UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCATIONS, et al., Plaintiffs, v. DAVID MURILLO, Regional Director of U.S. Bureau of Reclamation, U.S. BUREAU OF RECLAMATION, and SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, Defendants.	No. CIV S-2:11-2980-KJM-CKD ORDER

Before the court are two motions to dismiss. The first is brought by defendants David Murillo and the U.S. Bureau of Reclamation ("federal defendants"). (ECF 76.) The second is brought by defendant San Luis & Delta-Mendota Water Authority (the "Authority"). (ECF 77.) The court held a hearing on January 17, 2014, at which Martin McDermott appeared for federal defendants, Eric Buescher appeared for the Authority, and Stephen Volker appeared for plaintiffs. For the following reasons, both motions to dismiss are GRANTED in part and DENIED in part.

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I. BACKGROUND

This case already has progressed through several rounds of dispositive motions. Accordingly, the court sets forth below only that background necessary to resolve the instant motions.

The controversy in this case is whether discharges of polluted water by the Grasslands Bypass Project (the "Project"), jointly administered by defendants, require a National Pollutant Discharge Elimination System ("NPDES") permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq*. That determination hinges solely upon whether the Project falls under an exclusion to the CWA's NPDES permitting requirement: "The 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) (emphasis added).[1] Plaintiffs' single claim in this case is that the Project is not covered by this exclusion and therefore violates the CWA because it operates without a NPDES permit. (First Am. Compl. ¶ 46 ("FAC"), ECF 71.)

On September 16, 2013, this court denied federal defendants' and plaintiffs' cross-motions for judgment on the pleadings. (ECF 70 ("Order").) Federal defendants argued in their motion that they were entitled to judgment because the Project's discharges are "return flows from irrigated agriculture," while plaintiffs contended in their motion that these discharges did not fall under the plain language of this exemption. This court found that Congress, in exempting from the permitting requirement those discharges composed "entirely of return flows from irrigated agriculture," intended to exempt "discharges from irrigated agriculture that do not contain additional discharges unrelated to crop production." (*Id.* at 21.) Because the parties did not agree in their pleadings whether some or no amount of the Project's discharges were unrelated to crop production, the court had no basis to grant either party judgment on the pleadings. (*Id.* at 25–26.) Instead, the court converted federal defendants' 12(c) motion into a 12(b)(6) and dismissed plaintiffs' complaint without prejudice because plaintiffs did not plead adequate facts

[1] The irrigation return flows exception also exists in the CWA's definition of "point source." 33 U.S.C. § 1362(14) ("This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.").

to sustain a claim that some amount of the Project's discharges is unrelated to crop production. (*Id.* at 26.)

Plaintiffs filed their first amended complaint on October 7, 2013. (ECF 71.) Federal defendants and the Authority filed their motions to dismiss on November 15, 2013. (ECFs 76, 77.) Plaintiffs opposed on January 3, 2014. (ECFs 80, 82.) Defendants replied on January 10, 2014. (ECFs 83, 84.)

II. STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." A court may dismiss "based on the lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Although a complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief," FED. R. CIV. P. 8(a)(2), in order to survive a motion to dismiss this short and plain statement "must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint must include something more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" or "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action . . . .'" *Id.* (quoting *Twombly*, 550 U.S. at 555). Determining whether a complaint will survive a motion to dismiss for failure to state a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Ultimately, the inquiry focuses on the interplay between the factual allegations of the complaint and the dispositive issues of law in the action. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

In making this context-specific evaluation, this court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). This rule does not apply to "'a legal conclusion couched as a factual allegation,'" *Papasan v. Allain*,

478 U.S. 265, 286 (1986), *quoted in Twombly*, 550 U.S. at 555, nor to "allegations that contradict matters properly subject to judicial notice," or to material attached to or incorporated by reference into the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A court's consideration of documents attached to a complaint or incorporated by reference or matter of judicial notice will not convert a motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003).

III. ANALYSIS

A. The Parties' Positions

Federal defendants contend the First Amended Complaint should be dismissed with prejudice because it does not state a claim upon which relief can be granted. (ECF 76 at 8.) The complaint, according to federal defendants, once again asserts that the Project's discharges are not exempt because they are not surface irrigation return flows. (*Id.*) This theory, these defendants attest, is foreclosed by the court's prior order. (*Id.*) The only new allegations are not new at all, federal defendants argue; they are allegations plaintiffs made throughout the briefing and argument on their original complaint. (*Id.* at 9–10.) These allegations are that the Project discharges a substantial quantity of three types of polluted groundwater not related to irrigated agriculture: (1) groundwater that predates all farming in the area; (2) groundwater that is discharged in fall and winter when little or no irrigation occurs; and (3) groundwater that originates from parcels where no farming occurs because the parcels are retired or fallow. (*Id.* at 9.) Because this court's order on the cross-motions for judgment on the pleadings already assumed that some amount of the Project's discharges did not originate from surface irrigation, federal defendants assert that plaintiffs' First Amended Complaint must be dismissed because it does not sufficiently allege new facts demonstrating the tile drainage flows contain discharges unrelated to agricultural inputs, such as discharges from industrial pollution. (*Id.* at 11.)

