

No. 25-989

IN THE
Supreme Court of the United States

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE, *et al.*,

Petitioners,

v.

ADAM NICKELS, ACTING REGIONAL DIRECTOR,
UNITED STATES BUREAU OF RECLAMATION, *et al.*,

Respondents.

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

REPLY BRIEF

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INTRODUCTION

This is not a complicated case. The narrow question posed is whether Defendants' San Luis Drain is a point source whose "discharges [are] composed entirely of return flows from irrigated agriculture." (33 U.S.C. §1342(l)(1).) If they are, they are exempt from the Clean Water Act's ("CWA's") National Pollutant Discharge Elimination System ("NPDES"), and the Opinion should be affirmed. But if they are not, the Opinion must be reversed.

Plaintiffs California Sportfishing Protection Alliance, et al. ("Plaintiffs") demonstrated in their Petition for Writ of Certiorari ("Petition") that the Drain's discharges are not "composed entirely of return flows from irrigated agriculture." Defendants' monthly monitoring reports show that the Drain's discharges are heavily polluted from sources on *unfarmed* lands. (Petition 6-11, 14.) These pollutants include toxic selenium levels nearly six times higher than water quality standards allow. (Petition 8.) Defendants could have eliminated pollution from unfarmed lands by piping or treating the Drain's discharges, but chose not to do so. (Petition 9-10.)

Alternatively, Defendants could have obtained an NPDES permit. We know this because in 1996, Defendants did exactly that. (Petition 7.) But then, inexplicably, Defendants failed to renew their permit, and proceeded to discharge pollutants from unfarmed lands without complying with the NPDES permit system. That is unlawful, and is why Congress enacted the CWA's citizen suit provision, 33 U.S.C. §1365, to ensure that dischargers complied with the Act's requirements.

So, this is a simple enforcement case. Defendants discharge pollutants from the Drain, a point source, into waters of the United States without an NPDES permit. Their discharges are not exempt because they are not “composed entirely of return flows from irrigated agriculture.” (33 U.S.C. §1342(l)(1).) Therefore the Opinion must be reversed.

Defendants recast the issue whether the *Drain* is a point source whose discharges are “composed entirely of return flows from irrigated agriculture,” to instead, whether the *original sources* of the pollutants the Drain collects and discharges are also point sources. They claim the Drain’s discharges are exempt because its originating sources from unfarmed lands are non-point sources for which NPDES permits are never required. Their argument fails because it ignores:

(1) the indisputable fact that the Drain is a point source and thus *its* discharges must be “composed entirely of return flows from irrigated agriculture” to be exempt from NPDES permitting;

(2) the indisputable fact that the Drain’s discharges are not “composed entirely of return flows from irrigated agriculture”;

(3) the indisputable fact that it is physically (and legally) impossible for any original source of pollutants collected by the Drain to *also* be a point source, because by definition, a point source must discharge pollutants to “navigable waters,” and only the Drain – not its upstream sources – does that;

(4) this Court’s holding that “a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters,” confirming the Drain is a point source. (*South Florida Water Management Dist. v. Miccosukee Tribe of Indians* (“*Miccosukee*”), 541 U.S. 95, 105 (2004)); and

(5) the settled law that “[c]laims of exemption, from the jurisdictional 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* (2007) 496 F.3d 993, 1001, *cert. den. sub nom. City of Healdsburg, California v. Northern California River Watch*, 552 U.S. 1180 (2008), citing *U.S. v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986)).

Defendants’ arguments are further refuted below.

ARGUMENT

I. DEFENDANTS DESIGNED THEIR PROJECT TO OPERATE UNDER AN NPDES PERMIT.

Defendants warn that requiring an NPDES permit for their Project would “undermine” and “contravene the Act’s structure and purpose,” which distinguish “between point and nonpoint sources” as “an organizational paradigm.” (Opposition 6, 15.) But they fail to mention that they designed the Project to operate under an NPDES permit, which they obtained in 1996, without “undermin[ing]” the

“Act’s structure and purpose.” (3ER512-513.) They could easily apply for a permit again, and operate lawfully as the Act requires.

II. DEFENDANTS DESIGNED AND OPERATED THEIR PROJECT TO COMMINGLE IRRIGATION RUNOFF WITH WASTEWATER FROM UNFARMED LANDS.

Defendants refuse to take responsibility for their own decisions. They contend it would be impossible to operate their Project without commingling, but the record shows that Defendants – and no one else – caused the commingling.

