Nos. 04-17554 and 05-15051

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN FRANCISCO BAYKEEPER and
CITIZENS COMMITTEE TO COMPLETE THE REFUGE

Plaintiffs-Appellees

v.

CARGILL SALT DIVISION and
CARGILL, INCORPORATED

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF AMICI CURIAE
of the
AMERICAN FOREST & PAPER ASSOCIATION
AMERICAN PETROLEUM INSTITUTE
CHAMBER OF COMMERCE OF THE UNITED STATES
CORN REFINERS ASSOCIATION
GROCERY MANUFACTURERS OF AMERICA
NATIONAL ASSOCIATION OF MANUFACTURERS
and the
WESTERN STATES PETROLEUM ASSOCIATION

IN SUPPORT OF DEFENDANTS-APPELLANTS
and
Reversal of the Orders on Appeal

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and 29(c), amici curiae American Forest & Paper Association, American Petroleum Institute, Chamber of Commerce of the United States, Corn Refiners Association, Grocery Manufacturers of America, National Association of Manufacturers and Western States Petroleum Association state that each of them is a not-for-profit corporation, none has a parent corporation and none has issued stock.

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IN THE UNITED STATES COURT OF APPEALS
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This brief amici curiae of the American Forest & Paper Association, et al., is submitted in support of defendants-appellants/cross-appellees Cargill Salt Division and Cargill, Incorporated (Cargill). The April 30, 2003 order on appeal concerns a private suit (sometimes referred to as a "citizen" suit) under section 505 of the Clean Water Act, 33 U.S.C. § 1365, by plaintiffs-appellees San Francisco

BayKeeper and Citizens Committee to Complete the Refuge (BayKeeper).[1] That order (ER:1271-1286; 2003 U.S. Dist. LEXIS 8247), which was issued by the United States District Court for the Northern District of California, grants the plaintiffs' motion for summary judgment and finds Cargill in violation of the Act. For the reasons shown below, amici respectfully urge the Court to reverse the District Court's April 30, 2003 order and vacate the judgment entered.[2]

INTERESTS OF AMICI

Amici are national and regional associations whose members operate thousands of manufacturing and industrial facilities, including many facilities in California and the other states of the Ninth Circuit, in essentially all sectors of commerce and industry, from manufacturing to agriculture, grain processing and food products, forestry, paper and wood products, and petrochemicals and oil exploration, production and refining.

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1 The Clean Water Act, 33 U.S.C. §§ 1251-1387 (also known as the Federal Water Pollution Control Act), is referred to below as "the Act" or "the CWA." Cargill's appeal also involves a June 10, 2004 order, ER:1459-1467, which concerns the plaintiffs'-appellees' request for injunctive relief. Amici fully support Cargill's argument that such relief is impermissible under the CWA, but do not separately address the issue in this brief.

2 The parties' respective counsel have consented to the filing of this brief amici curiae and a stipulation confirming their consent has been filed with the Clerk of the Court. Descriptions of the individual amici are provided in the Appendix, and each of the amici has been authorized to file this brief pursuant to their respective by-laws, resolutions and other internal governance procedures.

Amici's interest in this case derives from the District Court's fundamental legal error in concluding that a containment area for salt processing residues at Cargill's Newark, California facility is a "navigable water" within the meaning of CWA section 502(7), 33 U.S.C. § 1362(7), which is defined as "waters of the United States, including the territorial seas." Aside from the fact that the containment (which the plaintiffs described as a "pond") will contain water only during the winter and is obviously non-navigable, it is also built on impervious clays, surrounded by a berm and has no hydrological connection to any navigable waterway.[3] The District Court's erroneous ruling disregards these facts and is unsupported by the text of the statute. The District Court also contradicts a wealth of precedent that guides determination of CWA jurisdiction, as stated by the Supreme Court in Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC), and United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), as well as post-SWANCC Court of Appeals decisions, including this Court's decision in Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001). In addition, the District Court's ruling is at odds with the decision of the United States Department of Justice to dismiss with prejudice the federal government's suit against Cargill for the same

[3] These points are discussed in detail by Cargill. See Appellant Cargill's Opening Brief, Nos. 04-17554 and 05-15051 (Apr. 11, 2005) (hereafter "Appellants' Opening Brief"), at 13-23.

matters as the plaintiffs' citizen suit after concluding, in conjunction with the Environmental Protection Agency (EPA), that there was no jurisdiction for the suit under the CWA.

