No. 11-460

In The Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

The Clean Water Act regulates the addition of pollutants to the navigable waters of the United States, including pollutants discharged from municipal storm sewer systems. 33 U.S.C. §1342(p).

The question presented is:

> When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Natural Resources Defense Council, Inc., and Santa Monica Baykeeper, plaintiffs, appellants below, and respondents here.
- Los Angeles County Flood Control District, defendant, appellee below, and petitioner here.

In addition, the County of Los Angeles was a defendant in the underlying action and an appellee in the proceedings below, but is not a party to the petition in this Court.

There are no publicly held corporations involved in this proceeding.

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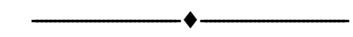
OPINIONS BELOW

The July 13, 2011 order and opinion of the United States Court of Appeals for the Ninth Circuit that is the subject of this proceeding is reported at 673 F.3d 880 (9th Cir. 2011). (Appendix to Petition for Writ of Certiorari ["App."] 1-50.) The Ninth Circuit's initial opinion was published at 636 F.3d 1235 (9th Cir. 2011). (App.51-97.)

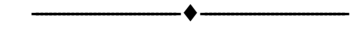
The district court's two orders granting petitioner's motion for summary judgment with respect to the claims involved in this matter are not published. (App.98-102 and 103-32.)



JURISDICTION

The Ninth Circuit initially filed an opinion in this case on March 10, 2011. (App.51-52.) Petitioner timely filed a petition for rehearing. On July 13, 2011, the Ninth Circuit issued an order withdrawing its prior opinion and replacing it with an opinion filed that date, and denying the petition for panel rehearing and rehearing en banc. (App.1-2.) On October 11, 2011, petitioner timely filed a petition for writ of certiorari in this Court.

This Court has jurisdiction under 28 U.S.C. §1254(1) to review the July 13, 2011 opinion and judgment of the Ninth Circuit.



STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondents to enforce permit requirements pursuant to provisions of the Clean Water Act (33 U.S.C. §1342(p)), which provides in pertinent part:

> (p) Municipal and industrial stormwater discharges
>
> (1) General rule
>
> Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.
>
> (2) Exceptions
>
> Paragraph (1) shall not apply with respect to the following stormwater discharges:
>
> (A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
>
> (B) A discharge associated with industrial activity.
>
> (C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering

> methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

The issues raised in the petition and addressed by the Ninth Circuit concern provisions of 40 C.F.R. §122.26 and 33 U.S.C. §1362(12) and (14), which respectively provide in pertinent part:

> 40 C.F.R. §122.26:
>
> (a) Permit requirement.
>
> * * *
>
> (3) Large and medium municipal separate storm sewer systems.
>
> (i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems. . . .
>
> (b) Definitions.
>
> * * *
>
> (8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes,

storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

33 U.S.C. §1362. Definitions

Except as otherwise specifically provided, when used in this chapter

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each

> means (A) any addition of any pollutant to navigable waters from any point source, (B) 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. . . .
>
> * * *
>
> (14) 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. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

STATEMENT OF THE CASE

A. The Clean Water Act's Regulation Of Municipal Stormwater.

In 1972, Congress adopted amendments to the Federal Water Pollution Control Act (33 U.S.C. §1251, *et seq.*). After subsequent amendments in 1977, the statute became known as the Clean Water Act ("CWA" or "the Act"). The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a).

In the CWA, Congress established a system of permits under the National Pollution Discharge Elimination System ("NPDES") (33 U.S.C. §1342), as one of the means to achieve the CWA's goals. *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992).

33 U.S.C. §1342(a)(1) provides that the Administrator of the Environmental Protection Agency ("EPA") may issue an NPDES permit "for the discharge of any pollutant." The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source" or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft." 33 U.S.C. §1362(12). A "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. §1362(14).

The EPA Administrator may delegate NPDES permit authority to a state. 33 U.S.C. §1342(b)-(c). California has been delegated this authority. *See* Cal. Water Code §13370. In California, NPDES permits are issued by the State Water Resources Control Board or a Regional Water Quality Control Board. *Id*. at §13377.

Initially, the EPA, by regulation, exempted stormwater uncontaminated by any industrial or commercial activity from NPDES requirements. The Circuit Court of Appeals for the District of Columbia invalidated that regulation, holding that the EPA Administrator did not have the authority to exempt categories

of point sources from Section 402 permit requirements. *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). Following this decision, the EPA issued proposed and final rules covering stormwater discharges in 1980, 1982, 1984 and 1985, rules that were challenged at the administrative level and in the courts. *See American Mining Congress v. U.S. E.P.A.*, 965 F.2d 759, 763 (9th Cir. 1992).

In 1987, Congress enacted the Water Quality Act amendments, which established a new statutory scheme for the regulation of stormwater runoff. 33 U.S.C. §1342(p). The amendments set forth dates by which certain categories of stormwater dischargers were required to obtain permits (42 U.S.C. §1342(p)(1) and (2); *Natural Resources Defense Council v. U.S. E.P.A.*, 966 F.2d 1292, 1296 (9th Cir. 1992)) and also enacted special provisions addressing municipal stormwater permits.

The 1987 amendments provided that permits for discharges from municipal storm sewers:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and

> engineering methods, and such other provisions as the Administrator or the State determines appropriate for control of such pollutants.

33 U.S.C. §1342(p)(3). These provisions apply to municipal separate storm sewer systems, sometimes referred to as "MS4s," which are systems that handle only stormwater and not also sewage.[1]

In response to the 1987 amendments, the EPA promulgated extensive regulations governing the content of municipal stormwater permits. 55 Fed. Reg. 47990 (Nov. 16, 1990). Recognizing that it may be impracticable, or undesirable to issue individual permits for MS4s operated by multiple municipalities within the same geographic area, these regulations allowed issuance of a permit covering multiple MS4s. *See* 40 C.F.R. §122.26(a)(3)(i)-(vi).

B. The Permit That Is The Subject Of The Underlying Litigation.

In December 2001, the California Regional Water Quality Control Board, Los Angeles Region, issued an

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[1] In its decision, the Ninth Circuit refers to general municipal separate storm sewer systems as "ms4s," and the municipal separate storm sewer system maintained by petitioner as the "MS4." (*See* App.8 n.2.) For sake of clarity, petitioner will instead follow common practice and use the term "MS4" or "storm sewers" to refer generally to municipal separate storm sewer systems and will specifically indicate when it is referring to its own storm sewers or MS4.

