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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PACIFIC COAST FEDERATION OF
FISHERMEN’S ASSOCIATIONS, 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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1 I. BACKGROUND

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

5 The controversy in this case is whether discharges of polluted water by the
6 Grasslands Bypass Project (the “Project”), jointly administered by defendants, require a National
7 Pollutant Discharge Elimination System (“NPDES”) permit under the Clean Water Act (“CWA”),
8 33 U.S.C. § 1251, *et seq.* That determination hinges solely upon whether the Project falls under
9 an exclusion to the CWA’s NPDES permitting requirement: “The Administrator shall not require
10 a permit under this section for discharges composed *entirely of return flows from irrigated*
11 *agriculture*” 33 U.S.C. § 1342(l)(1) (emphasis added).¹ Plaintiffs’ single claim in this case
12 is that the Project is not covered by this exclusion and therefore violates the CWA because it
13 operates without a NPDES permit. (First Am. Compl. ¶ 46 (“FAC”), ECF 71.)

14 On September 16, 2013, this court denied federal defendants’ and plaintiffs’ cross-
15 motions for judgment on the pleadings. (ECF 70 (“Order”).) Federal defendants argued in their
16 motion that they were entitled to judgment because the Project’s discharges are “return flows
17 from irrigated agriculture,” while plaintiffs contended in their motion that these discharges did
18 not fall under the plain language of this exemption. This court found that Congress, in exempting
19 from the permitting requirement those discharges composed “entirely of return flows from
20 irrigated agriculture,” intended to exempt “discharges from irrigated agriculture that do not
21 contain additional discharges unrelated to crop production.” (*Id.* at 21.) Because the parties did
22 not agree in their pleadings whether some or no amount of the Project’s discharges were unrelated
23 to crop production, the court had no basis to grant either party judgment on the pleadings. (*Id.* at
24 25–26.) Instead, the court converted federal defendants’ 12(c) motion into a 12(b)(6) and
25 dismissed plaintiffs’ complaint without prejudice because plaintiffs did not plead adequate facts
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27 ¹ The irrigation return flows exception also exists in the CWA’s definition of “point
28 source.” 33 U.S.C. § 1362(14) (“This term does not include agricultural stormwater discharges
and return flows from irrigated agriculture.”).

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

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

7 II. STANDARD

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

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

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

1 478 U.S. 265, 286 (1986), *quoted in Twombly*, 550 U.S. at 555, nor to “allegations that contradict
2 matters properly subject to judicial notice,” or to material attached to or incorporated by reference
3 into the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A
4 court’s consideration of documents attached to a complaint or incorporated by reference or matter
5 of judicial notice will not convert a motion to dismiss into a motion for summary judgment.
6 *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003).

7 III. ANALYSIS

8 A. The Parties’ Positions

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

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

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

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

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

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

5 B. Discussion

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

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

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

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

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

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

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

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

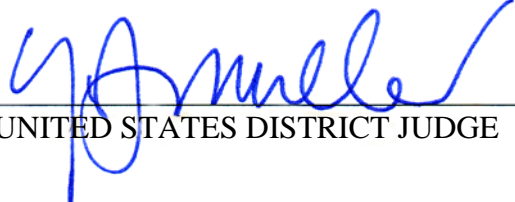
4 In sum, the court must infer at this juncture that groundwater under fallow or
5 retired land does not pose any risk of harm to crops’ root zones. (FAC ¶ 41(c).) Plaintiffs state a
6 plausible claim for relief in this respect, and this is plaintiffs’ sole valid allegation upon which
7 this case may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

8 IV. CONCLUSION

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

11 IT IS SO ORDERED.

12 DATED: March 27, 2014.

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16 UNITED STATES DISTRICT JUDGE
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