Case No. 16-35957

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLYMPIC FOREST COALITION, a Washington corporation,

Plaintiff-Appellee,

v.

COAST SEAFOODS COMPANY, a Washington corporation,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Washington
at Tacoma
District Court No. 3:16-cv-05068-RBL
Honorable Ronald B. Leighton

Date of Opinion: March 9, 2018
Author of Opinion: Fletcher, J.
Concurring Judges: Fernandez, J.; Melloy, J.
(Eighth Circuit, sitting by designation)

APPELLANT'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTRODUCTION AND STATEMENT OF COUNSEL

Defendant-appellant Coast Seafoods Company requests rehearing en banc because the panel's decision in this case directly conflicts with this Court's decision in *Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002) ("*APHETI*"). In light of this irreconcilable conflict, en banc review is necessary to maintain the uniformity of the Court's decisions. Fed. R. App. P. 35(a)(1).

APHETI considered and decided the identical issue presented in this case. Namely, if an aquatic animal production facility does not meet the criteria for classification as a concentrated aquatic animal production facility ("CAAPF") established in the Environmental Protection Agency's Clean Water Act regulations, can the facility nonetheless be deemed to be a "point source" under 33 U.S.C. § 1362(14), which requires it to obtain a National Pollution Discharge Elimination System ("NPDES") permit? *APHETI* squarely addressed that question and concluded that the answer was no. The panel in this case, however, addressed the same question and reached the opposite conclusion.

Section 1362(14) defines a "point source" as "any discernible, confined and discrete conveyance" from which pollutants may be discharged, and it contains a list of illustrative examples of such conveyances. In *APHETI*, the Court concluded that given the EPA's extensive CAAPF regulations, a mussel-

harvesting facility could be deemed to be a "point source" under Section 1362(14) only if it met the criteria for a CAAPF.[1] The Court explained that "[t]o hold that [aquaculture facilities that do not meet the CAAPF criteria] are nonetheless "point sources" under the statutory definition would render the EPA's CAAPF criteria superfluous and undermine the agency's interpretation of the Clean Water Act." *APHETI*, 299 F.3d at 1019.

In this case, however, the panel held that an oyster-growing facility that does not meet the CAAPF criteria could still be considered a "point source." *Olympic Forest Coalition v. Coast Seafoods Co.* ("*OFCO*"), 884 F.3d 901, 907 (9th Cir. 2018). To reach this result, the panel read *APHETI* in an unduly restrictive manner at odds with its plain language and essential logic. Although *APHETI* without question holds that an aquatic animal production facility is required to obtain an NPDES permit as a "point source" only if it meets the EPA's CAAPF criteria, the panel concluded that *APHETI* was not binding because *APHETI* involved a claim that the mussel-growing facility was discharging pollutants from a "vessel or other floating craft" (one of the illustrative examples under Section 1362(14)), whereas this case involves a claim that the oyster-

[1] A CAAPF is the aquaculture equivalent of a combined animal feeding operation ("CAFO"), which is one of the examples of a "point source" listed in Section 1362(14).

growing facility was discharging pollutants from "pipe[s], ditch[es, or] channel[s]," which are other examples of "point source[s]" under Section 1362(14). *OFCO*, 884 F.3d at 910.

The panel's rationale for avoiding *APHETI* is predicated on a classic distinction without a difference. The examples of "point source[s]" listed in Section 1362(14) are just that—illustrative examples of "discernible, confined and discrete conveyance[s]." Neither the language nor the logic of *APHETI*—nor the text of Section 1362(14) itself—treats differently the illustrative examples of a "point source." Indeed, any such distinction would be nonsensical, since they are simply examples of "discernible, confined and discrete conveyance[s]."

Faced with controlling precedent, the panel was obligated to call for en banc review if it disagreed with *APHETI*. *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc). The panel was not at liberty to overrule or disregard *APHETI* without intervening controlling authority to the contrary. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). Because the panel's opinion stands in direct conflict with *APHETI*, the Court should rehear this matter en banc to resolve the conflict and maintain the uniformity of its decisions.

ARGUMENT

I. Statutory and Regulatory Framework.

This case, like *APHETI*, arose under the Clean Water Act ("CWA") and the EPA's regulations interpreting the CWA. Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To help achieve that goal, the CWA prohibits "the discharge of any pollutant" without an NPDES permit that authorizes such a discharge. 33 U.S.C. § 1311(a).

The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). A "point source," in turn, is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

The CWA does not define the term "concentrated animal feeding operation" as used in 33 U.S.C. § 1362(14). The EPA, however, has promulgated regulations under the CWA that govern animal feeding operations and their aquaculture equivalent, aquatic animal production facilities. 40 C.F.R. §§ 122.23, 122.24. Among other things, the regulations contain numeric thresholds that

determine when an animal feeding operation qualifies as a CAFO and when an aquatic animal production facility qualifies as a CAAPF. Consistent with 33 U.S.C. § 1362(14), the EPA's regulations provide that CAFOs and CAAPFs are "point sources, subject to NPDES permitting requirements." 40 C.F.R. § 122.23(a); *see also* 40 C.F.R. § 122.24(a).

With respect to aquatic animal production facilities, the EPA's regulations provide that "[a] hatchery, fish farm, or other facility is a [CAAPF] for purposes of § 122.24 if it contains, grows, or holds," among other things, "[c]old water fish species or other cold water aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year." 40 C.F.R. § 122.24 app. C. The regulations, however, *exclude* from classification as a CAAPF—and the concomitant requirement to obtain an NPDES permit as a point source—facilities that produce less than 20,000 pounds of aquatic animals per year and that feed less than 5,000 pounds of food during the calendar month of maximum feeding. *Id*.

