

WESTERN WATER

Court reverses ruling on Calif. agricultural drainage permit

Jeremy P. Jacobs, E&E News reporter • Published: Monday, September 9, 2019



The San Luis Drain at Kesterson National Wildlife Refuge is pictured here in 1985. Robert Dawson/Smithsonian American Art Museum

A federal appeals court on Friday breathed new life into a long-running dispute concerning agricultural drainage in California's Central Valley.

The 9th U.S. Circuit Court of Appeals reversed a lower court ruling, saying it erred in its interpretation of a Clean Water Act permitting exception for agricultural discharges.

The case concerns a complex system in the San Joaquin Valley that captures agricultural wastewater that is rich in pollutants, like selenium, before it contaminates the area's groundwater aquifer.

A coalition of fishermen's groups led by the Pacific Coast Federation of Fishermen's Associations has contended since 2001 that the Grasslands Bypass Project, a tile drainage system managed by the Bureau of Reclamation and San Luis & Delta Mendota Water Authority, requires a Clean Water Act permit for discharges into a navigable water.

The project funnels those waters through part of the San Luis Drain, Mud Slough, San Joaquin River and Sacramento-San Joaquin Bay Delta east of San Francisco.

Reclamation and the water authority, however, point to an exception from permitting requirements under the Clean Water Act for discharges "composed entirely" of return flows from irrigation agriculture.

A lower court sided with Reclamation and the water district, dismissing all of the challengers' claims.

The San Francisco-based 9th Circuit, however, reversed that decision on several grounds.

In particular, the three-judge panel sided with the challengers that the lower court improperly placed the burden on them to show that the discharges were not covered by the exception — instead of vice versa.

"The defendant carries the burden to demonstrate the applicability of a statutory exception to the CWA," Judge Milan Smith [wrote](#) before quoting from the exception. "Defendants had the burden of establishing that the Project's discharges were 'composed entirely of return flows from irrigated agriculture.'"

Additionally, the court disagreed with the lower court's reading of "entirely" in the exception for agricultural water. The lower court said that it must be composed of a "majority" of water produced in the crop process, contending that "entirely" would lead to "an absurd result."

The 9th Circuit disagreed, noting that both the challenges — as well as Reclamation and the water district — said the court erred in that interpretation.

The judges remanded the case to federal district court for further proceedings. There remain significant disputes in the case between the two sides, including whether there is evidence proving there is water entering the drain system that is unrelated to agricultural flows.

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