While amici's members are committed to full compliance with the Clean Water Act, as well as related state laws for protection of water resources, and have spent vast sums for that purpose, the District Court's decision disregards the principles that guide CWA jurisdiction and extends the Act far beyond the limits Congress intended. As a consequence, the District Court's decision has spawned considerable uncertainty for amici (and industry generally), exposes industry to potentially severe sanctions, and portends significant unnecessary burdens on industry as well as regulators.

More specifically, the primary issue in this appeal, the District Court's conclusion that proximity ("adjacency") to a navigable waterway is a basis for Clean Water Act jurisdiction over non-navigable waters (despite the absence of a hydrological connection to any navigable waterway), has potentially broad implications that far transcend this case. In that regard, it is commonplace for industrial facilities to have containments of various types, such as impoundments for storage or treatment of non-hazardous wastewater, cooling ponds and in some cases containment areas for permanent disposal of waste. Office of Solid Waste, U.S. Envtl. Protection Agency, EPA530-R-01-005, Industrial Surface

Impoundments in the United States, at 2-2 (Mar. 2001), available at http://www.epa.gov/epaoswer/hazwaste/ldr/icr/impdfs/sisreprt.pdf. In fact, EPA has estimated that approximately 18,000 surface impoundments are in use at 7,500 facilities nationwide, many of which may be in close proximity to open water. See id. at 2-26 (EPA estimates that twenty percent of the 18,000 surface impoundments are located within 150 meters of fishable waterbodies). Under the District Court's interpretation of the CWA, untold numbers of these facilities could become subject to CWA jurisdiction despite the absence of any hydrological connection to navigable waterways.

An additional consequence of the District Court's ruling is that many facilities in circumstances similar to Cargill's could be in violation of the Act (and may have been in that status for an extended period). Such facilities are subject to substantial civil penalty liability as well as injunctive measures.[4] Moreover, aside from costly enforcement proceedings and sanctions, affected industrial facilities with containment areas or impoundments such as the one at Cargill's Newark

[4] Section 505(a) of the CWA authorizes injunctive relief (to enforce effluent standards and limitations) and civil penalties under CWA section 309(d), 33 U.S.C. § 1319(d), which can reach $32,500 for each day that a violation continues. See Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 7125 (Feb. 13, 2004) (implementing the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 (note)). The injunctive relief the plaintiffs are seeking in this case includes removal (at considerable expense) of salt processing residues from the lower portion of the containment.

facility would confront the burden of an entirely new CWA regimen for pollutant discharge permits (National Pollutant Discharge Elimination System – or "NPDES" – permits) under section 402 of the Act, 33 U.S.C. § 1342. They would also be subject to complex federal control technology requirements under sections 301(b)-(d), 33 U.S.C. §§ 1311(b)-(d), as well as permit requirements under CWA section 404, 33 U.S.C. § 1344, concerning the discharge of dredged or fill material. In addition, development of entirely new state water quality standards for containment areas would be required by section 303 of the CWA, 33 U.S.C. § 1313, which would be especially difficult for an impoundment such as the containment area because waste assimilation (disposal) is not a permissible use for "waters of the United States." See 40 C.F.R. § 131.10(a).[5] And governmental responsibility for these matters would largely fall on the shoulders of already overextended state regulatory agencies.[6]

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[5] Water quality standards are the applicable state's goals for protection of a given water body or a portion thereof. See 40 C.F.R. § 130.3. They are implemented by designating certain uses for the water body and setting criteria (numeric and narrative) with which dischargers must comply.

[6] As an example of the burdens such agencies confront, the backlog of NPDES permits that have expired and are awaiting renewal is estimated at 19,628 nationally. See http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm?program_id=1. Among the reasons for the backlog is a decline in state resources available for permit issuance. See http://www.epa.gov/npdes/pubs/factsht.pdf.

In short, amici's interest in this case arises due to the legally erroneous nature of the District Court's ruling, as well as the counterproductive and unnecessary burdens that will result. The good environmental stewardship that industry practices every day, such as, in this case, the containment of waste to prevent release to the environment, cannot be reconciled with the ruling below, which literally penalizes such stewardship.