NPDES permit (the "Permit") to 84 cities, the County of Los Angeles and petitioner Los Angeles County Flood Control District ("District"). (1 Joint Appendix, "JA" 52-254.) The purpose of the Permit was to regulate stormwater and urban runoff discharges from each of the 86 municipal storm sewers operated by the permittees. (*Id*.)

The Permit specifically recognized that "[c]ertain pollutants present in storm water and/or urban runoff may be derived from extraneous sources that Permittees have no or limited jurisdiction over." (1 JA 57, Permit ¶ B.2.) The Permit noted also that "Federal, State, Regional or local entities within the Permittees' boundaries or in jurisdictions outside the Los Angeles County Flood Control District, and not currently named in this Order, may operate storm drain facilities and/or discharge storm water to storm drains and watercourses covered by this Order." (1 JA 67, Permit ¶ D.2.) It further recognized the variability of stormwater discharges, finding that "[t]he quality of these discharges varies considerably and is affected by the hydrology, geology, land use, season, and sequence and duration of hydrologic events." (1 JA 56, Permit ¶ B.1.)

Although the Permit was issued to 86 separate entities, under its terms, each permittee was responsible only for its own discharge: "Each Permittee is responsible only for a discharge for which it is the operator." (1 JA 93, Permit ¶ G.4.) This Permit provision is consistent with federal regulation: "*Co-permittee* means a permittee to a NPDES permit that

is only responsible for permit conditions relating to the discharge for which it is operator." 40 C.F.R. §122.26(b)(1); *see also* 1 JA 103, Permit, Part 3 D.1 (providing that the District, designated as principal permittee, "is not responsible for ensuring compliance of any individual Permittee").

The Permit also included a monitoring and reporting program. (1 JA 210-254.) The monitoring and reporting program included several "Core Monitoring" elements, including "mass emissions" monitoring at seven mass-emissions monitoring stations in various river watersheds. (1 JA 219.) The objectives of this mass-emissions monitoring were to estimate "mass emissions" from the storm sewer systems; to assess trends in the mass emissions over time; and, to determine if the storm sewer systems were contributing to exceedances of water quality standards. (*Id*.) While other monitoring was included in the Core Monitoring required under the Permit, the mass-emissions stations monitoring results are the only monitoring results at issue in this case. As respondents admitted in the district court, the mass-emission monitoring stations for the Los Angeles and San Gabriel Rivers are located in the rivers themselves.[2]

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[2] In their Statement Of Genuine Issues Of Material Fact In Dispute filed in opposition to defendants' motion for summary judgment, respondents admitted that both monitoring stations were in the rivers. Defendants' first "uncontroverted" fact stated: "Plaintiffs allege that rainfall and urban runoff that becomes

(Continued on following page)

C. The Lawsuit.

On March 3, 2008, respondents Natural Resources Defense Council, Inc. and Santa Monica Baykeeper filed a complaint against the County of Los Angeles, individual members of its Board of Supervisors in their official capacity, the head of the Los Angeles County Department of Public Works, and petitioner District under 33 U.S.C. §1365(a). Respondents subsequently filed a first amended complaint asserting six claims for relief, with the first four claims alleging that discharges from the County's and petitioner District's storm sewers caused or contributed to exceedances of water quality standards at the mass-emissions monitoring stations in the Santa Clara River, Los Angeles River, San Gabriel River, and Malibu Creek watersheds in violation of Part 2.1 of the Permit. (Ninth Circuit Excerpt of Record "ER" 453-58; *see also* 414, 426, 430-45.) The district court referred to these allegations as the "watershed claims," a term the District will use here as well.

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collected in the flood control system contain pollutants that are in excess of 'water quality standards' adopted by the Regional Board. The plaintiffs base their allegations on samples taken at 'mass emission stations' *located in the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek, and on samples taken at Surfrider Beach*." (District Court Dkt. 140 at 2, Fact No. 1 (emphasis added).) Respondents' response was as follows: "First sentence: Disputed. . . . Second sentence: Undisputed." (*Id*.)

D. The District Court's Decision.

Respondents moved for partial summary judgment against the District with respect to exceedances of water quality standards in the Los Angeles and San Gabriel Rivers. (App.104; ER 9.)[3] Defendants, including the District, moved for summary judgment as to all watershed claims. (App.104-05; ER 9.)

Respondents contended that exceedances measured at the mass-emissions monitoring stations in and of themselves established a violation of the Permit that could be fairly attributable to the District's MS4. (App.117-18.) Defendants, including the District, contended in turn that the mass-emissions monitoring station data could not be used to determine compliance with the Permit (a contention rejected by the district court) and that, in any event, there was no evidence of a "discharge" from defendants' MS4 that violated the Permit. (App.116.)

In an opinion issued March 2, 2010, the district court initially denied both motions for summary judgment as to the watershed claims, concluding that an issue of fact existed as to whether pollutants in discharges from the District's MS4 exceeded the water quality standards set by the Permit. (App.105, 121-22.)

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[3] The parties moved for summary judgment with respect to other claims that are not relevant to this proceeding.

At the same time, the district court rejected respondents' contention that simply because the monitoring stations were within channelized portions of the rivers operated by the District as part of its flood control system, the District was responsible for any exceedances measured there. This was because in order for there to be a "discharge" for which petitioner District could be liable under the CWA, it was necessary that water be discharged from a "point source." The district court noted that this Court had expressly held in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004), that simply moving water between two portions of the same water body did not constitute a "discharge" from a point source under the Clean Water Act. (App.119.) The district court emphasized that there was no evidence that the Los Angeles River and San Gabriel River below the mass-emissions monitoring stations were bodies of water distinct from the MS4 above the monitoring stations, and found there was no evidence to "show where the MS4 ends and either River begins." (App.119.)

As the district court observed:

> In order for the District's actions to violate Part 2.1 of the Permit, it must be discharging pollutants from a point source. The Court has been presented with no evidence clearly establishing that the District is discharging pollutants from any given point source at or near the monitoring stations.

(App.119.)

The district court ordered the parties to file supplementary pleadings indicating whether there were any facts showing that the standards-exceeding pollutants identified at the mass-emissions monitoring stations had at any time passed through defendants' "outflows"[4] at or near the time the exceedances were observed in the monitoring station monitoring data. (App.122.)

On April 26, 2010, following receipt of supplementary briefing, the district court granted summary judgment to defendants, including petitioner, on all watershed claims. (App.98-99.) The court found that respondents had failed to present evidence that the standards-exceeding pollutants passed through the District's MS4 "outflows" at or near the time the exceedances were observed. (App.100.) The district court further found that respondents provided no evidence that the mass-emissions monitoring stations themselves were located at or near one of petitioner's "outflows." (*Id*.) The court again emphasized that under the Permit, the District could not be held liable for exceedances that may have been caused by discharges from "outflows" maintained by other co-permittees upstream from the mass-emissions monitoring stations. (App.101-02.)