Even if an aquatic animal production facility does not meet the numeric threshold for designation as a CAAPF, the EPA (or a state agency authorized to administer the NPDES permit program) may nevertheless designate the facility as a CAAPF if the EPA or state agency determines that the facility "is a significant contributor of pollution to waters of the United States." 40 C.F.R. § 122.24(c)(1). The EPA or authorized state agency can make this determination

on a case-by-case basis only after it "has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the permit program." 40 C.F.R. § 122.24(c)(2).

II. *APHETI* Holds That an Aquatic Animal Production Facility That Is Not a CAAPF Is Not Subject to NPDES Permitting As a Point Source.

In *APHETI*, 299 F.3d 1007, this Court addressed the question whether an aquatic animal production facility that does not meet the CAAPF requirements can nevertheless be considered a "point source" under 33 U.S.C. § 1362(14) if it discharges pollutants through a "discernible, confined and discrete conveyance." *APHETI* involved a claim by a nonprofit organization that a mussel-harvesting facility violated the CWA by discharging pollutants without an NPDES permit. 299 F.3d at 1009.

After determining that "the mussel shells, mussel feces and other mussel byproduct released from Taylor's live mussels" are not "pollutant[s]" under the CWA, the Court turned to the question "whether Taylor's mussel facility is a 'point source,' an issue keenly disputed in this litigation and the amicus briefing before us." *APHETI*, 299 F.3d at 1018. As the first step in answering that question, the Court analyzed the EPA's CAAPF regulations and determined that the mussel facility could not be classified as a CAAPF because it did not meet the feeding requirements necessary to qualify as a CAAPF. *Id*.

The Court then addressed the precise question that lies at the heart of this case—namely, if an aquatic animal production facility is not a CAAPF, can it nonetheless be considered a "point source" under 33 U.S.C. § 1362(14) if it discharges pollutants through a "discernible, confined and discrete conveyance"? The Court described the issue as follows:

> APHETI argues that, even if Taylor's mussel harvesting facilities do not meet the EPA's definition of a CAAPF, they still fall under the general definition, "discernible, confined, and discrete conveyance," or under the more specific definition, "vessel or other floating craft." By this reasoning, APHETI argues that Taylor's mussel rafts are "point source[s]" and that their operation, if discharging pollutants, requires an NPDES permit. But, whatever merit this argument might have in the absence of a regulatory definition of when an aquatic animal feeding operation is a point source, the argument has little persuasive effect when faced with aquatic animal farming that does not involve feeding and that is not within the express and described limits that invoke the [CWA] under the regulation.
>
> . . . In the context of aquatic animal harvesting, the EPA's regulations expressly exclude from the definition of "point source" facilities, like Taylor's, that do not meet certain feeding thresholds. To hold that these facilities are nonetheless "point sources" under the statutory definition would render the EPA's CAAPF criteria superfluous and undermine the agency's interpretation of the [CWA].

APHETI, 299 F.3d at 1018-19.

Thus, even though the mussel-growing operation contained features (i.e., mussel rafts) that met the statutory definition of a "point source"—under either the general definition as a "discernible, confined and discrete conveyance" or one of the illustrative examples ("vessel or other floating craft")—the Court concluded that

"Taylor's [mussel-growing] facilities are not 'point sources' under the [CWA]." *APHETI*, 299 F.3d at 1019.

III. The Panel's Decision Directly Conflicts With *APHETI*.

The present case is strikingly similar to *APHETI* both factually and legally. Here, plaintiff-appellee Olympic Forest Coalition commenced an action under the CWA against Coast, claiming that Coast was required to obtain an NPDES permit because its oyster-growing facility discharged pollutants from a "point source" as that term is defined in Section 1362(14). *OFCO*, 884 F.3d at 905.

After the district court denied Coast's motion to dismiss, the court certified its order of dismissal for interlocutory appeal under 28 U.S.C. § 1292(b), and this Court accepted certification of the following question of law: "The question of law presented in the Order is whether the [CWA] requires an aquatic animal production facility that is not a concentrated facility under 40 C.F.R. § 122.24, but that discharges effluent from a discrete conveyance, to obtain a[n NPDES] permit." (ER 3.) As characterized by the panel, the question on appeal was whether "an aquatic animal production facility—including any pipes, ditches, and channels associated with the facility—is a point source only if it is a CAAPF." *OFCO*, 884 F.3d at 904-05.

In rejecting Coast's argument on appeal, the panel concluded that *APHETI* is not controlling. Although *APHETI* unambiguously holds that an aquatic animal production facility that is not a CAAPF is not a "point source" even if the

facility includes features that "fall under the general definition, 'discernible, confined, and discrete conveyance,' or under the more specific definition, 'vessel or other floating craft,'" *APHETI*, 299 F.3d at 1018, the panel in this case concluded that *APHETI* is inapposite because it did not involve "pipes, ditches, and channels," which are other illustrative examples of a "discernible, confined and discrete conveyance" under Section 1362(14). *OFCO*, 884 F.3d at 910.

To reach this conclusion, the panel injected into 33 U.S.C. § 1362(14) a distinction that does not exist. Like many other definitional statutes, Section 1362(14) begins with a general definition of a term followed by a list of illustrative examples. The statute defines a "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged" and provides several examples of such a conveyance, "including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft."

