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Ninth Circuit Clarifies Irrigation Return Flows Permit Exemption

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The U.S. Court of Appeals for the Ninth Circuit recently issued an important decision at the intersection of irrigation water law and the Clean Water Act (CWA), with implications for over 53 million acres of irrigated land nationwide. The CWA expressly exempts irrigation return flows—the portions of irrigation water that are not consumed by crops or evaporated and instead flow back to surface waters by some means—from needing coverage under a National Pollution Discharge Elimination System (NPDES) permit. In *Pacific Coast Federation of Fishermen's Associations Inc. v. Nickels*, the Ninth Circuit held that when water in an agricultural drainage system contains pollutants from nonpoint sources, the presence of those pollutants in the drain does not abrogate the CWA's permit exemption for "'discharges composed entirely of return flows from irrigated agriculture.'" This decision provides the agriculture community much-needed clarity regarding the scope of the return flows exemption.

Prior to *Nickels*, there was uncertainty over whether the exemption would apply if any return flows in an irrigation drain were unrelated to crop production.[1] Such an interpretation would have effectively eliminated the exemption, as any drainage system would inevitably capture some pollutants from nonpoint sources in the drainage area.[2] In *Nickels*, the court held that contributions from nonpoint sources to the return flows did not require permits, because 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."[3]

Factual Background

Nickels involved an irrigation drainage system in California's Central Valley. Irrigation and drainage are inextricably linked because any project that brings fresh water to agricultural ground must drain away the salty water.[4] This drainage system was designed to recover and collect irrigation runoff from nearly 100,000 acres of agricultural land and convey the drainage though a concrete-lined system to discharge into a wetland. The drain also collects groundwater that seeps into the drain. The wetland where the drainage water is discharged is a water of the United States regulated under the CWA. The parties did not dispute that the drainage system is a point source that discharges "pollutants" to a water of the United States. The drainage project is jointly administered by the U.S. Bureau of Reclamation, the San Luis & Delta-Mendota Water Authority, and the Grassland Water District (collectively the Defendants), who jointly operate the drainage system and discharge the drain water into the wetland without a NPDES permit under an exemption from the permitting system for "discharges composed entirely of return flows from irrigated agriculture."[5] The drainage system captured runoff not just from active agricultural operations, but also from "fallow and retired farmland, as well as non-irrigable land used for public infrastructure, residences, and businesses."[6] The drainage system also captured runoff from the washing of an array of solar panels on formerly irrigated farmland. However, none of the challenged pollutants originated from point sources unrelated to crop production. The question before the court was whether the sources of pollutants in runoff from activities not associated with crop production eliminated Defendants' ability to rely on the return flows exemption.

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[1] *Pacific Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 945 F.3d 1076, 1085 (9th Cir. 2019).
[2] *See Nickels*, 2025 WL 2553725 at *8-*9.
[3] *Id*. at *2.
[4] *Id*. (citing *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 571 (9th Cir. 2000)).
[5] *Id*. at *4, *6.
[6] *Id*. at *4.

Procedural History: ***Pacific Coast Federation of Fishermen's Associations Inc. v. Glaser***

For fourteen years, the case has moved through the U.S. District Court for the Eastern District of California and the Ninth Circuit[7] to establish the scope of the term "irrigated agriculture" and the phrase "composed *entirely* of return flows from irrigated agriculture."[8] In 2011, Plaintiffs filed suit alleging that Defendants violated the CWA by discharging pollutants that were unrelated to irrigated agriculture without a permit. On cross-motions for summary judgment, the district court found that Plaintiffs failed to meet their burden of showing that return flows were not entirely from irrigated agriculture. The district court further found that "irrigated agriculture" must be interpreted broadly, but the word "entirely" in the exemption must be read to mean that the "majority" of return flows must be from irrigated agriculture.[9] Otherwise, the statute would be meaningless. The Ninth Circuit in *Pacific Coast Federation of Fishermen's Associations Inc. v. Glaser* reversed and remanded, holding that while the district court correctly interpreted the broad meaning of "irrigated agriculture," the district court erred in 1) placing the burden on Plaintiffs rather than on Defendants to demonstrate their entitlement to the exemption, and 2) finding the word "entirely" to mean "majority." The Ninth Circuit held that Congress' use of the word "entirely" means "discharges that include return flows from activities unrelated to crop production [are] excluded from the statutory exception, thus requiring an NPDES permit for such discharges."[10]