---

[4] The district court used the term "outflow" instead of "outfall" which is the regulatory term for the point at which compliance with an MS4 permit's terms is measured with respect to discharges into navigable waters. *See* 40 C.F.R. §§122.26(b)(9) and 122.45(a).

E. The Ninth Circuit's Decision.

Following briefing by the parties and oral argument, on March 10, 2011, the Ninth Circuit issued its published opinion reversing the district court in part, and directing the court to enter summary judgment for respondents as against the District with respect to the watershed claims regarding the Los Angeles and San Gabriel Rivers. (App.51-52, 93-94, 96-97.)

Writing for the court, Judge Smith agreed with the district court that, contrary to respondents' contention, the mere presence of polluted stormwater at the mass-emissions monitoring stations did not *ipso facto* establish petitioner's liability. (App.88-89.) The Ninth Circuit held, however, that the district court had erred in concluding that there had not been a "discharge" under the CWA from the District's MS4 into the Los Angeles or San Gabriel Rivers. The court found that the monitoring stations were in concrete channels maintained by the District and hence, when water exited these channels and flowed into the "naturally occurring" portions of the "rivers," this constituted a "discharge" from an "outfall" for purposes of imposing liability on the District for violation of the Permit. (App.91-92.) The court explained:

> [T]here is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River and San Gabriel River. Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in a section of

> the MS4 owned and operated by the District, when pollutants were detected, they had *not* yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged into the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state *man-made* construction – not a *naturally occurring* Watershed River.

(App.91-92 (emphasis added).)

The court continued:

> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that the MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

(App.92.)

The District timely filed a petition for panel rehearing and rehearing en banc. It noted that the Ninth Circuit's opinion adopted a theory of liability that had not been briefed by the parties, namely that

the District's channelization of portions of the Los Angeles and San Gabriel Rivers where the mass-emissions monitoring stations were located somehow transformed these portions of the rivers from navigable waters into non-navigable discrete portions of the District's MS4, thus creating a "discharge" from an "outfall." As the District explained, this was flatly contrary to uniform statutory and case law holding that artificial channelization of navigable waters does not alter their character for purposes of the CWA. Indeed, as the District observed, Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715, 769 (2006), noted that the Los Angeles River "has been encased in concrete and steel over a length of some 50 miles."

Moreover, the District noted that the Ninth Circuit's *sua sponte* resolution of the heretofore unbriefed and uncontested issue concerning navigability was directly contrary to the EPA's specific finding (in a report readily available on its website) that the *entire* Los Angeles River, from its mouth to its headwaters, including the channelized portions discussed in the Ninth Circuit opinion, was a "traditional navigable water" of the United States.[5]

Further, the District pointed out that by holding that channelizing portions of the navigable rivers

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[5] http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf (last visited Sept. 2, 2012). The District requested judicial notice of the EPA report.

somehow transformed their character so as to create a discharge from an "outfall" within the meaning of the Clean Water Act, the court had effectively overruled this Court's decision in *Miccosukee Tribe*, since the court was finding a permit violation based on the flow of water within a single navigable body of water.

The Ninth Circuit requested respondents to respond to the petition for rehearing, and respondents did so.

On July 13, 2011, the Ninth Circuit issued its order withdrawing its prior opinion, and issuing a new opinion. (App.1-2.) The only major modification of the prior opinion was to address an argument raised by the parties in their briefing that was not addressed in the prior opinion concerning the appropriate remedy in the event Permit violations were found. (App.37-38.) The court, however, repeated verbatim its reasoning from the prior opinion that the District was liable for a "discharge" from an "outfall" based on the fact that the monitoring stations were within portions of the river that the District had channelized for flood control purposes. (*See* App.44-45, and *compare to* App.91-92.) The court did not address any of the points raised in the petition for rehearing concerning long-standing law that a water body's status as a navigable water for purposes of the CWA is not affected by its channelization or other man-made improvements. It declined to address, let alone reconcile its holding with, the EPA's own determination that the Los Angeles River, including the channelized portions, constituted a "traditional

navigable water," and summarily denied the District's request for judicial notice.

Nor did the Ninth Circuit address this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that there could not be a "discharge" within the Clean Water Act based upon merely transferring water from one portion of a single body of water into another.

SUMMARY OF ARGUMENT

The Clean Water Act regulates the discharge of pollutants into the navigable waters of the United States from municipal storm sewers. It does so by imposing a permit scheme on discharges from municipal storm sewers into navigable waters. 33 U.S.C. §1342(p).

Here, respondents Natural Resources Defense Council, Inc. and Santa Monica Baykeeper sued petitioner Los Angeles County Flood Control District, asserting that the District had violated its municipal stormwater permit by causing exceedances of water quality standards in the Los Angeles and San Gabriel Rivers through discharges from the District's storm sewers. Respondents made no effort to establish that water containing levels of pollutants exceeding those allowed by the Permit was discharged into the rivers through any of the District's storm sewers upstream from the monitoring stations. Instead, respondents argued that they need not show such a discharge; it

was enough that monitoring undertaken at mass-emissions monitoring stations downstream from these storm sewers – monitoring stations which they admitted were located in the Los Angeles and San Gabriel Rivers – indicated the presence of pollutants at levels exceeding the Permit's standards.

Both the district court and the Ninth Circuit rejected respondents' core liability argument, noting that numerous other entities above the monitoring stations also discharged stormwater into the rivers, and that it was necessary for respondents to provide some evidence that the pollutants at issue stemmed from a District storm sewer outfall, and not from another source. Indeed, the district court granted summary judgment to the District on this claim, noting that respondents had not provided any evidence to establish any discharge by the District.

The Ninth Circuit nonetheless reversed, relying on a newly-minted theory of liability, one not argued or relied upon by the parties. Even though respondents admitted that the monitoring stations were located in the Los Angeles and San Gabriel Rivers, the Ninth Circuit held that since the monitoring stations were in channelized portions of the rivers that the District maintained for flood control, water flowing out of those channels into "naturally occurring" portions of the rivers downstream constituted a "discharge" from an "outfall" for purposes of finding a permit violation by the District. In sum, the Ninth Circuit concluded that water flowing from one portion of a river into another portion of the same river

constituted a "discharge" from a "point source" and "outfall" within the meaning of the Clean Water Act.