Although Section 1362(14) does not distinguish between the various examples of a "discernible, confined and discrete conveyance," the panel created an artificial distinction between "pipes, ditches, and channels," which it characterized as "conduits," and "vessel[s and] other floating craft," which it characterized as "facilities." *OFCO*, 884 F.3d at 910. Based on this false dichotomy, the panel then offered an entirely unfounded interpretation of *APHETI*. Disregarding *APHETI*'s

express holding that an aquatic animal feeding operation that is not a CAAPF is not a "point source," the panel speculated that *APHETI* embraced the "conduit versus facility" distinction, even though it finds no support in the statute or in the language of *APHETI*:

> Plaintiff in *APHETI* appears to have recognized the distinction between conduits such as pipes, ditches, and channels, on the one hand, and facilities, on the other. It argued that if the rafts were not CAAPFs, one kind of 'facility' listed as a point source in § 1362(14), they could be "vessel[s] or other floating craft," another kind of facility listed as a point source. *Id*. We rejected that argument in *APHETI*, concluding that an aquatic animal production facility could only be a point source as a "concentrated aquatic animal production facility," and not as another kind of facility such as a "vessel or other floating craft." *Id*.
>
> Because there were no conduits such as pipes, ditches, or channels associated with Taylor's mussel rafts, plaintiff in *APHETI* made no argument with respect to such point sources. In the passage from *APHETI* upon which Coast relies, we were responding to a different argument, one that addressed two kinds of "facilities." We therefore conclude, contrary to Coast's contention, that we did not in *APHETI* decide the question before us today.

OFCO, 884 F.3d at 910.

The panel's explanation of *APHETI* disregards its plain language in favor of a chimerical interpretation of the opinion. *APHETI* was quite clear in rejecting the plaintiff's argument that an aquatic animal production facility that is not a CAAPF could nonetheless be a "point source" if it contained a "discernible, confined and discrete conveyance." In fact, *APHETI* assumed that even if Taylor's mussel rafts could otherwise be a point source under either the general definition or

one of the specific examples in Section 1362(14), they could not be characterized as such in light of the EPA's extensive CAAPF regulations. *See APHETI*, 299 F.2d at 1018 ("[W]hatever merit this argument might have in the absence of [the EPA's CAAPF regulations, it] has little persuasive effect when faced with aquatic animal farming that does not [meet the CAAPF thresholds] that invoke the [CWA] under the regulation."). Nothing in *APHETI* even remotely suggests—let alone states—that the Court drew any distinction between "conduits" and "facilities" or that it otherwise limited the scope of its ruling to only some of the examples of point sources under Section 1362(14).[2]

In reading *APHETI* in such a tortured manner, the panel also injected into Section 1362(14) a hierarchy that does not exist. After defining a "point source" as "any discernible, confined and discrete conveyance," Section 1362(14) sets forth several examples of such a conveyance, ostensibly for illustrative purposes. Yet the panel treated some of the examples (pipes, ditches, and channels) as something materially different from other examples (vessels or other floating craft) even though they are all examples of "discernible, confined and discrete

[2] The panel's attempt to subdivide Section 1362(14) into two parts—"conduits" and "facilities"—conflicts with the statute itself, which treats a "conduit" as but one illustrative example of a "discernible, confined, and discrete conveyance" rather than a subcategory of a "point source." Neither the statute nor *APHETI* draws any distinction between the listed examples of a "point source," be it a "ditch," "pipe," "conduit," or "vessel," and there is no logical basis for doing so.

conveyance[s]." Nothing in the statute, however, supports such a distinction. And the distinction is illogical because a vessel or floating craft can discharge pollutants into navigable waters just as assuredly as a pipe or ditch. In other words, a "vessel or other floating craft" is every bit as much a "point source" under the statute as a "pipe, ditch, channel[, or] conduit." Thus, the panel's attempt to distinguish *APHETI* by stating that its reasoning applies only to certain types of point sources under Section 1362(14) not only is at odds with *APHETI*, but is based on an improper reading of Section 1362(14).

CONCLUSION

APHETI without question holds that an aquatic animal production facility that is not a CAAPF is not a "point source" under the CWA and the EPA's underlying regulations. Nothing in *APHETI* limits its holding to only certain types of point sources and the panel's attempt to distinguish *APHETI* on this basis is at odds with *APHETI* and the text of Section 1362(14). Because there is an

irreconcilable conflict between *APHETI* and the panel's decision in this case, the Court should rehear the matter en banc.

DATED: April 6, 2018

Respectfully submitted,

MILLER NASH GRAHAM & DUNN LLP

s/ Bruce L. Campbell

BRUCE L. CAMPBELL, P.C.

Attorneys for Defendant-Appellant

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 16-35957

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 2,828 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

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Date: Apr 6, 2018

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9th Circuit Case Number(s) 16-35957

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APPENDIX

Panel Opinion

884 F.3d 901
United States Court of Appeals, Ninth Circuit.

OLYMPIC FOREST COALITION, a Washington corporation, Plaintiff–Appellee,
v.
COAST SEAFOODS COMPANY, a Washington corporation, Defendant–Appellant.