INTRODUCTORY STATEMENT

The facts and procedural history pertinent to this appeal are fully set forth in Cargill's principal brief, and amici address here only those facts that have particular relevance to amici's arguments in support of Cargill.

This appeal concerns a facility in Newark, California where Cargill uses solar evaporation to extract salt from the waters of San Francisco Bay. Since the 1960s the facility has included a containment area for salt-processing muds and residues (e.g., brine precipitates). Large earthen levees (which, like the base of the containment are made of impervious mud) separate the containment area from a salt marsh that borders nearby Mowry Slough, a navigable waterway, and prevent liquid or other waste material from exiting the containment. During winter rains the lower portion of the containment area will hold a shallow accumulation of saline stormwater.

BayKeeper initiated its CWA suit against Cargill in 1996, and moved soon thereafter for summary judgment on liability. Of principal relevance here, BayKeeper alleged that Cargill's placement of salt-processing muds and residues in the containment area at the Newark facility constituted a discharge of pollutants to waters of the United States within the meaning of the CWA and violated the Act because Cargill did not have a CWA permit authorizing the discharge.[7] BayKeeper did not, on the other hand, claim in its summary judgment motion that there was any discharge from the containment area to a navigable water. Instead, BayKeeper's sole alleged basis for CWA jurisdiction was the U.S. Army Corps of Engineers' so-called "Migratory Bird Rule" ("waters of the United States" include intrastate waters used as habitat by migratory birds). See Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41217 (Nov. 13, 1986). The District Court granted summary judgment in BayKeeper's favor in April 1998, and Cargill appealed to this Court. While the appeal was pending the Supreme Court invalidated the Migratory Bird Rule in the SWANCC case, 531 U.S. 159. Because the Supreme Court's ruling put into question the jurisdictional

[7] Subject to certain exceptions, CWA section 301(a), 33 U.S.C § 1311(a), provides that "the discharge of any pollutant [to navigable waters] by any person shall be unlawful." The term "pollutant" is broadly defined to include, among other things, "dredged spoil, solid waste . . . and industrial, municipal, and agricultural waste." 33 U.S.C. § 1362(6); see also 33 U.S.C. § 1362(12) (defining "discharge of a pollutant"). One of the exceptions to

basis for BayKeeper's suit, this Court remanded the case back to the District Court to determine if alternative grounds for CWA jurisdiction existed.

In November 1998 (while Cargill's first appeal in this case was pending) the United States filed its own CWA enforcement suit against Cargill for the same matters as BayKeeper's suit. Because the Supreme Court's invalidation of the Migratory Bird Rule in SWANCC had put the jurisdictional basis for the United States' suit in doubt (just as it had put in doubt the basis for BayKeeper's suit), the Department of Justice, in conjunction with EPA, conducted a careful inquiry to determine if federal jurisdiction was present. Subsequently, the two agencies concluded that there was no viable basis for exercising CWA jurisdiction over the containment area at Cargill's facility. See Agency Implementation of the SWANCC Decision, Before the Committee on Government Reform, U.S. House of Representatives, 107th Cong. 2nd Session, at 6 (2002) (statement of Assistant Attorney General Thomas L. Sansonetti). ER:1225. Thereafter, the United States voluntarily dismissed its complaint against Cargill with prejudice. ER:268-270.

BayKeeper saw things differently, however, and following this Court's post-SWANCC remand BayKeeper decided to file a second motion for summary judgment on liability. BayKeeper's new motion was based on its "adjacency"

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section 301(a)'s prohibition is an NPDES permit authorizing the discharge under section 402.

jurisdiction theory. That is, BayKeeper argued that the geographic proximity of the containment area to navigable waters renders the containment a "water of the United States" within the meaning of the CWA, and Cargill, therefore, should have obtained a permit under section 402 of the CWA authorizing placement of salt-processing residues and stormwater in the containment.[8]

The District Court agreed with BayKeeper's argument. The court relied on Riverside Bayview Homes, 474 U.S. 121, which upheld a Corps of Engineers' regulation that treats a wetland as "a water of the United States" if the wetland is adjacent to navigable waters. The court suggested that "the same characteristics" which justified protection of adjacent wetlands in Riverside Bayview Homes apply as well to adjacent ponds. As the District Court noted, the record included a number of expert opinions which uniformly concluded that "there was no hydrological connection, subsurface or surface," between the containment and any navigable water. See ER:1279; Appellants' Opening Brief at 18-22. Nevertheless, the court ruled that because the containment area "is a body of water adjacent to Mowry Slough, a navigable water, . . . [it] is a 'water of the United States.'" ER:1280.