The Ninth Circuit's construction of the Clean Water Act is untenable and the decision must be reversed. It is directly contrary to basic provisions of the Clean Water Act, the entire regulatory scheme concerning MS4s and the decisions of this Court.

1. In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004), this Court held that merely transferring water from one portion of the same body of water to another does not constitute a "discharge" for purposes of the NPDES permit system of the Act. This was consistent with the Act's definition of the phrase "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12); 541 U.S. at 102. As this Court observed, merely transferring water from one portion of a body of water to another portion of the same water body does not result in the "addition" of anything to that water body.

The Ninth Circuit's decision is flatly inconsistent with the basic holding of *Miccosukee Tribe*, as it premised a discharge in this case based upon the mere flow of water within the Los Angeles and San Gabriel Rivers. The Ninth Circuit did not address this plain holding of *Miccosukee Tribe* nor offer a principled basis for departing from its strictures.

2. The Ninth Circuit's finding that there may be a "discharge" from channelized portions of a river into

"naturally occurring" portions of a river solely because one portion is man-made, is contrary to uniform statutory, regulatory and case authority making it clear that whether a body of water is man-made or improved is not relevant to the question of whether it is a navigable water of the United States. This Court and the lower federal courts have repeatedly recognized that man-made and improved bodies of water constitute navigable waters of the United States. The mere fact that the channels in question were "man-made" does not alter their character as waters of the United States nor somehow transform them into a "point source" for purposes of a "discharge" from an "outfall" under the Clean Water Act. Hence, there is no basis for the Ninth Circuit's creation, out of whole cloth, of an exception to this well-established principle for portions of navigable waters channelized for flood control purposes.

3. Nothing in the statutory or regulatory scheme concerning municipal storm sewers suggests that a portion of a river channelized for flood control purposes that merely transfers water from one part of a river to another can constitute a "point source" or an "outfall" under the Act. To the contrary – the EPA expressly defined the regulatory term "outfall" to mean a point source "at the point where a municipal separate storm sewer discharges to waters of the United States" and explicitly excluded from the definition of an outfall "conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the

United States." 40 C.F.R. §122.26(b)(9). The improved portions of the Los Angeles and San Gabriel Rivers that the Ninth Circuit found were municipal storm sewers that discharged into navigable waters are "conveyances that connected segments of the same streams and are used to convey waters of the United States" and hence are expressly excluded from the definition of "outfall."

4. Nothing in the legislative history of the Clean Water Act suggests that Congress intended to require an NPDES permit for the mere passage of water through navigable water bodies improved for flood control purposes. Congress did not enact a separate definition of "discharge" with respect to MS4s. Congress instead incorporated the existing definition which makes it clear that there can be no discharge unless there is the "addition" of pollutants, which, as the Court held in *Miccosukee Tribe*, forecloses the finding of a discharge premised upon merely transferring water within a single body of water.

Moreover, a basic principle underlying the Clean Water Act is that pollution is best addressed at its source. The Ninth Circuit's decision, by contrast, imposes liability miles downstream from the source of the pollution based solely on the fact that polluted water has passed through a portion of a river channelized for flood control purposes. Such a holding does little or nothing to address the actual source of pollutants within the channelized portions of the river that may have been discharged into the river by other

entities some distance upstream. That is particularly the case here, where literally hundreds of entities, both public and private, discharge into the Los Angeles and San Gabriel Rivers upstream from the channelized portions of the rivers containing the monitoring stations. None of the purposes of the Act is furthered by finding a "discharge" based solely upon water moving through a channel improved for flood control purposes.

5. Construing the Clean Water Act as imposing responsibility for a discharge based solely upon the flow of water from one portion of a river to another through a portion channelized for flood control purposes will create confusion concerning the regulatory authority of federal and state agencies and impose unintended and unacceptable costs on local entities that must safeguard the life and property of millions of citizens through basic flood control measures.

Under the Clean Water Act, navigable waters and municipal storm sewers, as a point source, are distinct. The status of a body of water as a "navigable water" is the *sine qua non* of the jurisdiction of both the Army Corps of Engineers and the EPA over such waters. Adopting the Ninth Circuit's view means that those portions of the San Gabriel and Los Angeles Rivers that are channelized for flood control become part of the District's MS4, and are not navigable waters. As a consequence, neither the District nor other entities will then be required to obtain a permit from the Army Corps for work within those portions of the rivers, as they are no longer navigable waters.

Likewise, in order to improve water quality, the EPA may specify total daily maximum loads ("TDMLs") for certain pollutants in navigable waters. These TMDLs will not apply to channelized portions of the rivers that would now be separate and distinct from navigable waters. The result is that thousands of miles of improved navigable waters will be stripped of basic protections under the Act, or at the very least be the subject of costly litigation to clarify regulatory authority. Similarly, a holding that portions of rivers channelized for flood control purposes may somehow be regulated both as navigable waters and as MS4s will create confusing, potentially conflicting overlapping regulatory authority, again spawning protracted litigation.

Finally, imposing liability on local entities that may channelize portions of navigable waters for flood control will expose them to substantial liability for "discharges" of pollutants over which they effectively exercise no control. An entity merely channelizing a portion of a navigable water has little or no control over what entities upstream may discharge into the river through their own outfalls. The exposure to this potential liability and multiple additional layers of regulatory compliance will vastly increase the cost of essential flood control protection.

There is no justification for the Ninth Circuit's departure from basic principles of the Clean Water Act and the decisions of this Court. The decision and judgment of the Ninth Circuit should be reversed,

with directions that judgment be reinstated for the District on these claims.

ARGUMENT

THE PROVISIONS OF THE CWA AS CORRECTLY INTERPRETED BY THIS COURT IN *SOUTH FLORIDA WATER MANAGEMENT DISTRICT V. MICCOSUKEE TRIBE* MAKE CLEAR THAT THE FLOW OF WATER WITHIN A NAVIGABLE WATER IMPROVED FOR FLOOD CONTROL PURPOSES IS NOT A "DISCHARGE" UNDER THE CWA.

The Clean Water Act regulates the addition of pollutants into the waters of the United States. With respect to pollutants in stormwater from storm sewers, the Act provides for the issuance of permits to municipalities on an individual or collective basis concerning discharge from municipal separate storm sewer systems – MS4s. 33 U.S.C. §1342(p)(3); 40 C.F.R. §122.26.