No. 16-35957
|
Argued and Submitted November 8, 2017, Portland, Oregon
|
Filed March 9, 2018

Synopsis

Background: Environmental advocacy coalition brought citizen suit, under Clean Water Act (CWA), against owner of cold-water oyster hatchery adjacent to bay, claiming that discharges of pollutants from hatchery through pipes, ditches, and channels required National Pollution Discharge Elimination System (NPDES) permit. The United States District Court for the Western District of Washington, Ronald B. Leighton, J., D.C. No. 3:16-cv-05068-RBL, denied owner's motion to dismiss for failure to state claim. Owner appealed.

[Holding:] The Court of Appeals, W. Fletcher, Circuit Judge, held that pipe, ditches, and channels discharging pollutants from non-concentrated aquatic animal production facilities are point sources requiring NPDES permit.

Affirmed.

West Headnotes (13)

[1] Evidence
Official proceedings and acts

In Clean Water Act (CWA) citizen suit claiming that discharges of pollutants from oyster hatchery adjacent to bay near north end of Hood Canal in Washington State required National Pollution Discharge Elimination System (NPDES) permit, judicial notice would be taken of letter from Washington State Department of Ecology stating that NPDES permit was not required, as hatchery did not meet criteria for automatic designation as concentrated aquatic animal production facility (CAAPF), and department's surface water monitoring specialist reviewed and concurred with report by hatchery's consultant finding that discharge from hatchery was unlikely to alter water quality of bay. Federal Water Pollution Control Act §§ 301, 502, 505, 33 U.S.C.A. §§ 1311(a), 1362(14), 1365.

Cases that cite this headnote

[2] Federal Courts
Pleading

Court of Appeals reviews de novo a district court's denial of a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[3] Federal Courts
Dismissal for failure to state a claim

On de novo review of a denial of a motion to dismiss for failure to state a claim, Court of Appeals accepts all plausible allegations as true and construes them in the light most favorable to the claim. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[4] Environmental Law
Scope of review

Court of Appeals reviews de novo the district court's interpretation of the Clean Water Act (CWA) and its implementing regulations. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

Cases that cite this headnote

[5] **Environmental Law**
Scope of review

Court of Appeals reviews the Environmental Protection Agency's (EPA) interpretation of the Clean Water Act (CWA) under *Chevron*. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

Cases that cite this headnote

[6] **Statutes**
Language

The starting point for interpreting a statute is the language of the statute itself.

Cases that cite this headnote

[7] **Statutes**
Giving effect to statute or language; construction as written

When interpreting a statute, Court of Appeals first uses the traditional tools of statutory construction to determine whether Congress directly addressed the precise question at issue; if the precise question at issue is addressed, then the unambiguously expressed intent of Congress controls.

Cases that cite this headnote

[8] **Statutes**
Absence of Ambiguity;Application of Clear or Unambiguous Statute or Language

A clear and unambiguous statutory provision is one in which the meaning is not contradicted by other language in the same act.

Cases that cite this headnote

[9] **Statutes**
Context

The meaning of a statutory provision is determined by placing the language in context, both the specific context in which it is used and the broader context of the overall statute.

Cases that cite this headnote

[10] **Environmental Law**
Extensions, Exceptions, and Variances for Particular Parties

Where exceptions or exemptions are meant in the Clean Water Act (CWA), they are expressly provided. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

Cases that cite this headnote

[11] **Environmental Law**
Substances, Sources, and Activities Regulated

Any "pipe, ditch, channel," and "concentrated animal feeding operation" (CAFO) that discharges pollutants into navigable waters is a "point source," within meaning of Clean Water Act (CWA), and thus is subject to the National Pollution Discharge Elimination System (NPDES) permit requirement. Federal Water Pollution Control Act §§ 301, 502, 33 U.S.C.A. §§ 1311(a), 1362(12), 1362(14).

Cases that cite this headnote

[12] **Environmental Law**
Substances, Sources, and Activities Regulated

Any "pipe, ditch, channel" that discharges pollutants from an aquatic animal production facility that is not a concentrated aquatic animal production facility (CAAPF) is a "point source," within meaning of the Clean Water Act (CWA), for which a National Pollution Discharge Elimination System (NPDES) permit is required. Federal Water Pollution Control Act §§ 301, 502, 33 U.S.C.A. §§ 1311(a), 1362(12), 1362(14); 40 C.F.R. § 122.24.

Cases that cite this headnote

[13] **Environmental Law**

Discharge of pollutants

Although oyster hatchery was not concentrated aquatic animal production facility (CAAPF), any "pipe, ditch, channel" through which hatchery discharged pollutants was "point source," within meaning of Clean Water Act (CWA), and thus, hatchery was required to obtain National Pollution Discharge Elimination System (NPDES) permit before discharging pollutants. Federal Water Pollution Control Act §§ 301, 502, 33 U.S.C.A. §§ 1311(a), 1362(12), 1362(14); 40 C.F.R. § 122.24.

Cases that cite this headnote

Appeal from the United States District Court for the Western District of Washington, Ronald B. Leighton, District Judge, Presiding, D.C. No. 3:16-cv-05068-RBL

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Before: Ferdinand F. Fernandez, William A. Fletcher, and Michael J. Melloy,* Circuit Judges.

Opinion

OPINION

W. FLETCHER, Circuit Judge:

Olympic Forest Coalition ("Olympic Forest") brought suit against Coast Seafoods Company ("Coast") under the Clean Water Act ("CWA" or "Act"), contending that discharges from Coast's oyster hatchery through "pipes, ditches, and channels" require a National Pollution Discharge Elimination System ("NPDES") permit. Coast moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the ground that its hatchery is an aquatic animal production facility that can be regulated as a "point source" under the CWA only if it is a "concentrated aquatic animal production facility" ("CAAPF").

