

District Court Grants Summary Judgment in Long Running Clean Water Act Case

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On February 21, 2023, the Eastern District of California, Judge Drozd presiding, issued an order granting summary judgment in favor of Defendants SLDMWA, the Bureau of Reclamation, and the Grassland Water District in a citizen suit originally filed in November 2011 by a group consisting of various fishing associations and Friends of the River. The case is *Pacific Coast Federation of Fisherman's Ass'n et al. v. Conant et al.*, Case No. 2:11-cv-02980-DAD-CKD.

In 2011, CPM had been approached by the SLDMWA (the "Authority") seeking its assistance in defending against this suit, which alleged that the Authority's operation of the San Luis Drain (the "Drain") in California's Central Valley was in violation of the Clean Water Act ("CWA"). The Drain is a water project 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 Mud Slough. Plaintiffs alleged that the Authority had been 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 National Pollutant Discharge Elimination System ("NPDES"). Since the suit was filed, and CPM attorneys have spent over 11 years defending the Authority, which has involved extensive motion practice, including multiple cross-motions for summary judgment and an appeal to the Ninth Circuit.

A cornerstone of the CWA 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. However, there are

Attorneys

Julie L. Fieber

Practice Areas

Environmental Law

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exceptions to this rule including, as relevant here, discharges composed entirely of return flows from irrigated agriculture or agricultural stormwater. Plaintiffs contended these exceptions did not apply because the irrigation return flows the Drain was designed to carry were co-mingled with allegedly non-exempt flows, specifically groundwater seepage from adjacent wildlife preserves, sediments deposited in the Drain over time by the agricultural waters it carried, distant rainwater and groundwater, and alleged discharges from a solar facility.

After the case was returned to the District Court from the 9th Circuit, the parties filed cross motions for summary judgment. Resolving those motions required the Court to determine the scope of the CWA's agricultural return flows exception, guided by the 9th Circuit's prior opinion, which had confirmed that the term irrigated agriculture as used in the exception must be understood broadly, and would include discharges from irrigated agriculture that do not contain additional discharges from activities unrelated to crop production. Further, relying upon dictionary definitions, the district court reasoned that for an activity to relate to crop production, it must merely have reference to or concern crop production. The issue therefore was whether any of the sources identified by plaintiffs in fact was an additional discharge from an activity unrelated to crop production. Notably, the district court further reasoned that the term discharges meant a point source, in the sense of the discernible confined and discrete conveyance and would not include nonpoint sources of pollutants. In short, based on the guidance provided by the 9th Circuit's opinion, the court reasoned that the Authority must establish that the alleged sources of pollutants identified by plaintiffs, which were purportedly co-mingling with the flows in the Drain, were not added from an extra or supplementary point source unrelated to the Drain's overall drainage function.

The court then analyzed each of the alleged nonexempt flows. The first 2 sources, seepage from adjacent lands, including wildlife preserves, and sediment within the Drain itself, were found both to be nonpoint sources and related to crop production, and so did not give rise to liability. The other 2 sources, seepage and runoff from the solar project and upstream non-irrigated lands, both purportedly occurred within the drainage area before collected drainage water is piped into the Drain. With respect to the solar facility, the court accepted Defendants' evidence establishing that any water use related to the facility did not penetrate to the underlying agricultural drains. Further, any upwelling of groundwater collected in the drain was related to crop production, not the solar project. Similarly, alleged discharges from highways, residences, and other non-irrigated lands in the drainage area, which essentially were rainfall or stormwater runoff, are classic examples of nonpoint sources. As such, none of these sources voided the agricultural exemption.

Finally, the court recognized that an overly technical reading of the exception finding it inapplicable whenever any pollutant added to the Project did not directly arise from water irrigating active farmland would have an absurd result. The Project's operation of collecting water through subsurface tile drains

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and moving it through agricultural canals is emblematic of how irrigated agriculture works generally. Requiring a NPDES permit because of their existing operation would effectively wipe out the exemption 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.

The CPM team was lead by Julie Fieber, working with attorneys for the other Defendants.