The Authority similarly asserts plaintiffs' First Amended Complaint must be dismissed because it does not contain any new allegations, much less any allegation that the Project's discharges are unrelated to crop production. (ECF 77-1 at 10.) Plaintiffs' allegations can be reduced to reliance on four categories of non-exempt discharges, the Authority contends:

the three identified by federal defendants and a fourth, irrigation return flows, which plaintiffs assert are not exempt because they are not surface flows. (*Id.* at 11.) The Authority argues this court's order provided three reasons why each of these four types of discharges falls within the scope of the exemption. (*Id.* at 10–12.) First, this court held the exemption is not limited to surface flows, so groundwater may be exempt. (*See id.* at 12–13.) Second, the court concluded that inclusion of the phrase "entirely of" in one of the two statutory exemptions meant the CWA "exempts discharges from irrigated agriculture that are related to crop production." (*Id.*) Each of the four categories of discharges plaintiffs identify is related to crop production. (*Id.* at 15.) Third, the court determined that the term "return flows" does not limit the exemption to discharges that return to the exact same source from which they originated. (*Id.* at 15–16.) Therefore, plaintiffs' focus on where a specific molecule of water comes from, instead of whether the water is discharged because of crop production or some unrelated activity, misapprehends the court's order. (*Id.*)

Plaintiffs counter that they have pled adequate facts to support a claim that some amount of the Project's discharges is unrelated to crop production. (ECF 80 at 1.) Plaintiffs plead, for example, that the Project discharges groundwater that "predates all farming." (*Id.* at 15.) The statutory exemption language considers the source of the discharge, plaintiffs' claim, not the purpose of the discharge system. (*Id.*) Therefore, the mere happenstance that the Project's purpose may be "related to" crop production does not automatically exempt all of its discharges of polluted groundwater. Furthermore, plaintiffs contend, exemptions from the CWA's permitting regime must be narrowly construed. (*Id.* at 11–14 (citing *inter alia N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007)).) Plaintiffs also rehash their arguments on statutory interpretation contained in their unsuccessful motion for judgment on the pleadings. (*Id.* at 5 –11; ECF 82 at 9–15.)

In its reply, the Authority reiterates its argument that the applicability of the exemption turns on whether the discharge was caused by an activity related to crop production or by some other activity, such as the disposal of toxic waste. (ECF 84 at 4–5.) Plaintiffs' focus on the content of each type of discharge is therefore myopic and counter to Congressional intent,

which confirmed that Congress created this exemption to ensure a level playing field between irrigated and non-irrigated agriculture. (*Id.* at 6.) Because plaintiffs do not plead that the Project's discharges contain discharges caused by some activity unrelated to crop production, the Authority asserts its motion to dismiss must be granted.

B. Discussion

There is tension between the overarching purpose of the CWA and this Circuit's interpretive canons applicable to the CWA, on the one hand, and Congress's stated purpose for, and explanation of, the irrigated agriculture exemption on the other. The general purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "Claims of exemption, from the jurisdiction or permitting requirements, of the CWA's broad pollution prevention mandate must be narrowly construed to achieve" this purpose. *N. Cal. River Watch*, 496 F.3d at 1001. On the other hand, the legislative history of the return flows exemption suggests some members of Congress, at least, believed the exemption would level the playing field between farmers who rely on irrigation and those who do not. *See, e.g.*, 123 Cong. Rec. S21, 26,702 (daily ed. Aug. 4, 1977) (statement of Sen. Stafford) ("This amendment promotes 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 discrete conveyances.")). Moreover, in discussing the exemption, the Senate Environment and Public Works Committee Report explained, "In exempting discharges composed 'entirely' of return flows from irrigated agriculture from the [NPDES permitting] requirements of section 402, the committee did not intend to differentiate among return flows based upon their content." S. REP. NO. 95-370, *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360. These conflicting background considerations are not unsurprising given the nature of the legislative process. That process does not provide clear guidance on the issues presented by the pending motions to dismiss. The procedural burdens and inferences that control at the motion to dismiss stage do, however.