The Ninth Circuit held that respondents had established that the District had discharged pollutants in excess of water quality standards set forth in the Permit, because exceedances were shown by mass-emissions monitoring stations located in portions of the Los Angeles and San Gabriel Rivers that had been improved by the District for flood control purposes. The court did not find that respondents had shown that the District's storm sewer system had

discharged pollutants upstream of the monitoring stations. (App.41-44.) Rather, the court concluded that improvements within the rivers could constitute point sources for purposes of a discharge through an outfall:

> Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in the section of the MS4 owned and operated by the District, when pollutants were detected, they had not yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intrastate *man-made* construction – not a *naturally occurring* Watershed River.

(App.44 (emphasis added).)

The court continued:

> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways.

(App.45.)

As noted, *supra*, footnote 2, respondents admitted in the district court that the monitoring stations

in question were located *in* the Los Angeles and San Gabriel Rivers, respectively. This was not surprising, since as the district court noted in its description of respondents' allegations, the operative complaint specifically alleged that the monitoring stations were within the rivers. (App.117.) The Ninth Circuit itself cited the District's website, which states that the monitoring stations are within the rivers. (App.18 n.4.) Thus, the Ninth Circuit found a discharge from a point source based solely upon water moving through a river improved for flood control purposes, or, in other words, a discharge from a point source based upon the mere flow of water within a single body of water.

The Ninth Circuit's decision runs afoul of basic jurisdictional provisions of the CWA's NPDES Permit System which require the "addition" of a pollutant for purposes of a discharge and that any discharge occur from a point source – principles made clear by this Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The Ninth Circuit's decision is untenable and must be reversed.

A. The Ninth Circuit Decision Must Be Reversed Because It Is Contrary To The Provisions Of The CWA And This Court's Decision In *Miccosukee Tribe* Making It Clear That Mere Transfer Of Water Between Two Points Of A Single Body Of Water Cannot Constitute The "Addition Of Pollutants" To A Navigable Water Of The United States For Purposes Of A Discharge Under 33 U.S.C. §1362(12).

The issue before the Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), was whether the flow of water from a canal, through a pumping station and into a reservoir, required a discharge permit under the NPDES. 541 U.S. at 98-99. The lower courts had held that a permit was required, concluding that the two bodies of water – the canal and the reservoir – were distinct. *Id*. at 99.

Among the issues before this Court was whether a "point source" needed to be the original source of a pollutant in order to require a permit for discharging pollutants into waters of the United States. *Id*. at 105. The Court rejected that reading of the Act, concluding that "discharge of a pollutant" under 33 U.S.C. §1362(12) "includes within its reach point sources that do not themselves generate pollutants." *Id*.

However, the Court agreed with the parties, that if the canal and reservoir were in fact not distinct

bodies of water "but instead are two hydrologically indistinguishable parts of a single water body," no permit would be required because no "discharge" had occurred. *Id*. at 109-10. This was consistent with the CWA's definition of the phrase "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12); 541 U.S. at 102. Merely transferring water from one portion of the same body of water to another does not result in the "addition" of anything. As the Court explained:

> The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants. As the Second Circuit put it in [*Catskill Mountains Chapter of*] *Trout Unlimited*[*, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)], "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot."

Id. at 109-10.

Because the record did not contain enough information for the Court to determine whether the canal and reservoir were a single body of water, or distinct bodies of water, the Court remanded for further proceedings. 541 U.S. at 112.

In *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), the Court

reaffirmed that "[t]he question in *Miccosukee* was whether a pump between a canal and an impoundment produced a 'discharge of a pollutant' within the meaning of §402 [citation] and the Court accepted the shared view of the parties that if two identified volumes of water are 'simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants'. . . ." 547 U.S. at 381.

Consistent with the provisions of §1362(12) and *Miccosukee Tribe*, the courts, at the federal government's urging, have held that mere transfer of water within a single navigable body does not constitute a discharge. *See*, *e.g.*, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) (no NPDES permit required for discharge of water from dam where no pollutant added to the water and noting the EPA's position that a pollutant is "added" when it is introduced into a water from the "outside world" by a point source); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (no NPDES discharge occurred for permit purposes based upon transfer of water from reservoir through power turbines into Lake Michigan since water was simply transferred back and forth between the reservoir and lake).

Similarly, in adopting its water transfer rule (40 C.F.R. §122.3(i)),[6] the EPA has taken the position that a mere transfer of waters of the United States without subjecting the water to intervening industrial, municipal or commercial use does not constitute a discharge for purposes of an NPDES permit, citing the statutory definition of "discharge." 73 Fed. Reg. 33697, 33700 (June 13, 2008). The EPA has stated that it "believes that an addition of a pollutant under the Act occurs when pollutants are introduced from outside the waters being transferred." *Id*. at 33701.

In holding that the District was liable for permit violations based upon waters of the Los Angeles and San Gabriel Rivers passing through the concrete channels within the rivers, the Ninth Circuit cited *Miccosukee Tribe* but did so only in the context of asserting that it was not necessary to show that the District's MS4 generated the pollutants. (App.46-47.) Thus, while the court correctly cited *Miccosukee Tribe* for the proposition that a "discharge of a pollutant" as defined by 33 U.S.C. §1362(12) includes point sources that do not themselves generate pollutants, the court

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[6] 40 C.F.R. §122.3(i) provides as follows:

Exclusions.

(i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

flatly ignored the basic premise of *Miccosukee Tribe* – that a mere transfer, or flow, of water between two points of a single body of water cannot constitute the "addition of pollutants" to a navigable water of the United States.

The Ninth Circuit's failure to follow *Miccosukee Tribe*'s holding and the plain language of 33 U.S. §1362(12) can only be ascribed to its statement that the monitoring stations within the improved portions of the rivers were distinct "as a matter of law and fact" because "the MS4 is an intra-state man-made *construction* – not a *naturally occurring* Watershed River." (App.44 (emphasis added).) Thus, it appears that the Ninth Circuit deemed improved portions of the rivers to be separate from downstream portions of the rivers based upon a particular physical fact, i.e., that the channelized portions of the river were "man-made" and not "naturally occurring," and that because the channelization occurred for flood control purposes and the monitoring stations placed as part of the MS4 permit, that the legal status of the channelized portions of the river somehow made them distinct from the navigable waters themselves for purposes of creating a discharge from a point source under the CWA.

Yet, neither the man-made nature of the channelized portions of the river, nor provisions of the CWA, nor applicable regulations concerning MS4s justify the Ninth Circuit's departure from *Miccosukee Tribe*.

B. The Ninth Circuit's Conclusion That Man-Made Alterations To A Navigable Water May Change Its Character For Purposes Of The Clean Water Act Is Unsupported By The Act Itself And Relevant Regulations.