The court's holding in *Glaser*, that any return flows containing pollutants from activities unrelated to crop production required a permit, caused considerable confusion among operators of irrigation drains. The court's holding, on its face, suggested that the exemption was exceedingly narrow, if it remained intact at all after *Glaser.*

District Court Decision on Remand

On remand, however, the district court distinguished between "discharges" from point sources subject to NPDES permits and pollutants entering the drain from nonpoint sources that were not subject to NPDES permits.[11] The district court found that Defendants met their burden of establishing their entitlement to the exemption because "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."[12] Defendants further carried their burden to establish that the allegedly disqualifying pollutants were either "added from a

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[7] The Ninth Circuit reversed and remanded several issues from a prior partial denial and partial grant of cross-motions for summary judgement. *Pacific Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 945 F.3d 1076 (9th Cir. 2019).

[8] *Id*. at 1083.

[9] *Id*. at 1082-83.

[10] *Id*. at 1085.

[11] *Pacific Coast Fed'n of Fishermen's Ass'ns v. Conant*, 657 F.Supp.3d 1341, 1359-60 (E.D. Cal. 2023).

[12] *Id*. at 1360.

nonpoint source or [were] added from a point source that related to the Project's overall drainage function."[13] The district court limited the term "entirely" to the universe of pollutants discharged from point sources.

Ninth Circuit's Opinion in *Nickels*

The Ninth Circuit affirmed the district court's partial grant of summary judgement and its conclusion that Defendants met their burden of establishing entitlement to the irrigation return flows exemption.[14]

Appellants challenged the Project's exempt status, arguing that, because the return flows contain pollutants that did not originate from irrigated agriculture, the discharge was not "composed entirely" or "solely" of discharges from irrigated agriculture.[15] Under this theory, any irrigation return flows that commingled with any other pollutants from any other source would require an NPDES permit. Appellants argued that the CWA regulates pollutants discharged from a point source, and that Congress's use of "entirely" in the exemption, required the court to hold that the exemption only applied if the return flows contained pollutants only from return flows.

The court relied on its prior opinion that established that "irrigated agriculture" includes "all activities related to crop production"[16] and that "entirely" follows its ordinary meaning of "wholly, completely, fully."[17] But the court then found that the term "entirely" is ambiguous as to what "category of objects" the term is meant to exclude. The court examined the question of whether the pollutants had to come entirely from irrigated agriculture or only the "discharges."

Because "entirely" in this context was ambiguous, the court turned to a "highly probative" section of the legislative history to determine Congress' intent in passing the exemption. The legislators who authored the exemption also drafted a report which used key statutory terms as they are defined in the statute. The report explains that "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."[18] The terms "discharge" and "discharge of a pollutant" are statutorily defined terms which are limited to the addition of any pollutant to navigable waters from any point source.[19] Relying on these statutory

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[13] *Nickels*, 2025 WL 2553725 at *6; *Conant*, 657 F.Supp.3d at 1362-63.

[14] *Nickels*, 2025 WL 2553725 at *6.

[15] *Id*.

[16] In *Glaser*, the Ninth Circuit noted that activities related to crop production included fallowed and retired fields, but did not provide a detailed explanation of what that phrase means. 945 F.3d. at 1084-85.

[17] *Nickels*, 2025 WL 2553725 at *7.

[18] *Id*. (citing S. Rep. No. 950379, 35).

[19] 33 U.S.C. §§ 1362(12), 1362(16).

definitions, the court held that the exemption applies to irrigation return flows that do not contain additional point source discharges because that reading is consistent with the overall structure of the CWA, which does not regulate nonpoint sources of pollution.