Defendants decided how to design, build and operate the Project. Defendants designed it to commingle farm and non-farm wastewater and to operate with an NPDES permit, which they obtained but then allowed to expire. (3ER512-513.) Defendants failed to maintain the Drain, whose resulting “accumulated damage” (as well as Defendants’ design) allowed contamination from seepage. (App. 15a.)

Defendants rejected alternatives that would remedy the inflow of contaminated groundwater from unfarmed lands. Defendants considered building a new drain or enclosed pipeline that would “convey only agricultural drainage and discharge it directly to the San Joaquin River,” but failed to build it. (2FER334 (Alternative 9: Construct New Channel), 335-337 (Alternatives 13 and 14: Construction of Pipeline or New Drain).) Defendants considered construction of a wastewater treatment plant but failed to build it. (3ER389-391.) Because of the choices

Defendants made, the Drain continues to discharge pollutants from unfarmed lands. (*Id.*)

Because commingling was avoidable by design, operation and maintenance, Plaintiffs never stated that it was “inevitable” as Defendants incorrectly claim. (Opp. 11.) The only time Plaintiffs used the term “inevitable” in their appellate briefs was to explain that because *Defendants chose* to allow 274,000 cubic yards of toxic seleniferous sediment to accumulate along the Drain’s bottom, and then allow scouring high flows, “[m]obilization of contaminated sediment in the Drain is inevitable during high flows.” (AOB 43, citing 3ER501.) Defendants’ deliberate design, poor maintenance, questionable operation and refusal to implement solutions provide no basis for judicially rewriting the CWA to exempt the Project.

III. DEFENDANTS’ ARGUMENT THAT THE EXEMPTION ONLY APPLIES TO “DISCHARGES” OF POLLUTANTS MERELY CONFIRMS THE PROJECT IS NOT EXEMPT.

Defendants urge the Court to ignore the Drain – which Defendants admitted and the District Court ruled was a point source under §1362(14) (App. 52a.) – and consider only the “original sources” of the pollutants that the Drain discharges. (Opp. 11-14.) Defendants claim the originating sources must themselves be “point sources” to require an NPDES permit for the Drain. Their argument is meritless.

First, it conflicts with the plain language of the provisions Defendants cite. Section 1342(l)(1) exempts “discharges composed entirely of return flows from

irrigated agriculture.” Section 1362 states that “discharge” “includes a discharge of a pollutant” (subsection (16)) and “discharge of a pollutant’ . . . means . . . any addition of any pollutant to navigable waters *from any point source*” (subsection (12) (emphasis added)). Since the Drain is “any point source,” its discharges must be “composed entirely of return flows from irrigated agriculture” to be exempt. But Defendants’ monthly monitoring records confirm the Drain discharges polluted waters from *unfarmed* lands. (Petition 6-11, 14.) Consequently, the Project’s discharges are not “composed entirely of return flows from irrigated agriculture.” Therefore, the Project cannot be exempt.

Second, Defendants’ argument is premised on a factual impossibility. It is impossible for an original source whose pollutants flow into the Drain to also be a point source. As noted, by statutory definition a “point source discharge” requires a discharge of pollutants to “navigable waters.” (33 U.S.C. §1362(12).) None of the Drain’s originating sources discharges to navigable waters. Only the Drain does.

IV. DEFENDANTS’ INTERPRETATION FAILS REGARDLESS OF WHETHER “DISCHARGE” IS GIVEN ITS STATUTORY OR ITS EVERY DAY MEANING.

Section 1342(l)(1) exempts “discharges composed entirely of return flows from irrigated agriculture.” (*Id.*) Defendants contend the Project is exempt because the word “discharge” must be given its statutory definition. (Opp. 12.) Its statutory definition is “any addition of any pollutant to navigable waters from any point source.” (§1362(12).) A “point source,” in turn, is defined as “any

discernible, confined and discrete conveyance” such as a “ditch [or] channel” (§1362(14).) The every day meaning of “discharge” (as a noun) is much broader, and includes “a flowing or issuing out.” (Merriam-Webster Dictionary, “discharge”.)

Regardless of whether the term “discharge” is given its statutory meaning (§1362(12)), or its “every day meaning” (*County of Maui, Hawaii v. Hawaii Wildlife Fund* (“*Maui*”), 590 U.S. 165, 179 (2020)), it would still include the Drain’s wastewater emissions. They not only “flow out” from the Drain, they also add pollutants to Mud Slough, a navigable water, from a discrete conveyance.

Applying either meaning, it is indisputable that the Drain is a “discharge.” It is likewise indisputable that Defendants’ monthly monitoring reports show that the Drain’s discharges are not “composed entirely of return flows from irrigated agriculture.” (Petition 8-11.)