The district court denied Coast's motion to dismiss, holding that pipes, ditches, and channels that discharge pollutants from its hatchery are point sources within the meaning of 33 U.S.C. § 1362(14). The district court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question whether an NPDES permit is ***904** required for discharges through pipes, ditches, and channels from an aquatic animal production facility that is not a CAAPF.

We affirm.

I. Background

We recount the facts as alleged in the complaint and as supplemented by a letter from the Washington State Department of Ecology of which we have taken judicial notice. The complaint alleges that Coast owns and operates a cold-water oyster hatchery adjacent to Quilcene Bay, near the north end of Hood Canal in Washington State. Coast's hatchery is the world's largest shellfish hatchery, capable of producing over 45 billion eyed oyster larvae per year. As part of its operation, the hatchery discharges pollutants into Quilcene Bay through pipes, ditches, and channels, including the following: "suspended solids, nitrogen, phosphorous, ammonia, nitrites, nitrates, Chlorophyll *a*, Phaeoshytin *a*, heat, pH, salinity, dissolved oxygen, and chlorine."

The complaint further alleges that Coast hired a consulting firm, Rensel Associates Aquatic Sciences ("Rensel Associates"), to assess the effluent discharged from the hatchery. After sampling the effluent, Rensel Associates produced a report on February 7, 2013, that documented the presence of certain pollutants in the effluent. However, Rensel Associates did not sample all

sources of effluent from the hatchery and did not test for the presence of chlorine. The complaint alleges that water quality samples taken from Quilcene Bay on June 25, June 29, July 2, July 9, July 11, July 16, and July 17, 2014, indicated discharges of chlorine from Coast's hatchery.

On January 27, 2016, Olympic Forest filed a citizen suit under § 505 of the CWA, alleging that discharges from the hatchery through pipes, ditches, and channels violate § 301(a) of the Act because the hatchery has not obtained a NPDES permit. 33 U.S.C. §§ 1365, 1311(a). Pipes, ditches, and channels are "point sources" under 33 U.S.C. § 1362(14).

[1] On July 19, 2016, six months after Olympic Forest filed its complaint, Coast wrote a letter to the Washington Department of Ecology ("Ecology"), referencing the 2013 Rensel Report and asking "whether the Department of Ecology's (Ecology) view, communicated in 2013, that Coast's Quilcene shellfish hatchery does not require a National Pollution Discharge Elimination System (NPDES) permit, is still applicable." On July 29, 2016, ten days later, Ecology responded that an NPDES permit was not required. Ecology gave two reasons for its conclusion. First, the hatchery did not meet the criteria for automatic designation as a CAAPF under 40 C.F.R. § 122.24, Appendix C. Second, "[an] Ecology surface water monitoring specialist had reviewed the report and concurred with Dr. Rensel's findings that discharge from facility was unlikely to alter the Quilcene Bay water quality." We have taken judicial notice of Ecology's July 29 letter.

Coast moved under Rule 12(b)(6) to dismiss the complaint, contending that despite the hatchery's use of pipes, ditches, and channels to discharge pollutants into Quilcene Bay, a NPDES permit was not required. Coast argued to the district court, and argues here, that its hatchery can be required to obtain an NPDES permit only if it is a CAAPF. A CAAPF is a subcategory of the statutory category "concentrated animal feeding operation" ("CAFO"), which is a point source under § 1362(14). Coast argues that an aquatic animal production facility—including any pipes, ditches, and channels associated with the facility—is a point source only if it ***905** is a CAAPF. Thus, it argues, pipes, ditches, and channels that discharge pollutants from an aquatic animal production facility cannot themselves be point sources.

The district court denied Coast's motion to dismiss. We affirm.

II. Standard of Review

[2] **[3]** We review de novo a district court's denial of a motion to dismiss under Rule 12(b)(6). *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 866 (9th Cir. 2013). We accept all plausible allegations as true and construe them in the light most favorable to the claim. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

[4] **[5]** We also review de novo the district court's interpretation of the CWA and its implementing regulations. *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). We review the EPA's interpretation of the CWA under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

III. Discussion

In 1948, Congress enacted the Federal Water Pollution Control Act ("FWPCA"), which encouraged states to pass uniform laws to address water contamination. Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155. In 1972, in response to the increased degradation of the nation's waters, Congress amended the FWPCA, replacing the state-run water maintenance system with increased federal obligations, including strict timetables, permit requirements, and technology-based effluent limitations. *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1371 (D.C. Cir. 1977); Pub. L. No. 92-500, 86 Stat. 816 (1972). In 1977, Congress amended the FWPCA and renamed it the Clean Water Act. The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011), *rev'd on other grounds*, *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 133 S.Ct. 1326, 185 L.Ed.2d 447 (2013) (quoting 33 U.S.C. § 1251(a)). The CWA declared as a "national goal" the elimination of the discharges of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a)(1). To attain the goals of the Act, Congress placed limitations on point source discharges of pollutants through the NPDES permit system. *See*

33 U.S.C. § 1342 (authorizing only certain point source discharges). Section 301(a) of the Act prohibits "the discharge of any pollutant by any person" unless in compliance with an NPDES permit. 33 U.S.C. § 1311(a). Section 505 authorizes "any citizen" to bring a suit alleging a violation of the Act. 33 U.S.C. § 1365(a).