The court also found that this interpretation is consistent with Congress's intent in including the return flows exemption in the 1977 amendments to the CWA. Congress passed the irrigation return flows exemption for three primary reasons: (1) to reduce EPA's burden to issue an excessive number of permits related to irrigated agriculture, (2) to address the unequal treatment between farmers who depend on rainfall to irrigate their crops who were not subject to NPDES permitting and farmers who rely on surface irrigation if they were required to obtain a permit for return flows, and (3) to address the technical difficulties of regulating return flow pollutants through the NPDES permitting program because it was "practically impossible to determine whether agricultural pollutants were originally from point or nonpoint sources."[20] Congress determined that irrigation return flows were best managed under Section 208 of the CWA through direct regulation by the States along with nonpoint sources of pollution rather than requiring EPA to undergo the impossible task of separating the point source and nonpoint source pollutants in each and every return flow across the United States. Under the court's interpretation, the operator of the drain only needs to show that there are no additional point sources, without quantifying the amount of pollutants in the commingled wastewater from each individual source.

If Appellants' interpretation were adopted, the court reasoned, then none of Congress's primary goals would be achieved, and the exemption would effectively be read out of the CWA because it would be impossible to ensure that no nonpoint source pollution, like windblown dust, ever enters the return flows conveyance.

Implications of *Nickels*

The Ninth Circuit covers much of the territory where irrigated agriculture takes place in the United States. In *Nickels*, the court made it clear that the irrigation return flows exemption is not defeated when "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."[21]

This article originally published on October 6, 2025.

[20] *Nickels*, 2025 WL 2553725 at *8 (citing S. Rep. No. 95-370, 35).
[21] *Id*. at *8-*9.

Clean Water Act Citizen Suits in the Spotlight: Solicitor General Calls for Supreme Court Review

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This alert was originally published on June 3, 2025, and has been revised based on recent developments.

Update

On June 30, 2025, the U.S. Supreme Court denied certiorari *Port of Tacoma v. Puget Soundkeeper Alliance*, No. 24-350. The Court often gives considerable weight to the Solicitor General's views, but the Solicitor General's amicus brief supporting certiorari failed to sway the Court. The Court generally does not explain cert denials, and there were no opinions issued relating to the case, but the Court often waits to resolve circuit splits until more courts of appeals have had the opportunity to consider an issue. The Court denying certiorari allows for the non-uniform enforcement of the Clean Water Act (CWA) and the potential deepening of the circuit split as the issue is litigated in future cases. Though the Court denied certiorari on the issue as presented in this case, the Solicitor General's views will be relevant to future cases with similar issues, and we expect defendants to press this issue in future citizen suits and to cite to the Solicitor General's filing in this case.

Key Takeaways

- Federal citizen suits are likely to become more frequent as the federal government decreases its enforcement efforts. Federal courts are split on whether CWA citizen suits can enforce permit terms that implement only state law. The Solicitor General has now weighed in on that issue at the Supreme Court's request, arguing that the Court should grant certiorari and that such suits are not permissible.
- The case, *Port of Tacoma v. Puget Soundkeeper Alliance*, is potentially very significant. Whether or not the Court grants certiorari on the issue now, the Solicitor General's views will be relevant to the scope of remedies under the CWA.

The Solicitor General Favors Granting Review

Last week, the Solicitor General weighed in on a pending petition for a writ of certiorari in *Port of Tacoma v. Puget Soundkeeper Alliance*, No. 24-350. The issue is whether Section 1365 of the CWA authorizes federal enforcement of provisions in a state-issued National Pollutant Discharge Elimination System (NPDES) permit that imposes broader obligations than those required under the federal CWA. The CWA gives states the authority to run the NPDES

permitting program for discharges into navigable waters. State-issued permits must ensure compliance with federal requirements but may also include requirements that are "more stringent" or of a "greater scope" than the federal requirements.

The issue is an important one that has divided the Courts of Appeals. The Ninth Circuit ruled that CWA citizen suits can be a tool for enforcing the entirety of a state-issued NPDES permit, including conditions that mandate a broader scope of coverage than the federal requirements in the Act. *Puget Soundkeeper Alliance v. Port of Tacoma*, No. 21-35881 (9th Cir. 2024). As pointed out by the Solicitor General, the Fourth and Eleventh Circuits have both signaled that they may adopt the Ninth Circuit's interpretation. By contrast, the Second Circuit, in *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), disallowed citizen suit enforcement for state permit requirements of a "greater scope" than what federal law requires.