Therefore under section 1342(l)(1)’s plain meaning – whether statutory or every day – the Drain is not exempt.

V. DEFENDANTS’ INTERPRETATION IMPERMISSIBLY REWRITES THE EXEMPTION.

Defendants argue that section 1342(l)(1) only exempts point sources such as the Drain if the “original sources” of pollutants are themselves point sources. (Opp. 11-14.) This interpretation violates four canons of statutory construction. First, it ignores the “well settled [rule] 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).)

Contrary to this rule, Defendants fail to give effect to the section's plain language, which exempts only "discharges composed entirely or return flows from irrigated agriculture," not commingled flows containing wastewater from unfarmed lands.

Second, Defendants ignore the rule that courts "cannot rewrite the statute to insert an additional restriction that Congress omitted." (*Charboneau v. Davis*, 87 F.4th 443, 454 (9th Cir. 2023).) Contrary to this rule, Defendants claim section 1342(l)(1) also exempts commingled flows containing wastewater from unfarmed lands even though this section never mentions them.

Third, by exempting wastewater from unfarmed lands, Defendants' interpretation renders the term "entirely" superfluous, contrary to the canon that statutes must be construed "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, 698-699 (2022).) As *Mawi* 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." (*Id.*, 590 U.S. at 178.)

Fourth, Defendants' interpretation creates the broad exemption of the Drain that Congressman Roncalio had proposed, even though it was "rejected on the House floor." (*Northwest Environmental Defense Center v. Brown* ("Brown"), 640 F.3d 1063, 1072 (9th Cir. 2011); *rvsd. and rem. on other gds. sub nom. Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013).) Defendants seek through judicial intervention "language that would have mandated the exact result that" Congress

“expressly rejected.” (*Mohasco Corp. v. Silver*, 447 U.S. 807, 824 (1980).)

VI. DEFENDANTS’ NEW CLAIM THAT 40 C.F.R. 122.2 DOES NOT APPLY IS WRONG.

Defendants claim that Plaintiffs seek to “expand EPA’s permitting authority to cover nonpoint sources that otherwise fall outside the NPDES framework.” (Opp. 13.) Not so. EPA’s NPDES regulations defining “point source” to include the collection and discharge of pollutants from nonpoint sources such as surface runoff have been in force, and circuit courts have enforced them, for many decades. (40 C.F.R. §122.2 (“This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man. . . .”)); *Sierra Club v. El Paso Gold Mines, Inc.* (“*El Paso*”), 421 F.3d 1133, 1144 (10th Cir. 2005) (enforcing this definition); *Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984) (same); *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 47 (5th Cir. 1980) (same); *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (same).)

Defendants’ contention that 40 C.F.R. §122.2 is inapplicable because it “merely means that . . . [municipal and industrial stormwater] point-source discharge will generally require an NPDES permit” is likewise incorrect. (Opp. 14.) By its terms, section 122.2 provides definitions that apply to all three Parts of Title 40 that “implement the [NPDES] Program under sections 318, 402, and 405 of the [CWA].” (40 C.F.R. §§122.1(a)(1), 122.2.) Therefore, the definitions contained in section 122.2 are applicable to the Drain.

Accordingly, Part 122 has been cited for many decades by circuit courts interpreting the NPDES. 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*, 486 U.S. 931 (1988)); *reinstated*, 853 F.2d 667 (9th Cir. 1988)), the court held that Part 122 governs the NPDES permit program. (*Id.* at 1490-1491.) In *Committee to Save Mokelumne River v. East Bay Municipal Utility Dist.* (“*Mokelumne*”), 13 F.3d 305, 308 (9th Cir. 1993), 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. In *El Paso*, 421 F.3d at 1142, 1144, the Tenth Circuit held the same, paraphrasing *Mokelumne*, 13 F.3d at 308, and citing 40 C.F.R. §122.2. Defendants cite no contrary authority.

Thus, section 122.2 and the many rulings enforcing it are fully applicable. They hold that where – as here – nonpoint source pollution is collected and discharged by a point source, the NPDES permit system applies. Discharges from such point sources – like any other – must be “composed entirely of return flows from irrigated agriculture” to be exempted.

VII. DEFENDANTS’ INTERPRETATION DOES NOT FULFILL CONGRESS’ INTENT.

Defendants claim their interpretation fulfills Congress’ intent. (Opp. 14.) It does the opposite. It ignores Congress’ definition of “discharge,” which is the “addition of any pollutant *to navigable waters.*” (§1362(12) (emphasis added).) Originating sources do not discharge

to navigable waters. Instead, they flow into the Drain. Because it is impossible for an upstream “original source” flowing into the Drain to also be a point source, Defendants’ interpretation exempts *all* commingled discharges and defeats Congress’ intent to limit the exemption to irrigation return flows.