A. Text of the CWA

[6] **[7]** **[8]** "It is well settled that the starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) (internal quotation marks and citation omitted). When interpreting a statute, we first use the "traditional tools of statutory construction," to determine whether Congress directly addressed the "precise question at issue." *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778. If the precise question at issue is addressed, then the "unambiguously expressed intent of Congress" controls. *Id.* at 843, 104 S.Ct. 2778. A "clear and unambiguous" statutory provision is one in which the meaning is not contradicted by other language in the same act. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 460–62, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002); ***906** *United States v. Rosenthal*, 266 F.Supp.2d 1068 (N.D. Cal. 2003), *aff'd in part, rev'd in part on other grounds*, 454 F.3d 943 (9th Cir. 2006).

The CWA defines "point source" as follows:

> The term "point source" means *any* discernible, confined and discrete conveyance, including but not limited to *any pipe, ditch, channel*, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14) (emphases added).

It is undisputed that discharges from point sources must obtain NPDES permits. It is also undisputed that under § 1362(14) "pipe[s], ditch[es], [and] channel[s]" are point sources, and that a CAAPF, a kind of "concentrated animal feeding operation," is also a point source. The disputed question is whether pipes, ditches, and channels that discharge pollutants from a non-concentrated aquatic animal production facility are point sources.

The key to interpreting § 1362(14) is the word "any." The CWA requires an NPDES permit for the "discharge of *any* pollutant." 33 U.S.C. § 1311(a) (emphasis added). The Act defines "discharge of a pollutant" as "*any* addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12) (emphasis added). And, as quoted above, the Act provides that "*any* ... conveyance, including but not limited to *any* pipe, ditch, channel, ... concentrated animal feeding operation," is a "point source." 33 U.S.C. § 1362(14).

The Supreme Court has interpreted the term "any" as being broad and all-encompassing. *See United States v. Williams*, 514 U.S. 527, 531–32, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995) (broadly construing the word "any" in tax refund statute) (emphasis added). We have similarly interpreted "any." *See Lockett v. Ericson*, 656 F.3d 892, 898 (9th Cir. 2011) (finding that an "any issue determined therein" clause is all-inclusive); *Barker v. Riverside Cty. Office of Educ.*, 584 F.3d 821, 825–26 (9th Cir. 2009) (holding that "any person aggrieved" and "any individual" are all-inclusive phrases); *Ivers v. United States*, 581 F.2d 1362, 1373 (9th Cir. 1978) (interpreting the term "any" broadly under forfeiture law).

[9] **[10]** The meaning of a statutory provision is also determined by placing the language in context—both the specific context in which it is used and the broader context of the overall statute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 114 L.Ed.2d 194 (1991). Where exceptions or exemptions are meant in the CWA, they are expressly provided. For example, the Act carves out exemptions for what constitutes a "pollutant," 33 U.S.C. § 1362(6), what constitute "coastal recreation waters," 33 U.S.C. § 1362(21), what constitute "recreational vessels," 33 U.S.C. § 1362(25), and what constitutes a "point source," 33 U.S.C. § 1362(14). Further, the "point source" definition expressly exempts "agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). The Act does not exempt point source conveyances, such as pipes, ditches, and channels, that discharge pollutants

from aquatic animal production facilities that are not CAAPFs.

[11] **[12]** We therefore conclude, as a matter of the plain meaning of the text of the CWA, that "pipes, ditches, channels," ***907** *and* "concentrated animal feeding operations" that discharge pollutants into navigable waters are all "point sources" subject to the NPDES permit requirement. *See Brown*, 640 F.3d at 1071 (relying on the "clarity of the text" of the CWA to hold that a "system of ditches, culverts, and channels" collecting storm water runoff was a point source); *Forsgren*, 309 F.3d 1181, 1185–86 (9th Cir. 2002) (relying on the "clear and unambiguous" text of CWA to hold that an aircraft spraying insecticide was point source). We further conclude, as a necessary corollary, that pipes, ditches, and channels that discharge pollutants from an aquatic animal production facility that is not a CAAPF are point sources for which an NPDES permit is required.

B. EPA Definitions of CAFOs

Coast contends that the text of the CWA is unclear, and that we should defer under *Chevron* to the interpretation of the CWA by the Environmental Protection Agency ("EPA"). The EPA is not a party to this litigation and has taken no position in this litigation on the question before us.

Coast points to EPA regulations defining CAFOs, contending that the regulations provide clarity that is lacking in the text of the statute. According to Coast, the regulations require us to hold that an aquatic animal production facility, and any pipes, ditches, and channels discharging pollutants from that facility, can be regulated as a point source only if it is a CAAPF. That is, according to Coast, pipes, ditches, and channels are not point sources if they discharge pollutants from an aquatic animal production facility that is not a CAAPF. A description of the EPA's CAFO regulations shows why Coast is right in contending that the text of the CWA is unclear with respect to CAFOs, but wrong in contending that the lack of clarity is relevant to the question before us.

As indicated above, a "concentrated animal feeding operation," or CAFO, is listed in § 1362(14) as a point source. There are two subcategories of the statutory category CAFO.