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[8] BayKeeper's "adjacency" jurisdiction theory appears to have been an afterthought. See ER:1273 ("Despite the fact that it had apparently researched the possibility of raising multiple grounds for CWA subject matter jurisdiction, BayKeeper['s initial summary judgment motion] argued only . . . its [Migratory Bird Rule] jurisdictional theor[y]").

The District Court's reasoning with regard to CWA jurisdiction and the meaning of the term "waters of the United States" are the core of Cargill's appeal to this Court.

SUMMARY OF ARGUMENT

The District Court erred in ruling that "adjacency" (or proximity) to navigable waters is a basis for extending CWA jurisdiction to non-navigable waters. To the contrary, as the Supreme Court emphasized in the SWANCC case, 531 U.S. at 167, CWA jurisdiction does not extend to a non-navigable water absent, at a minimum, a "significant nexus" between navigable and non-navigable waters such that they "are inseparably bound up" and pollution of one will affect the other. That principle has been applied in numerous post-SWANCC Court of Appeals decisions in which SWANCC's "significant nexus" was found to be present where a hydrological connection allowed contamination from upstream non-navigable waters to affect downstream navigable waters. In this case, however, the record shows that the containment area at Cargill's facility is not hydrologically connected to – and has no impact on – any navigable waterway. The containment area is, accordingly, outside the jurisdiction of the Clean Water Act.

In addition, the District Court's decision disregards the principles of federalism that are a fundamental aspect of the Clean Water Act. Thus, a

prominent feature of the Act is Congress' emphasis on preserving the primary responsibility of the individual states to protect water resources and prevent pollution. See 33 U.S.C. § 1251(b). Consistent with that policy, Congress carefully limited CWA jurisdiction to protection of navigable waters and left various areas of traditional state authority unchanged. In fact, the Clean Water Act is the mirror image of the principle that courts will require "unmistakable" statutory clarity to justify interpreting a federal statute in a manner that alters the balance of state and federal responsibility. That is because the CWA is "unmistakably clear" in preserving traditional state authority.

Finally, the District Court's erroneous interpretation of the Act will also seriously distort the limited purpose Congress intended for citizen suits by allowing BayKeeper's suit to proceed despite the determination of the agencies with primary responsibility for CWA interpretation and enforcement that there is no CWA jurisdiction here.

ARGUMENT

I. The Containment Area Is Not Subject To CWA Jurisdiction Because It Is Non-Navigable And Does Not Discharge Pollutants To Any Navigable Waterway Or Tributary

The District Court's "adjacency" jurisdiction ruling is erroneous and should be reversed. The ruling reflects a fundamental misunderstanding of the principles that determine the scope of CWA jurisdiction over non-navigable waters and is in

conflict with a substantial body of precedent that precludes extension of CWA jurisdiction under the circumstances of this case.

To begin, the District Court's reliance on Riverside Bayview Homes, 474 U.S. 121, is entirely misplaced. The primary issue in that case was whether a Corps of Engineers' regulation exceeded the Corps' CWA authority over navigable waters. The regulation at issue, 33 C.F.R. § 323.2 (1985), required a permit from the Corps under CWA section 404 prior to discharging fill into a non-navigable wetland adjacent to a jurisdictional waterway. The Supreme Court agreed that the regulation was a permissible interpretation of the Act.