The Solicitor General urged the U.S. Supreme Court to grant certiorari, adding to the likelihood of a grant of certiorari. Below, Judge O'Scannlain wrote a special concurrence effectively crying out for Supreme Court review by highlighting the circuit split and flaws in the Ninth Circuit's interpretation of the Act. The Port of Tacoma also received robust amicus support that, in conjunction with the Solicitor General's argument in favor of review, could secure this case on the Court's merits docket.

"More Stringent" vs. "Greater Scope"

The Solicitor General's filing distinguishes between state requirements that are "more stringent" and those of a "greater scope" than what the CWA requires. A "more stringent" state standard involves a stricter version of a federal requirement, such as a lower effluent limit for a discharge that the Act already regulates. A state requirement that is broader in scope than the federal requirements involves state-imposed restrictions for discharges that the Act does not otherwise regulate. This can include, for example, a state's decision to regulate sources that are not subject to permitting requirements under the Act, such as in *Port of Tacoma*.

All parties agree that "more stringent" standards are considered part of the federally-approved NPDES program and are enforceable through citizen suits. The Solicitor General's brief concludes that this rule does not extend to permit provisions with a "greater scope" than what the CWA requires. The brief explains that the federal government cannot enforce these exclusively state-law provisions and that allowing private citizens broader enforcement authority than the federal government would subvert the intended supplemental nature of CWA citizen suits. The brief argues that such a grant of enforcement authority would raise concerns under Article II of the Constitution, making this interpretation disfavored under constitutional avoidance principles. The brief also presents

a textualist analysis of the key statutory provisions, relying on a long-standing U.S. Environmental Protection Agency (EPA) regulation, 40 C.F.R. 123.1(i)(2).

The Impact of *Loper Bright*

The Second Circuit's Atlantic States decision relied in part upon the same EPA regulation that the Solicitor General now cites, 40 C.F.R. 123.1(i)(2), which clarifies that broader state-law components of the permit are not part of the federal program. The respondents argue that the Second Circuit's reliance on the EPA regulation during the *Chevron* era weakens the Second Circuit precedent and reduces the need for the Court to grant certiorari. The Solicitor General addresses this point by arguing that the Second Circuit gave *Chevron* deference on a separate issue and not the scope of citizen suit enforcement. Further, the Solicitor General argues that a "proper reading" of the citizen suit provision would result in the same interpretation that the Second Circuit reached.

Yet Another CWA Case Before the Court?

The Court often gives considerable weight to the Solicitor General's views, so the brief may signal that the Court will hear a CWA case for the second consecutive term. In March, the Court held in *City & County of San Francisco v. EPA*, 145 S. Ct. 704 (2025), that EPA exceeded its statutory authority when it included "end-result" provisions that hold permittees liable for the quality of the receiving water in NPDES permits. If the Court grants certiorari in *Port of Tacoma*, it would have another opportunity to address the scope of the statute. Even if the Court does not grant certiorari on the issue now, the Solicitor General's analysis is likely to be of great interest to federal courts considering pending and future CWA citizen suits.

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One Stop Shop: Court Confirms Exclusive Jurisdiction of U.S. Courts of Appeals Over Review of Licensed Hydropower Projects

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In a significant victory for the hydropower industry, last week the U.S. District Court for the District of Oregon issued an order in *Cascadia Wildlands v. EWEB* (Case No. 6:25-00446), reaffirming that the U.S. courts of appeals, on review of orders of the Federal Energy Regulatory Commission (FERC), have exclusive jurisdiction over controversies related to fish passage and other environmental measures included in hydropower licenses issued by FERC. This decision adds to precedent making clear that project opponents may not collaterally attack fish passage conditions in FERC licenses via citizen suits filed under the Endangered Species Act (ESA).

Cascadia Wildlands involved fish passage requirements for the Eugene Water and Electric Board's (EWEB) Trail Bridge Dam, which is part of the Carmen-Smith Hydroelectric Project on the McKenzie River in Oregon. EWEB operates the Trail Bridge Dam under the terms of a FERC license issued in 2019. The Trail Bridge Dam presents a barrier to upstream passage of Chinook salmon and bull trout protected under the ESA. The 2019 license required EWEB to implement a permanent trap-and-haul program for upstream fish passage and spillway improvements at the Trail Bridge Dam. The fish passage requirements are consistent with the terms and conditions of Incidental Take Statements (ITS) in the National Marine Fisheries Service's and Fish and Wildlife Service's (collectively, the Services) Biological Opinions for ESA-listed Chinook salmon and bull trout, respectively.

