding that “generalized stormwater runoff do not establish a ‘point source’ discharge absent an allegation that the stormwater is discretely collected and conveyed to waters of the United States”); *Dombeck*, 172 F.3d at 1098 (“Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants. Such runoff could not be traced to any identifiable point of discharge.”) (citation omitted); see also *County of Maui*, 140 S. Ct. at 1471 (“Rainwater, for example, can carry pollutants (say, as might otherwise collect on a roadway); it can pollute groundwater, and pollution collected by unchanneled rainwater runoff is not ordinarily considered point source pollution.”).

Accordingly, based on the evidence before it on summary judgment, the court concludes that there is no genuine dispute of material fact regarding whether plaintiffs’ alleged sources of pollutants constitute nonpoint sources or whether they stem from “activities related to crop production,” and, thus, these alleged sources of pollutants do not prevent application of the § 1342(l)(1)

19. In addition, stormwater discharges do not require a permit under the Act unless those discharges are “associated with industrial activity.” 33 U.S.C. 1342(p)(2)(B). Here, it is undisputed on summary judgment that there is no industrial activity related to the Project. (Doc. No. 228-1 at ¶¶ 22, 32.) Further, the definition of “point source” specifically excludes “agricultural stormwater discharges.” 33 U.S.C. 1362(14). Thus, rainfall runoff is also exempt.

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exception to the Project. Put another way, the alleged sources of pollutants are, on this evidence of record, nonpoint sources or stem from activities related to crop production. Therefore, they are all covered under the § 1342(l)(1) exception.

This conclusion is further bolstered by the legislative history of the exception's enactment, and thus to find otherwise would undermine Congress's intent. (*See* Doc. No. 190 at 14–15.) An overly technical reading of the exception as inapplicable when any pollutant added to the Project did not directly arise from water irrigating active farmland would have an absurd result. *See Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996) (“In interpreting the liability provisions of the [Act] we realize that Congress is presumed not to have intended absurd (impossible) results.”). As explained by local defendants' expert, Dr. Charles Burt, the Project's operation of collecting water through subsurface tile drains and moving it through agricultural canals like the Drain is emblematic of how irrigated agriculture works generally. (*See* Doc. No. 221-4 at 7–14, 47.) Requiring large drainage projects to obtain NPDES permits because of their existing operation would effectively wipe out the exception for return flows from irrigated agriculture and put farmers who rely on irrigated agriculture, as opposed to natural rainfall, at a severe disadvantage, which is precisely what the exception was intended to prevent. (*See* Doc. No. 190 at 14–15) (explaining that the exception was enacted “to treat equally under the [Act]'s permitting requirement farmers relying on irrigation and those relying on rainfall” and that it “corrects what has been

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a discrimination against irrigated agriculture”) (citation omitted). Indeed, demonstrating that Congress was aware of how agricultural drains such as the Project operated when the exception was enacted, the Ninth Circuit pointed in this case to one legislator’s statement that “an NPDES permit would not be required for ‘a vast irrigation basin that collects all of the waste resident of irrigation water in the Central Valley and places it in [the San Luis Drain] and transport[s] it . . . [to] the San Joaquin River.’” (Doc. No. 190 at 15) (citing *Brown*, 640 F.3d at 1072).

The court pauses to make one additional point clear. The evidence presented to it on summary judgment in *this* case does not call upon the court to examine the *County of Maui* factors to determine whether the otherwise exempt agricultural tile drainage system within the Drainage Area is conveying *covered point source* pollution to a navigable water. The court expresses no opinion as to how those factors might apply under different circumstances or in a different case.

CONCLUSION

For the reasons explained above,

1. Plaintiffs’ motion for summary judgment (Doc. No. 226) is denied;
2. Local defendants’ motion for summary judgment (Doc. No. 221) is granted in part and denied in part as follows:

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- a. Local defendants' motion for summary judgment as to plaintiffs' Article III standing is denied;
 - b. Local defendants' motion for summary judgment as to plaintiffs' Clean Water Act claim is granted based on the application of 33 U.S.C. 1342(l)(1) to the discharges from the Project into Mud Slough;
3. Federal defendants' motion for summary judgment (Doc. No. 219) is granted in part as follows:
- a. To the extent federal defendants join and incorporate local defendants' arguments regarding the application of 33 U.S.C. § 1342(l)(1) to the discharges from the Project into Mud Slough, federal defendants' motion for summary judgment is granted;
 - b. Due to the court's granting of summary judgment in favor of defendants, the remaining arguments presented in federal defendants' motion for summary judgment are not reached by the court;

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4. The Clerk of the Court is directed to update the docket to reflect that defendant Donald R. Glaser is no longer the Regional Director of the U.S. Bureau of Reclamation, and the proper defendant is now: Ernest A. Conant, Regional Director of the U.S. Bureau of Reclamation; and
5. The Clerk of the Court is directed to enter judgment in favor of defendants and close this case.

IT IS SO ORDERED.

Dated: **February 17, 2023**

/s/ Dale A. Drozd
UNITED STATES
DISTRICT JUDGE

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**APPENDIX D — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED NOVEMBER 18, 2025**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15599

D.C. No. 2:11-cv-02980-DAD-CKD

PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS, INC.;
CALIFORNIA SPORTFISHING PROTECTION
ALLIANCE; FRIENDS OF THE RIVER;
SAN FRANCISCO CRAB BOAT OWNERS
ASSOCIATION, INC.; THE INSTITUTE FOR
FISHERIES RESOURCES; FELIX SMITH,

Plaintiffs-Appellants,

v.

ERNEST A. CONANT, REGIONAL DIRECTOR OF
THE U.S. BUREAU OF RECLAMATION; UNITED
STATES BUREAU OF RECLAMATION; SAN LUIS
& DELTA MENDOTA WATER AUTHORITY,

Defendants-Appellees,

and

GRASSLAND WATER DISTRICT,

Intervenor Defendant-Appellee.

Filed November 18, 2025

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ORDER

Before: Richard R. Clifton, Jennifer Sung, and Gabriel P. Sanchez, Circuit Judges.

Judge Sung and Judge Sanchez voted to deny the petition for rehearing en banc, and Judge Clifton so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 40.

The petition for rehearing en banc (Dkt No. 64) is **DENIED**.

**APPENDIX E — RELEVANT STATUTORY
PROVISIONS**

United States Code Annotated

Title 33. Navigation and Navigable Waters

Chapter 26. Water Pollution Prevention and Control

Subchapter I. Research and Related Programs

§ 1251. Congressional declaration of goals and policy

**(a) Restoration and maintenance of chemical, physical
and biological integrity of Nation's waters; national
goals for achievement of objective**

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

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- (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
- (5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;
- (6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and
- (7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution. . . .

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§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful. . . .

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§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

. . .

(1) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

. . .

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§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter

. . .

(12) The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

. . .

(14) The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

. . .

(16) The term “discharge” when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

APPENDIX F — REGULATIONS

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency
Subchapter D. Water Programs
Part 122. EPA Administered Permit Programs:
The National Pollutant Discharge Elimination System
Subpart A. Definitions and General Program
Requirements

§ 122.2 Definitions

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

. . .

Discharge when used without qualification means the “discharge of a pollutant.”

Discharge of a pollutant means:

(a) Any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or

(b) Any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

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This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

. . .

Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3). . . .

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§ 122.3 Exclusions.

The following discharges do not require NPDES permits:

. . .

(f) Return flows from irrigated agriculture. . . .