More specifically, the Court found that the Corps' regulation was supported by the CWA's legislative history as well as the Corps' scientific judgment that pollution of wetlands would directly affect the water quality of adjacent navigable waters. See 474 U.S. at 133-35. In that regard, the Court deferred to the Corps' technical expertise (and EPA's technical expertise as well) in "determin[ing] that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality," and are, therefore, "inseparably bound up with the 'waters' of the United States." Id.; see also id. at 135 n.9 (referring to the Corps' finding that "in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem"). Elaborating on these points, the Court noted that "wetlands adjacent to lakes, rivers, streams, and other

[navigable] bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of [navigable] water" because such wetlands "may still tend to drain into those waters. . . [and] may serve to filter and purify water draining into adjacent bodies of water." Id. at 135 (internal citations omitted); see also SWANCC, 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes").

This case is starkly different. First, and most importantly, it is undisputed that the containment area at Cargill's facility is not a wetland. See Appellants' Opening Brief at 30 n.20. Moreover, unlike the circumstances in Riverside Bayview Homes, here the record shows that the containment area at Cargill's Newark facility is not hydrologically connected to navigable waters and is not discharging pollutants to any waterway. Another difference is the absence of any legislative history or technical-administrative expertise to which the District Court could refer as justification for extending CWA jurisdiction to an area that is neither a wetland nor hydrologically connected to navigable waters. In addition, there is nothing in Riverside Bayview Homes to suggest that the policy justification on which the Court relied in extending CWA jurisdiction to wetlands adjacent to navigable waters, 474 U.S. at 134 (such wetlands are either "flood[ed] or

permeat[ed]" by . . . open water" or "tend to drain into those [open] waters"), is intended to apply where, as in this case, it is clear that Mowry Slough and the containment area do not exchange waters. See Headwaters v. Talent, 243 F.3d at 533 (irrigation canals are "waters of the United States" because they "exchange water" with jurisdictional waters or their tributaries).[9]

The District Court's indifference to the record evidence showing the absence of any hydrological connection between the containment area and navigable waters, as well as the court's failure to recognize the importance of that evidence in resolving the CWA jurisdictional issue before it, are fundamental errors. That is because under the reasoning of a consistent line of Court of Appeals' decisions, including precedent in this Court, the absence of a hydrological connection precludes CWA jurisdiction. For example, one court has explained that "[w]aters sharing a hydrological connection are interconnected, sharing a symbiotic relationship." United States v. Rapanos, 376 F.3d 629, 640 (6th Cir. 2004),

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[9] Given the substantial difference between the facts underlying Riverside Bayview Homes and the facts in this case, there is no support for the District Court's suggestion (ER:1277) that "the same characteristics that justified protection of adjacent wetlands in . . . Riverside Bayview Homes apply as well to adjacent ponds." Equally invalid is the District Court's suggestion that BayKeeper's position below was presented "on [the] same basis" as Riverside Bayview Homes. See id. To the contrary, BayKeeper's argument before the District Court was that CWA jurisdiction over non-navigable waters does not depend on a hydrological connection linking navigable and non-navigable waters. See ER:1282 (plaintiffs' "motion does not depend on

petition for cert. filed. (Supreme Court Case No. 04-1034) (Jan. 28, 2005). In addition, in Headwaters v. Talent, 243 F.3d 526, this Court similarly relied on evidence of a hydrological connection linking navigable and non-navigable waters as justification for extending CWA jurisdiction to the latter (the case involved a CWA citizen suit where the Court concluded that non-navigable irrigation canals were "waters of the United States" because they "exchange water with a number of natural streams," that is, they "receive water from . . . and divert water to" natural waterways that "no one disputes are 'waters of the United States'"). Id. at 533. See also United States v. Rapanos, 376 F.3d at 639 ("[w]hat is required for CWA jurisdiction over 'adjacent waters' . . . is a 'significant nexus between the wetlands and 'navigable waters,' which can be satisfied by the presence of a hydrological connection'") (internal citation omitted); United States v. Deaton, 332 F.3d 698, 712 (4th Cir. 2003) (a hydrological connection is predicated on "evidence . . . that discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters"), cert. denied, 541 U.S. 972 (2004).[10]

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a showing that water moves from the Pond [i.e., the containment] to the Slough").