The Clean Water Act regulates the addition of pollutants to "navigable waters" which is defined by 33 U.S.C. §1362(7), as meaning "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). The Act's implementing regulations in turn, define "waters of the United States" to mean:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (b) All interstate waters, including interstate "wetlands";
>
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, west meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for

> industrial purposes by industries in interstate commerce;
>
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
>
> (f) The territorial sea; and
>
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (a) through (f) of this definition.

40 C.F.R. §122.2.

Although the Ninth Circuit cited this regulation to support its conclusion that the man-made nature of the portions of the channels located in the Los Angeles and San Gabriel Rivers somehow altered the rivers' status as navigable waters so there could be a discharge from the District's MS4 within the meaning of the Clean Water Act, the language of the regulation belies that construction. Nowhere in 40 C.F.R. §122.2 is it stated that a navigable water must be free of man-made improvements. Indeed, nowhere is there any reference to a "naturally occurring" body of water. (*Compare* 40 C.F.R. §122.2 *to* App.44.)

The Ninth Circuit cites no case holding or even suggesting that the status of a body of water as a navigable water changes depending upon whether it has been subject to man-made improvements. While

the court cited *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001), nothing in that decision supports the strained proposition urged by the Ninth Circuit. In fact, in *Headwaters*, the Ninth Circuit found that man-made irrigation canals were "waters of the United States." 243 F.3d at 533.

This Court, in *Rapanos v. United States*, 547 U.S. 715 (2006), although divided on the construction of the phrase "waters of the United States," uniformly recognized that man-made bodies of water could constitute such waters under the Act. As the plurality observed, "a permanently flooded man-made ditch used for navigation is normally described, not as a 'ditch,' but as a 'canal.'" 547 U.S. at 736 n.7. Indeed, in his concurring opinion, Justice Kennedy invoked the Los Angeles River as emblematic of a "water of the United States" and highlighted the fact that it was subject to man-made improvements for virtually all of its length:

> The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. [Citation.] Yet it periodically releases water volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles.

Id. at 769.

The Court's recognition that "navigable waters of the United States" necessarily included man-made or improved water bodies is not surprising. This Court

has found that improved waterbodies are "navigable waters," in defining Congress' regulatory authority under the Commerce Clause. *Kaiser Aetna v. United States*, 444 U.S. 164, 172-73 (1979) (private pond, dredged and opened to navigable waters, is a navigable water). *See also*, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-08 (1940) (error to determine navigability based on natural conditions only; a waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids are required before commercial navigation may be undertaken).

Moreover, the regulations implementing the Rivers and Harbors Act, 33 U.S.C. §401, *et seq.*, provide that artificial channels, even those that are a "major portion" of a river, can constitute a navigable water of the United States. 33 C.F.R. §329.8(a)(1)-(2). The regulations also provide that a water body which was "navigable in its natural or improved state . . . retains its character as 'navigable in law' even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions." 33 C.F.R. §329.9(a).

The lower federal courts have similarly recognized that navigable waters are not limited to unaltered "naturally occurring" bodies of water. In *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), the court held that a drainage ditch into which the defendant had discharged industrial wastewater was a "navigable water" of the United States within the meaning of the CWA. 108 F.3d at 1339-40. The court

rejected the contention that because the drainage ditch was man-made, it could not constitute a water of the United States for purposes of the Act:

> There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes. The fact that bodies of water are "man-made makes no difference. . . . That the defendants used them to convey the pollutants without a permit is the matter of importance."

108 F.3d at 1342.

Similarly, in *United States v. Vierstra*, 803 F. Supp. 2d 1166 (D.Idaho 2011), *aff'd*, 2012 WL 3269211 (9th Cir. Aug. 13, 2012), the court held that a man-made canal constituted a water of the United States because it met both the plurality standard of *Rapanos* as well as the "significant nexus" requirement of Justice Kennedy's concurring opinion. 803 F. Supp. 2d at 1168-70. In *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), applying *Rapanos*, the court held that a man-made creek constituted a water of the United States for purposes of the Act. 496 F.3d at 988-91.

There is simply no support for the Ninth Circuit's statement that there may be a discharge from a point source under the CWA based solely on the fact that water has flowed from an improved "man-made" portion of a river into a purportedly "naturally occurring" portion of the same river. Nor, as we discuss, do

the statutes and regulations concerning MS4s suggest that mere transfer of water through a navigable water improved for flood control purposes into another portion of the same river can constitute a discharge from a point source under the CWA.

C. None Of The Statutory Or Regulatory Provisions Concerning MS4s Suggests That Mere Flow Of Water From One Portion Of A River Through A Channel Improved For Flood Control Purposes Into Another Portion Of The River May Constitute A Discharge From A Point Source Under The CWA.

As noted, the Ninth Circuit concluded that the channelized portions of the river containing the monitoring stations were somehow distinct from the navigable waters because they were "man-made" and "intra-state" constructions maintained for flood control and part of the District's MS4. Implicit in the Ninth Circuit's statement is the suggestion that an MS4 may be coextensive with a navigable water; that is to say, when a river is channelized or otherwise altered for flood control purposes, it becomes part of an MS4, and hence somehow distinct from the river itself for purposes of a discharge under the CWA.

The Ninth Circuit's reasoning does not withstand scrutiny. There is no suggestion in the statutory scheme that for purposes of a discharge, an MS4 and a navigable water can be one and the same. To the contrary, as the EPA noted in the preamble to the

initial proposed MS4 regulations, MS4s and navigable waters are distinct:

> In addition to identifying outfalls from municipal storm sewer systems for the development of a management program to reduce pollutants in storm water discharges, it is also important to identify the locations of such outfalls to clarify *where the storm sewer ends and where waters of the United States begin*. *In many situations, waters of the United States that receive discharges from municipal storm sewers can be mistakenly considered to be part of the storm sewer system.* Permit applicants should refer to the regulatory definition of waters of the United States at 40 C.F.R. 122.2 for appropriate guidance.

53 Fed. Reg. 49416, 49453 (Dec. 7, 1988) (emphasis added).

To be sure, as the district court recognized (App.119), it may be difficult as both a factual and legal matter to discern where the rivers leave off and where the District's MS4 begins. And, District personnel have referred generally to channelized portions of the Los Angeles and San Gabriel Rivers as being part of the District's MS4, given that improvements in the river indisputably were undertaken for flood control purposes. Even the United States, in its Brief as Amicus Curiae at the petition stage, conflated the MS4s with the rivers, stating that "the portions of the MS4 that contain the relevant monitoring stations actually lie within . . . the Los Angeles

and San Gabriel Rivers." (Brief for United States as Amicus Curiae ("BFUS") at 14-15.)[7] Nevertheless, the District has, consistent with the CWA, the underlying regulations and the terms of the Permit, consistently argued that there is no "discharge" within a channelized river itself, and pointed out that respondents had failed to establish any exceedances from discharges from the District's MS4 outfalls into the rivers at or upstream of the monitoring stations.