In March 2025, a coalition of environmental organizations filed a citizen suit under ESA Section 9, alleging that EWEB had failed to timely complete the fish passage requirements in its license, and thus the take coverage provided in the ITSs was no longer valid. The plaintiffs sought an order requiring EWEB to either complete volitional fish passage at the Trail Bridge Dam as quickly as possible or, alternatively, decommission and remove the dam. Subsequently, the plaintiffs requested a preliminary injunction seeking immediate modifications to EWEB's ongoing temporary trap-and-haul program.

In response, EWEB filed a motion to dismiss, arguing that the district court lacked subject matter jurisdiction over the plaintiffs' ESA claims. More specifically, EWEB argued that Section 313(b) of the Federal Power Act (FPA) conferred exclusive jurisdiction to the U.S. courts of appeals, following proceedings at FERC, for actions that implicate hydropower

licenses. The plaintiffs countered that their ESA Section 9 claim was independent of the FERC license and could be heard by the district court. The plaintiffs also argued that proceedings before FERC were unnecessary with respect to fish passage, as FERC has no authority under FPA Section 18 to modify or reject fishways prescribed by the Services.

The court first analyzed the jurisdictional provisions of the FPA and ESA, concluding that the FPA's *exclusive* grant of jurisdiction prevailed over the ESA's *general* grant of jurisdiction. Considering the exclusive jurisdiction conferred by Section 313(b), "all objections to [FERC's] order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all."[1] In contrast, the court observed that the ESA's judicial review provisions included a "general" grant of jurisdiction to the district court, which "must therefore give way to the more specific language of the FPA."[2]

The court then examined whether the plaintiffs' ESA Section 9 claim was, in substance, a collateral attack on the FERC license. Relying on Ninth Circuit precedent, the court ruled that the plaintiffs' claims, though styled as ESA violations, effectively challenged FERC's licensing decisions regarding fish passage, including a remedy proposed by the plaintiffs (volitional fish passage) that FERC considered and rejected during relicensing.[3] Because FPA Section 313(b) expressly grants exclusive jurisdiction to the U.S. courts of appeals to hear challenges to FERC's licensing decisions, the court concluded it lacked subject matter jurisdiction over the plaintiffs' claims. The court made clear that the plaintiffs "may not avoid the FPA's strict jurisdictional limits" by styling their challenge to conditions of the FERC license as ESA Section 9 violations.[4]

The court also stated that its ruling would not "exempt" FERC-licensed hydropower projects from ESA Section 9 liability, considering FERC's obligation to monitor license compliance (including compliance with ITS terms and conditions included in a license) and to reinitiate consultation under ESA Section 7 if "the amount or extent of taking specified in the incidental take statement is exceeded."[5]

Finally, the court observed that, while ESA Section 9 was the trigger for the plaintiffs' lawsuit, "it is impossible to ignore the extent to which this Court would be required to wade into the issue of adequate fish passage in addressing any remedy, which is the exact issue being considered in ongoing conversations between the Services, FERC, and

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[1] *Slip Op.* at 8 (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958)).

[2] *Id*.

[3] *Slip Op.* at 10-11 (citing *Sauk-Suiattle Indian Tribe v. City of Seattle*, 56 F.4th 1179 (9th Cir. 2022)).

[4] *Slip Op.* at 9 (quoting *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989) (internal quotations omitted)).

[5] *Slip Op.* at 10-11 (quoting 50 C.F.R. § 402.16).

[EWEB]."[6] Because FPA Section 313(b) grants the U.S. courts of appeals exclusive jurisdiction, it would "frustrate the purpose of the FPA by creating a parallel proceeding that addresses the same fish passage issues being discussed by [EWEB], FERC, and the Services related to [EWEB's] license." In light of these determinations, the court dismissed the lawsuit with prejudice on jurisdictional grounds.

Troutman Pepper Locke represented EWEB in *Cascadia Wildlands v. EWEB*. A copy of the court's order is available here.

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[6] *Slip Op.* at 13.