[10] Amici hasten to note they are not suggesting that any hydrological connection, however attenuated and remote it may be, would suffice for CWA jurisdiction. That issue, for which there is some variation in Court of Appeals precedent, see United States v. Rapanos, 376 F.3d at 638-39, is obviously not before the Court (and amici include entities that dispute the validity of the Court of Appeals decisions discussed in the preceding text precisely because the decisions, among other things, find CWA jurisdiction

This case bears no resemblance to the cases discussed above because here the record shows that the containment area at Cargill's Newark facility has no effect on Mowry Slough or any other navigable water. Put another way, the "significant nexus," SWANCC, 531 U.S. at 168, between navigable waters and adjacent wetlands that was fundamental to Riverside Bayview Homes is simply not present. In short, as the Second Circuit recently explained,

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based on such factors as a remote hydrological connection, and cannot be squared with the Supreme Court's reasoning in the SWANCC case). But the important point for present purposes is that the Circuits are uniform in their positions on the issue that is before the Court in this case: simply put, in the absence of a hydrological connection between navigable and non-navigable waters, there is no CWA jurisdiction.

Amici would also note that in the proceedings before the District Court BayKeeper relied on Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001), for the proposition that "a body of water is subject to Clean Water Act regulation if it is adjacent to open water." See ER:1277. Amici need not dwell on this point; suffice it to say that, contrary to BayKeeper, Rice v. Harken holds that a prerequisite for extending CWA jurisdiction to intermittent, non-navigable waterways is evidence that the latter "are sufficiently linked to an open body of navigable water as to qualify for protection under the OPA [Oil Pollution Act of 1990, 33 U.S.C §§ 2701-20]." 250 F.3d at 271; see also id. at 272 (OPA jurisdiction requires "a close, direct and proximate link between [allegedly jurisdictional discharges] and any resulting actual, identifiable oil contamination of a particular body of [jurisdictional] natural surface water") (although Rice v. Harken involved interpretation of the OPA, the decision is applicable to the CWA because Congress intended that terms used in common in the CWA and OPA, such as "navigable waters," would have the same meaning). See 250 F.3d at 267-68. See also In re Needham, 354 F.3d 340, 347 (5th Cir. 2003) ("[T]he term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway").

> in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 505 (2d Cir. 2005).[11] Amici submit that the same conclusion applies here: the containment area at Cargill's Newark, California facility is not hydrologically connected to any navigable water and does not discharge any pollutants to waters of the United States; the containment area is not, therefore, subject to the permit requirements of the Clean Water Act.

II. The District Court's Decision Seriously Intrudes On The Principles of Federalism That Congress Sought To Protect In The Clean Water Act

The District Court's decision to force Clean Water Act regulation in this case is invalid for the additional reason that it jettisons the principles of federalism that are a hallmark of the Clean Water Act. While Congress may legislate in areas traditionally regulated by the states, to do so is the exercise of "an extraordinary

[11] In this portion of its opinion in WaterKeeper Alliance v. EPA the Second Circuit ruled that EPA had overstepped its authority in adopting a regulation requiring the operators of concentrated animal feeding operations (CAFOs) to file an application for an NPDES permit even in situations where the CAFO does not discharge to navigable waters. See generally 399 F.3d at 504-06.

power . . . [which] we must assume Congress does not exercise lightly." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

In that regard, at the outset of its opinion in the SWANCC case the Supreme Court emphasized that Congress enacted the CWA to restore the Nation's waters, and "[i]n so doing, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" 531 U.S. at 166-67, quoting section 101(b) of the Act, 33 U.S.C. § 1251(b).[12] The theme on which the Supreme Court focused in quoting section 101(b) of the Act is also evident in section 510, 33 U.S.C. § 1370, which provides, among other things, that "[e]xcept as expressly provided in [the CWA], nothing in [the Act] shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including the boundary waters) of such States."

[12] CWA section 101(b) built on the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371(b)(2), which stated a general federal policy for protection of the environment, adding that "[t]he primary responsibility for implementing this policy rests with State and local governments."

Consistent with these policies, one of the CWA's principal regulatory elements, the general prohibition on the "discharge of any pollutant" in section 301(a), is defined in section 502(12) as "any addition of any pollutant to navigable waters from any point source." The same term is carried forward in section 402(a), which provides an exception to the prohibition on the discharge "of any pollutant to navigable waters" if a permit authorizes the discharge. See also CWA section 404(a) (authorizing permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites"). Put another way, Congress explicitly limited CWA jurisdiction to protection of navigable waters and left protection of non-navigable waters and various other areas of traditional state authority unchanged. See, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994), cert. denied, 513 U.S. 930 (1994) (Congress elected to leave the subject of ground water regulation to state law).