The court finds plaintiffs have pled sufficient facts to state a claim for a violation of the CWA. The only dispute before the court is whether the Project is exempt from the NPDES permit requirement because it is covered by the "return flows from irrigated agriculture"

exemption. This court has interpreted that exemption to cover discharges from irrigated agriculture that do not contain additional discharges unrelated to crop production. (Order at 21.) Plaintiffs plead new facts that, when accepted as true, suggest at least some amount of the Project's discharges may be unrelated to crop production. Defendants correctly note that plaintiffs previously raised several of their new allegations in the First Amended Complaint as arguments on the adjudicated cross-motions for judgment on the pleadings. (*See* ECF 77-1 at 4–7.) However, the inclusion of these new facts in the First Amended Complaint makes all the difference on the pending motions to dismiss, which challenge the legal sufficiency of plaintiffs' pleading. In particular, plaintiffs allege that the Project discharges a substantial quantity of contaminated groundwater originating in parcels where no farming occurs because these parcels are fallow or have been retired from agricultural use. (FAC ¶ 41(c).) Given this allegation, the court reasonably infers, as it must at this stage of the litigation, that the Project's discharges are not composed "entirely of return flows from irrigated agriculture" because they contain additional discharges from polluted groundwater originating from retired land that no longer supports irrigated agriculture. The exemption does not cover these resulting commingled discharges because it is plausible that discharges from retired land, which no longer supports irrigated agriculture, are not related to crop production.

The court's prior order does not foreclose this conclusion. The court found, as a matter of statutory interpretation, that the Project falls within the plain language of "irrigated agriculture" contained in the CWA exemption. (Order at 13–14.) To reach this conclusion, the court noted that the parties agree the reason the Project exists is to enable the growing of crops and that the Project's drainage of contaminated groundwater through the Project's subsurface tiles occurs only to enable the growing of irrigated agriculture. (*Id.*) However, the question raised by the pending motions to dismiss is not whether the Project exists to enable the growing of irrigated crops: it is whether plaintiff may plead that the Project's discharges do not consist "entirely of return flows from irrigated agriculture." Nothing before the court renders implausible plaintiffs' allegation that groundwater from retired parcels is unrelated to crop production.

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The Authority's argument that applicability of the exemption turns on what activity causes the discharge does not change the court's conclusion here. In *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 120–122 (2d Cir. 1994), discussed in the court's prior order, the Second Circuit considered whether discharges from a concentrated animal feeding facility fell under the "agricultural stormwater" exemption from the CWA's NPDES permitting requirement. In interpreting the scope of the exemption from the definition of "point source," the court mused: "We think the real issue is not whether the discharges occurred during rainfall or were mixed with rain water run-off, but rather, whether the discharges were the result of precipitation." *Id.* at 120. This suggests that the court in *Southview Farm* believed the cause of the discharge to be determinative.

In contrast, this court held that the "return flows" exemption "covers discharges from irrigated agriculture that do not contain additional discharges unrelated to crop production." Moreover, if taken to its logical conclusion, the Authority's interpretation would exempt any discharge made in the name of crop production without any closer inquiry into whether a majority of the total commingled discharge is in fact related to crop production. Such a loophole is not consistent with a fair reading of the CWA.

Plaintiffs' remaining allegations in their First Amended Complaint do not state a plausible claim for relief. Accordingly, the court STRIKES these allegations. To the extent plaintiffs premise a violation of the CWA upon allegations contained in the original complaint, these allegations, already dispensed with in the court's prior order, remain insufficient. (*See, e.g.*, Order at 26 (dismissing as conclusory plaintiffs' allegation the Project "necessarily discharges polluted groundwater along with irrigation water".) The only other new allegations in the First Amended Complaint do not state a plausible claim in light of the court's interpretation of the exclusion at issue here, which is that the exemption covers "discharges from irrigated agriculture that do not contain additional discharges unrelated to crop production." (Order at 21.) In particular, plaintiffs newly plead that (1) "[c]ontaminated groundwater that pre-dates all farming in the area" and (2) "[c]ontaminated groundwater discharged at times, such as the fall and winter months, when little or no irrigation occurs" and whose source is not "irrigation water," are not

related to "irrigated agriculture." (FAC ¶ 41(a)–(b).) These two allegations do not amount to a plausible claim that such groundwater, discharged to prevent damage to crops' root zones, is unrelated to crop production.

In sum, the court must infer at this juncture that groundwater under fallow or retired land does not pose any risk of harm to crops' root zones. (FAC ¶ 41(c).) Plaintiffs state a plausible claim for relief in this respect, and this is plaintiffs' sole valid allegation upon which this case may proceed.

IV. CONCLUSION

For the foregoing reasons, federal defendants' and the Authority's motions to dismiss are GRANTED in part and DENIED in part.

IT IS SO ORDERED.

DATED: March 27, 2014.

UNITED STATES DISTRICT JUDGE