The first subcategory is a CAFO for land-based animals. This subcategory, called a CAFO in EPA regulations, is defined in 40 C.F.R. § 122.23. The criteria specified in the regulation are quite elaborate, and it is not necessary to describe all of them here. They include such things as the number and type of animals (*e.g.*, 700 mature dairy cows, 2,500 swine each weighing 55 pounds or more, 55,000 turkeys), *id.* § 122.23(a), (b)(4), (6), and several factors relevant to designation as a CAFO (*e.g.*, the size of the feeding operation and the amount of waste reaching waters of the United States, the location of the feeding operation relative to waters of the United States, and the means of conveying animal wastes into waters of the United States). *Id.* § 122.23(c)(2).

The second subcategory is a CAFO for aquatic animals. This subcategory, called a CAAPF in EPA regulations, is defined in 40 C.F.R. § 122.24. There are two ways in which an aquatic animal production facility may be designated a CAAPF. First, a facility is a CAAPF if it meets the criteria set forth in Appendix C to 40 C.F.R. § 122. *See* 40 C.F.R. § 122.24(b). For cold-water aquatic animals such as salmon and oysters, a facility must meet the following criteria. The facility must "discharge at least 30 days per year"; it must produce at least 9,090 "harvest weight kilograms ... of aquatic animals per year"; and it must feed at least "2,272 kilograms ... of food during the calendar month of maximum feeding." Appendix C (a). Second, a facility that does not meet the criteria of Appendix C may be designated a CAAPF by the Director of the EPA, or by an authorized state official, on a case-by-case basis after ***908** an in-person inspection of the facility. 40 C.F.R. §§ 122.24(b)–(c), 122.25(a). Factors to be considered in making such a designation are: "(i) The location and quality of the receiving waters of the United States; (ii) The holding, feeding, and production capacities of the facility; (iii) The quantity and nature of the pollutants reaching waters of the United States; and (iv) Other relevant factors." *Id.* § 122.24(c).

We agree with Coast that the EPA's CAFO regulations resolve a lack of clarity in the CWA. Section 1362(14) provides that a "concentrated animal feeding operation" is a point source, but the words "concentrated" and "operation" are not self-defining. The regulations just described provide a precision that is lacking in the statutory language. However, the lack of clarity in the statutory term "concentrated animal feeding operation"

is irrelevant here, for the meaning of that term is not the question before us.

The question is whether "pipes, ditches, [and] channels" and "concentrated animal feeding operations" are all point sources. Sections 122.23 and 122.24 of the EPA regulations tell us only what a CAFO is. These regulations do not purport to tell us whether pipes, ditches, and channels that discharge effluents from non-concentrated aquatic animal production facilities are point sources.

C. Practical Sense of the Permitting Scheme

It makes practical sense that a CAFO is itself a point source. A CAFO can discharge pollutants through pipes, ditches, channels, or similar conduits; but it often discharges pollutants directly, without using any such conduit. For example, a CAFO for land-based animals such as a cattle feeding lot can discharge pollutants from a manure storage "lagoon" into navigable waters through direct seepage into the earth or through overflows from the lagoon. *See*, *e.g.*, *Waterkeeper All., Inc. v. E.P.A.*, 399 F.3d 486, 494 (2d Cir. 2005) ("[P]ollutants can infiltrate the surface waters in a variety of ways including ... overflows from storage 'lagoons[.]' "). A CAFO for aquatic animals, such as a salmon farm, often discharges pollutants directly into navigable waters. Since a CAFO requires an NPDES permit, the permit covers all discharges from the CAFO however the discharges are made, including through pipes, ditches, and channels. *See*, *e.g.*, *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002) ("[F]ields where manure is stored and ditches therein are part of the CAFO and thus, point sources").

[13] It also makes practical sense that pipes, ditches, and channels that discharge pollutants from a non-concentrated aquatic animal production facility are point sources. If the facility is not a CAAPF, it cannot be required to obtain an NPDES permit as a CAAPF. But the fact that an aquatic animal production facility is not a CAAPF does not mean that the facility does not discharge pollutants through pipes, ditches, and channels. To the degree that such a facility discharges pollutants through pipes, ditches, and channels, those pipes, ditches, and channels are point sources. If they were not point sources, a non-concentrated aquatic animal production facility would be free to pollute at will, exempt from any regulation under the CWA and the NPDES system.

Coast disagrees, arguing that a non-concentrated aquatic animal production facility is necessarily not a significant contributor of pollution. That is, if the facility does not satisfy the criteria of 40 C.F.R. § 122.24, Appendix C, and has not been designated a CAAPF by the Director or an authorized state official applying the factors ***909** listed in § 122.24(c), the facility is necessarily not a significant polluter. Therefore, argues Coast, it does not make sense to characterize as point sources pipes, ditches, and channels that discharge pollutants from non-concentrated aquatic animal production facilities. Coast's argument is refuted in the very case before us.

As described above, on July 19, 2016, after Olympic Forest filed its complaint in this case, Coast wrote a letter to Washington's Department of Ecology ("Ecology"), asking whether its oyster hatchery was required to obtain an NPDES permit. Three years earlier, based on the Rensel Report, Ecology had concluded that Coast's hatchery did not need an NPDES permit. On July 29, Ecology responded to Coast's letter, stating that a permit was not required and giving two reasons. First, Coast's hatchery did not satisfy the criteria of Appendix C for a CAAPF. Second, based on the Rensel Report, the hatchery did not otherwise qualify as a CAAPF. Ecology wrote, referring to its earlier decision, "[an] Ecology surface water monitoring specialist had reviewed the report and concurred with Dr. Rensel's findings that discharge from facility was unlikely to alter the Quilcene Bay water quality."