While Congress' intention to alter the balance of state and federal responsibility must be made "unmistakably clear in the language of the statute," Gregory v. Ashcroft, 501 U.S. at 460 (internal citations and quotations omitted), the provisions described above demonstrate the opposite intent, that is, the Clean Water Act was intended to leave intact the functions traditionally performed by state and local governments. See also Nixon v. Missouri Mun. League, 541 U.S. 125, 140 (2004) ("federal legislation threatening to trench on the States'

arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement Gregory requires"). Emphasizing the importance of these principles, in SWANCC the Supreme Court repeated its earlier quotation from CWA section 101(b), adding that "[r]ather than expressing a desire to readjust the federal-state balance . . . Congress chose [in the CWA] to 'recognize, preserve and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources.'" 531 U.S. at 174. The District Court's erroneous decision simply disregards these vitally important principles.[13]

The absence of CWA jurisdiction over the containment area does not, moreover, create any regulatory gap. In that regard, the regulatory authority of California's Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000-14958 (Porter-Cologne Act), extends to "waters of the state," which the Porter-Cologne Act broadly defines as "any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water Code § 13050(e). The Porter-Cologne Act is implemented by the California Regional

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[13] The District Court's broad interpretation of the CWA also raises significant constitutional questions concerning the scope of Congress' authority under the Commerce Clause. SWANCC counsels for interpreting the Act in a manner that will avoid significant constitutional and federalism questions,

Water Quality Control Board (RWQCB), in conjunction with the State Water Resources Control Board, and the RWQCB has broad authority over discharges to the waters of the state. See generally id. §§ 13263, 13264. The RWQCB has never suggested (let alone required) a permit for the containment area at Cargill's Newark facility. See Appellants' Opening Brief at 17-18. If BayKeeper had been aggrieved by the RWQCB's actions – or inaction – with respect to the containment area, BayKeeper had ample remedies (administrative and judicial) to pursue such grievances. See Cal. Water Code § 13320 (petitions to State Water Resources Control Board for review of actions, or failure to act, by the RWQCB) and section 13330 (judicial review of administrative actions under section 13320). In short, the federal intrusion into state and local matters that the District Court's decision would encourage is not only an invalid interpretation of the CWA, it is also unnecessary.

III. BayKeeper's Suit Seriously Distorts The Role Congress Intended For Citizen Suits

Finally, amici would be remiss in failing to address one additional point – the distortion that BayKeeper's CWA citizen suit presents relative to the purposes Congress intended for such suits.

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such as those presented by the District Court's interpretation of the CWA. 531 U.S. at 173.

More specifically, citizen suits are intended to "supplement rather than to supplant" government enforcement – they "are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility,'" Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Fdn., Inc., 484 U.S. 49, 60 (1987), quoting S. Rep. No. 92-414, at 64 (1971) (emphasis added), and such suits should not be allowed to unnecessarily burden the federal courts. Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 396 (5th Cir. 1985); see also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13-14, 17 n.27 (1981) (the role of citizen suits is of a "limited nature" that only "supplement[s]" government enforcement). In this case the United States filed suit against Cargill for the same matters as BayKeeper's suit, and, like BayKeeper, in reliance on the Migratory Bird Rule. But the Migratory Bird Rule's invalidation in the SWANCC case required the United States to "investigate whether there were any viable alternative bases for exercising CWA jurisdiction over the waterbody in question" (the containment area), see ER:1225, and after careful inquiry (by the Department of Justice and EPA) to determine if there was any such jurisdictional basis, the United States' suit against Cargill was voluntarily dismissed with prejudice.

While amici recognize that later-filed government enforcement does not present an express bar on BayKeeper's suit (see, e.g., CWA section 505(b)(1)(B); see also section 309(g)(6), 33 U.S.C. § 1319(g)(6)), that does not diminish the fact

that the two agencies with primary responsibility for interpretation and enforcement of the CWA determined that there is no jurisdiction to sue, and their entirely reasonable interpretation of the Act is entitled deference. See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 842-44 (1984). To allow a citizen suit to proceed under such circumstances clearly "would change the nature of the citizens' role from interstitial to potentially intrusive." Gwaltney, 484 U.S. at 61. That is all the more reason why this Court should reverse the District Court.