By regulatory definition, an MS4 must be distinct from waters of the United States for purposes of a discharge. 40 C.F.R. §122.26(b)(8) defines a "municipal separate storm sewer" as a publicly owned "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)," "designed or used for collecting or conveying storm water," that "*discharges to waters of the United States*." *Id*. (emphasis added).

Without a doubt, channelization of the Los Angeles and San Gabriel Rivers created a system "designed or used for collecting or conveying storm water." 40 C.F.R. §122.26(b)(8)(ii). The channels,

[7] The United States, however, correctly concluded that the "discharges" had already occurred "from upstream MS4 outfalls" and that the Ninth Circuit was "mistaken" in determining that "polluted stormwater flowing through the monitoring stations was *later* discharged from the MS4 into the rivers." (BFUS at 15 (emphasis in original).)

however, do not "discharge[ ] to waters of the United States" – they *are* waters of the United States.

The clear distinction between MS4s and navigable waters for purposes of a discharge is fundamental to the implementation of the stormwater program. The foundation of permit compliance is measurement at an "outfall." 40 C.F.R. §122.45(a). Significantly, the EPA has expressly defined "outfall" from an MS4 as *excluding* the mere transfer of water within a navigable water. 40 C.F.R. §122.26(b)(9) defines "outfall" as:

> a point source as defined by 40 C.F.R. 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and *does not include* open conveyances connecting two municipal separate storm sewers, or pipes, tunnels *or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.*

40 C.F.R. §122.26(b)(9) (emphasis added).

A navigable water improved for flood control clearly falls outside the definition of "outfall," since it merely connects segments of the same stream or other waters of that navigable water body and is used to convey waters of the United States.

The definition of MS4s as point sources distinct from, and not coextensive with, waters of the United States reflects the basic definitional foundations of the CWA, which, as Justice Scalia noted for the

plurality in *Rapanos v. United States*, 547 U.S. at 735, "conceive of 'point sources' and 'navigable waters' as separate and distinct categories."

Consistent with *Miccosukee Tribe*, the applicable regulations make it clear that for purposes of imposing liability for "discharge of a pollutant" in violation of 33 U.S.C. §1311(a), it is necessary to establish that there was an "addition of any pollutant to navigable waters from any point source" under 33 U.S.C. §1362(12) and there can be no such "addition" by simply transferring water within a single navigable water of the United States. The Ninth Circuit was not free to discard the statutory definition of "discharge." As this Court recognized in *S.D. Warren Co. v. Maine Board of Environmental Protection,* 547 U.S. 370, the CWA is a statute whose technical definitions were worked out with great effort in the legislative process. *Id*. at 380, citing H. R. Rep. No. 92-911 (1972) ("[I]t is extremely important to an understanding of [§402] to know the definition of various terms used and a careful reading of the definitions . . . is recommended. Of particular significance [are] the words 'discharge of pollutants' ").

A "discharge" from an MS4 occurs only when water is discharged from an "outfall" into the navigable waters. Petitioner's pipes, drains and other elements of its storm sewer system that discharge to the Los Angeles and San Gabriel Rivers plainly fall within the definition of "outfall" and are therefore subject to the Clean Water Act's proscriptions. Yet, as both the district court and Ninth Circuit recognized

here, respondents – despite multiple opportunities – made no effort to establish exceedances attributable to water flowing from the District's MS4 outfalls discharging into either river. The Ninth Circuit's finding of a discharge based solely upon the flow of water from one part of a river into another part of the same river is flatly inconsistent with the provisions of the CWA defining "discharge," and other applicable statutes and regulations concerning MS4s. The Ninth Circuit judgment must be reversed.

D. Nothing In The Legislative History Of The CWA Supports Finding A Discharge Based Upon The Mere Flow Of Water Through A Navigable Water Improved For Flood Control Purposes, And Such A Construction Is Contrary To The Legislative Purpose Underlying The CWA – To Address Pollutants At Their Source.

Nothing in the legislative history underlying the provisions of the CWA concerning MS4s even remotely suggests that Congress intended to regulate the "discharge" of pollutants by regulating water simply flowing through a channelized portion of a river. As a threshold matter, Congress did not carve out a separate definition of "discharge" with respect to permit requirements for MS4s; rather, it incorporated the Act's definition of "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source. . . ." 33 U.S.C. §1362(12). Not surprisingly, this definition was specifically incorporated

in the Permit. (1 JA 173-174.) As the Court observed in *Miccosukee Tribe*, the requirement that there be an "addition" of a pollutant to navigable waters forecloses any interpretation of the phrase to include simply moving water within a single water body. Had Congress intended to somehow submit flood control channels within navigable waters to the permit requirements of the CWA, it would not have incorporated the existing definition of "discharge" as requiring the "addition" of pollutants to a body of water.

In contrast, when Congress intended to treat MS4s differently than other entities regulated under the Act it did so in unmistakable fashion. For example, industrial stormwater dischargers must meet all applicable requirements of 33 U.S.C. §1342 and 33 U.S.C. §1311. 33 U.S.C. §1342(p)(3)(A). However, municipal stormwater dischargers are not required to meet these requirements, but instead must meet only the "more flexible" requirements set forth in 33 U.S.C. §1342(p)(3)(B). *City of Abilene v. U.S. E.P.A.*, 325 F.3d 657, 659-60 (5th Cir. 2003).

More fundamentally, in enacting the CWA, Congress generally intended that pollutants be controlled at the source whenever possible. *See* S. Rep. No. 92-414, p. 77 (1972) (definition of navigable waters should be broad because it is "essential that discharge of pollutants be controlled at the source"). Yet, finding a discharge of pollutants based solely upon water passing through a channel within a river and the resulting imposition of liability on the entity

maintaining the channel, does nothing to address the actual source of pollutants.