Ecology thus determined that Coast's hatchery did not meet the criteria of a CAAPF specified in § 122.24, Appendix C. That factual determination is not disputed. Ecology further determined that the hatchery did not meet the criteria for designation as a CAAPF under § 122.24(c). The manner in which Ecology made this second determination reveals the flaw in Coast's argument.

In concluding in 2013 and again in 2016 that Coast's hatchery is not a CAAPF under § 122.24(c), Ecology relied on the Rensel Report, which was commissioned and paid for by Coast. There is no indication in Ecology's July 29, 2016, letter to Coast that Ecology ever conducted its own assessment of pollutants discharged from the hatchery, or that it considered any other source of information

than the Report. According to the complaint, significant amounts of chlorine are discharged from Coast's hatchery through pipes, ditches, and channels. However, Rensel Associates failed to test for chlorine, and the Report upon which Ecology relied accordingly reported no chlorine discharges. Assuming, as we must, that the allegations in the complaint are true, there are discharges of chlorine from the hatchery's pipes, ditches, and channels that require an NPDES permit.

D. *APHETI*

Finally, citing *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Resources, Inc.* ("*APHETI* "), 299 F.3d 1007 (9th Cir. 2002), Coast contends that we have already decided the question presented in this case. Plaintiff in *APHETI* contended that defendant Taylor Resources was required to obtain an NPDES permit for its Totten Inlet mussel-harvesting rafts located in Puget Sound. Suspended from the rafts were ropes on which mussels grew until they were harvested. The mussels were nourished by nutrients naturally found in the water of the Sound. As a "byproduct of their metabolism," the mussels produced and released into the water "particulate matter, feces and pseudo-feces," and generated "ammonium and inorganic phosphate" that dissolved in the water. *Id.* at 1010.

Plaintiff contended that Taylor's rafts were point sources under § 1362(14). We disagreed. We held that the particulate matter, mussel feces, and other "natural byproduct" of mussels were not "pollutants" within the meaning of the CWA. *Id.* at 1016. In the alternative, we held that the mussel rafts were not CAAPFs, and ***910** therefore not point sources, because defendant Taylor did not feed the mussels. The rafts therefore did not meet the criteria for classification as CAAPFs under 40 C.F.R. § 244.24, Appendix C. *Id.* at 1018.

In the passage upon which Coast relies, we then wrote:

> [Plaintiff] APHETI argues that, even if Taylor's mussel harvesting facilities do not meet the EPA's definition of a CAAPF, they still fall under the general definition, "discernible, confined, and discrete conveyance," or under the more specific definition, "*vessel or other floating craft*." By this reasoning, APHETI argues that Taylor's mussel rafts are "point source[s]" and that their operation, if discharging pollutants, requires an NPDES permit. But, whatever merit this argument might have in the absence of a regulatory definition of when an aquatic animal feeding operation is a point source, the argument has little persuasive effect when faced with aquatic animal farming that does not involve feeding and that is not within the express and described limits that invoke the Act under the regulation.
>
> ... In the context of aquatic animal harvesting, the EPA's regulations expressly exclude from the definition of "point source" *facilities*, like Taylor's that do not meet certain feeding thresholds. To hold that these *facilities* are nonetheless "point sources" under the statutory definition would render the EPA's CAAPF criteria superfluous and undermine the agency's interpretation of the Clean Water Act.

Id. at 1018–19 (emphases added).

Plaintiff in *APHETI* never argued that "pipes, ditches, and channels" were point sources if they discharged pollutants from aquatic animal production facilities. Rather, it argued that the catch-all phrase "discernible, confined and discrete conveyance," and the more specific phrase "vessel or other floating craft," provided additional definitions of point sources under which the rafts could be regulated. Plaintiff argued that if the rafts were not a point source as a "concentrated aquatic animal production facility," they could be a point source as another kind of "facility," such as a "vessel or other floating craft." *Id.*

As Coast has pointed out in its briefing to us, CAAPFs are not conveyances in the sense of conduits, such as pipes, ditches, and channels. Rather, in the terminology used by the EPA, they are facilities, as the phrase "concentrated aquatic animal production facilities" indicates. These facilities are in and of themselves point sources, whether or not they use conduits such as pipes, ditches, channels to introduce pollutants into navigable waters. Plaintiff in *APHETI* appears to have recognized the distinction between conduits such as pipes, ditches, and channels, on the one hand, and facilities, on the other. It argued that if the rafts were not CAAPFs, one kind of "facility" listed as a point source in § 1362(14), they could be "vessel[s] or other floating craft," another kind of facility listed as a point source. *Id.* We rejected that argument in *APHETI*, concluding that an aquatic animal production facility could only be a point source as a "concentrated aquatic

animal production facility," and not as another kind of facility such as a "vessel or other floating craft." *Id.*

Because there were no conduits such as pipes, ditches, or channels associated with Taylor's mussel rafts, plaintiff in *APHETI* made no argument with respect to such point sources. In the passage from *APHETI* upon which Coast relies, we were responding to a different argument, one that addressed two kinds of "facilities." We therefore conclude, contrary to Coast's contention, that we did not in *APHETI* decide the question before us today.

***911** Conclusion

We affirm the district court. We hold that pipes, ditches, and channels that discharge pollutants from non-concentrated aquatic animal production facilities are point sources within the meaning of 33 U.S.C. § 1362(14).

AFFIRMED.

All Citations

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Footnotes

* The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

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