Defendants’ claim (Opp. 14) that Plaintiffs’ plain meaning interpretation would “thwart” Congress’ intent is nonsensical. Congress’ intent is shown by its language. “[C]ourts 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*, 503 U.S. 250, 254 (1992).) Defendants’ reliance on (1) a term – “point source” – that Congress chose *not* to include in this section, and (2) an exemption of the Drain that Congress specifically *rejected* (*Brown*, 640 F.3d at 1072), by contrast, belies Defendants’ supposed adherence to Congressional intent.

Defendants’ claim (Opp. 14) that Plaintiffs’ interpretation would task EPA with “issuing permits for an inordinate amount of return flows” is incorrect because: (1) EPA has delegated its authority to issue NPDES permits to 47 of the 50 states, including California (40 C.F.R. Part 123; see <https://www.epa.gov/npdes-state-program-authority>), and (2) issuing a *single* NPDES permit for a commingled Drain that collects wastewater from hundreds of farms, residences, and businesses would be highly efficient and *reduce* the regulatory burden.

Defendants’ final claim that requiring a single permit for the Drain would “disproportionately burden” irrigated farmers and impose a “virtually impossible” task of “disentangling commingled pollutants” is baseless

hyperbole. Defendants easily secured an NPDES permit for the Drain when it began operation. (3ER512-513.)

VIII. DEFENDANTS MISSTATE PLAINTIFFS' CORRECT SUMMARY OF THE SENATE REPORT.

Defendants misstate the record, claiming that “Plaintiffs[] invo[ke] additional snippets of legislative history.” (Opp. 18.) The opposite is true. Plaintiffs pointed out, correctly, that the Opinion took a single sentence from the Senate Report out of context and misread it. (Petition 32-34.) Unlike the Opinion, Plaintiffs quoted the entirety of the two paragraphs in question and demonstrated that in context, that sentence supported Plaintiffs’ interpretation. (*Id.*)

IX. DEFENDANTS’ ATTEMPT TO DISTINGUISH CONTRARY CASE LAW FAILS.

Defendants’ attempt to distinguish the five appellate rulings with which the Opinion conflicts fails. (Opp. 18-21.)

Miccosukee held, contrary to Defendants’ argument, that the Act defines “point source” as a “conveyance” of pollutants to “navigable waters,” something the Drain’s originating sources cannot be, as only the Drain – and not its sources – conveys pollutants to navigable waters. (541 U.S. at 105.) It further held that “a point source need not be the original source of the pollutant.” (*Id.*) Since the Drain’s discharges are not “composed entirely of return flows from irrigated agriculture,” they are not exempt.

Mawi ruled, contrary to Defendants’ argument, that courts must accord great weight to EPA’s “longstanding

regulatory practice.” (590 U.S. at 177-179.) Here, EPA’s longstanding regulations state that the “[d]ischarge of a pollutant” that triggers the NPDES permit requirement “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.) The Drain does exactly that.

Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc., 300 F.3d 1294, 1298 (11th Cir. 2002) stated, contrary to Defendants’ argument, that “[a]ny pollutants that originated in the non-agricultural properties . . . obviously do not fall within the agricultural exemptions.”

El Paso ruled, contrary to Defendants’ argument, that “the collecting and channeling of surface runoff” for discharge to navigable waters is subject to NPDES permitting. (421 F.3d at 1142.)

Mokelumne quoted 40 C.F.R. §122.2 and based thereon held, contrary to Defendants’ argument, that the collection and discharge to navigable waters of polluted surface runoff is a point source subject to NPDES permitting. (13 F.3d at 308-309.)

Because the Opinion conflicts with these appellate rulings, this Court should grant review.

X. DEFENDANTS’ RELIANCE UPON A “WATER TRANSFER” EXEMPTION NEVER ADDRESSED BY THE OPINION IS BEYOND THE SCOPE OF THIS PETITION AND MISTAKEN.

Defendants rely upon a hypothetical “water transfer” exemption. (Opp. 21.) But that argument was never

addressed in the Opinion, and exceeds the scope of Plaintiffs' Petition. In any event, Plaintiffs demonstrated this claim is meritless. (Appellants' Reply Brief 19-21; *Na Kia'i Kai v. Nakatani*, 401 F.Supp.3d 1097, 1107 (D.Haw. 2019).)

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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