CONCLUSION

For the foregoing reasons, amici curiae American Forest & Paper Association, et al., respectfully urge this Court to reverse the District Court's orders of April 30, 2003 and June 10, 2004 and vacate the judgment entered.

Respectfully submitted,

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April 20, 2005

APPENDIX

DESCRIPTION OF AMICI CURIAE

Amicus American Forest & Paper Association (AF&PA) is the national association of the forest, paper, and wood products industry, a vital national industry which accounts for over eight percent of the United States' total manufacturing output. Employing some 1.4 million people, this industry ranks among the top ten manufacturing employers in forty-six states. AF&PA's 400 member companies and related trade associations are engaged in growing, harvesting, and processing wood and wood fiber; manufacturing pulp, paper, and paperboard products from both virgin and recycled fiber; and producing engineered and traditional wood products. AF&PA's interest in this appeal reflects the AF&PA members' longstanding interest in proper interpretation of the provisions of the Clean Water Act.

Amicus American Petroleum Institute (API) is a national association whose membership includes over 400 companies involved in all aspects of the petroleum and oil and gas industries. API's member companies are regulated under the Clean Water Act and parallel state laws. In that regard, API is a frequent advocate on important issues of public policy before courts, legislative bodies and other forums, including important issues of Clean Water Act jurisdiction and federalism, such as the issues that underlie this appeal.

Amicus Chamber of Commerce of the United States (Chamber), is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector and from every region of the country. Ninety-six percent of the Chamber's members are businesses with fewer than 100 employees. The Chamber regularly advocates the interests of its members in court on environmental issues of national concern to the business community (including the SWANCC and Riverside Bayview Homes cases before the Supreme Court). In addition, the Chamber has extensive interests in federalism issues and regularly participates in federalism cases before the Supreme Court and various circuits of the Court of Appeals. The Chamber recognizes that where state and local authority is the best means to address environmental regulation, federal intervention may be counterproductive – a prescription for duplicative requirements and uncertainty for the regulated community.

Amicus Corn Refiners Association is the national trade association representing the corn wet milling industry in the United States. The association (and its predecessors) have served this important segment of American agribusiness since 1913. Through a series of operating committees of executives from corn refining firms, the association conducts programs of research and technical service, public relations and government relations for the association's

membership. The association frequently serves as the principal advocate for its members before executive, legislative and judicial forums in important matters of economic and regulatory policy.

Amicus Grocery Manufacturers of America (GMA) is the world's largest association of food, beverage and consumer product companies. Led by a board of forty-two Chief Executive Officers, GMA applies legal, scientific and political expertise from its more than 120 member companies to vital public policy issues affecting its membership. The association also leads efforts to increase productivity, efficiency and growth in the food, beverage and consumer products industry. With United States sales of more than $500 billion, GMA members employ more than 2.5 million workers in all fifty states.

Amicus National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Amicus Western States Petroleum Association (WSPA) is a trade association representing companies that produce, refine, market and transport most

of the crude oil, motor fuel and other petroleum products in the western United States. One of WSPA's primary functions is to represent the interests of its members in regulatory and judicial proceedings presenting issues of considerable importance to the petroleum industry, such as the Clean Water Act jurisdictional issues on appeal in this proceeding.

CERTIFICATE REQUIRED BY FED. R. APP. P. 32(a)(7)(C)

The undersigned hereby certifies as follows:

1. The foregoing brief was prepared using Microsoft Word. The font is Times New Roman, proportionally spaced, 14-point type.

2. The brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the calculation made by the word processing software, the brief contains 6,270 words (including the Appendix), excluding those portions of the brief listed in Fed. R. App. P. 32(a)(7)(B)(iii).

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Scott M. DuBoff

Dated: April 20, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of April, 2005 caused two copies of the foregoing brief amici curiae of the American Forest & Paper Association, et al., to be served by first-class mail, postage prepaid, upon each of the following at the addresses indicated:

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