For example, 42 separate incorporated cities within the Los Angeles River Watershed discharge to the river upstream of the mass-emissions monitoring station. (Ninth Circuit Supplemental Excerpt of Record "SER" 229.) In the San Gabriel River Watershed, at least 276 industrial and 232 construction stormwater dischargers were permitted to discharge upstream of the mass-emissions monitoring station during the relevant time period, along with more than 20 separate incorporated cities. (SER 218, 229.) Any, or perhaps all of these other entities may be responsible for discharging pollutants from outfalls that exceeded the Permit's water quality standard requirements, yet imposing liability on the District premised upon the mere presence of polluted water in the District's downstream channelized portions of the rivers does nothing to ameliorate the discharge of pollutants by such entities.[8]

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[8] This is why it has been the District's position (supported by the plain language of the Permit) that the mass-emission monitoring stations in fact were not designed to measure the compliance of any individual permittee's MS4 upstream from the monitoring stations, but rather, simply to measure the general "health" of the rivers. Detection of exceedances at the monitoring stations does not provide any information as to which of any of the multitude of entities discharging into the rivers through MS4 outfalls upstream of the stations may have added the pollutants. The district court disagreed in part, concluding that the monitoring stations could be used to determine the compliance

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Nor does it make sense to affix responsibility on the District to somehow address these exceedances, since it is not within the District's power to control what flows from the outfalls of the multitude of upstream entities. Unlike the context of an industrial permit, where polluted water may be treated at its source and the discharger can make the choice either to treat or stop the discharge, as Congress recognized in enacting the CWA, municipal stormwater does not lend itself to traditional "end-of-the-pipe" treatment technology.[9] Indeed, recognizing the more flexible and

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of an individual permittee, but only insofar as respondents could somehow show a discharge from an outfall in close enough proximity to the monitoring station to establish that the water flowing from the outfall exceeded permit standards. As the district court noted, despite two opportunities to do so, respondents never showed any such exceedances from any MS4 outfall of the District at or near the monitoring stations. (App.100.)

[9] In addressing the type of pollution control programs that will be required by municipal storm water permittees under 33 U.S.C. §1342(p)(3)(B)(iii), EPA stated:

> When enacting this provision, Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers solely through traditional end-of-pipe treatment and intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits for industrial process discharges or POTWs. The legislative history indicates, municipal storm sewer system's "permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge."

55 Fed. Reg. 47990, 48037-38 (Nov. 16, 1990) (quoting Vol. 132 Cong. Rec. S16425).

comprehensive approach to this problem, the EPA has encouraged system-wide permits of the sort at issue here rather than separate permits for municipal stormwater permittees. 40 C.F.R. §122.26(d); 55 Fed. Reg. at 48043.

There is no indication that Congress contemplated, let alone intended, to require a public entity that has improved a navigable water for basic flood control protection to incur the substantial cost of building and operating water treatment facilities solely to treat exceedances as a result of stormwater flowing through a portion of the river in which it operated flood control channels, notwithstanding the fact that pollutants may have been added by other entities far upstream.[10] Whatever measures may be taken by a permittee to address exceedances in stormwater, as a basic proposition it makes sense that they be undertaken by the entity that can control the addition of that pollution, not an entity that is simply downstream with no control over that addition.

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[10] The impracticalities of such an approach in the context of the Los Angeles and San Gabriel Rivers is particularly apparent given that the rivers are a feast or famine proposition – running at barely a trickle during summer months, but flowing to capacity during torrential rains. *See, e.g., Rapanos v. United States*, 547 U.S. at 769 (Kennedy, J., concurring) (observing that the Los Angeles River varies from a "trickle" to having "water volumes" that are "powerful and destructive").

Nothing in the general provisions of the CWA, nor any of its specific provisions concerning MS4s, evinces any congressional intent that a public entity be held responsible for a discharge of pollutants premised solely upon the flow of water through a navigable water improved for flood control purposes, and imposition of liability on such a basis runs counter to the Act's underlying principle that pollutants be addressed at their actual source. For this reason too, the Ninth Circuit's decision is untenable and must be reversed.

E. Permitting A "Discharge" To Be Premised On Mere Flow Of Water Through A Portion Of A River Improved For Flood Control Purposes Blurs The Distinction Between Navigable Waters And MS4s, Creating Confusion With Respect To The Regulatory Authority Of Federal Agencies And Imposing Substantially Increased Costs On The Agencies Engaged In Basic Flood Control Planning.

As noted, based upon the provisions of the Clean Water Act and regulations concerning MS4s, MS4s are distinct from navigable waters. Yet, affirming the Ninth Circuit's decision and finding a discharge here based upon the mere transfer of water through channels improved for flood control purposes, would inevitably blur the distinction between MS4s and navigable waters. This will have a profound adverse

effect on federal, state and local agencies engaging in pollution control and flood protection.

First, if, as the Ninth Circuit states, portions of a river improved for flood control purposes are somehow distinct from "naturally occurring" portions of the river, the fundamental authority of federal agencies over such improved portions of a river is called into question. This is because the authority of the EPA and the Army Corps of Engineers under the Act is derived from the status of water bodies as navigable waters.

For example, the EPA has the authority to adopt new and modified water quality standards in "the navigable waters involved" if water quality standards submitted by a state are not consistent with applicable requirements of the Act or the Administrator determines that a revised or new standard is necessary to meet the Act's requirements. 33 U.S.C. §1313(c)(4). Further, both the EPA and states with delegated authority can adopt "total maximum daily loads" (TMDLs) for navigable waters where effluent limitations are not stringent enough to achieve water quality standards for such waters. 33 U.S.C. §1313(d).

Likewise, under the Act, the Army Corps of Engineers issues permits for the discharge of dredged or fill material into "navigable waters," 33 U.S.C. §1344(a). Persons subject to these permits also are required to obtain a "certification," pursuant to 33 U.S.C. §1341, from the state that the discharge will

meet the requirements of §§1311, 1312, 1313, 1316 and 1317 of the Act. Such certification may "set forth any effluent limitations and other limitations, and monitoring requirements" to assure that the applicant will comply with the Act. 33 U.S.C. §1341(d).

If improvements to a traditional navigable river render the improved sections an MS4, distinct from the original navigable water, the EPA loses its authority to adopt new water quality standards and TMDL programs for those sections, and the Corps and states lose their authority to require permits and certifications for discharges of dredged and fill material into the improved channels. The result is that thousands of miles of improved flood control channels that also are navigable waters of the United States will be stripped of basic protections under the CWA. This will also necessarily spawn litigation, as local entities must inevitably contest application of now unnecessary additional layers of regulation over such improved portions of rivers or other bodies of water previously regarded as "navigable waters."

Second, a determination that a portion of a river or other navigable water improved for flood control purposes can be regulated as both an MS4 and a navigable water, will have equally pernicious consequences. It will create confusion concerning overlapping and potentially conflicting layers of regulatory responsibility, again triggering protracted and costly litigation.

The plain fact is that any blurring of the distinction between MS4s as a point source and navigable waters invariably spawns confusion and will necessarily increase the cost of flood control planning and implementation. Cities, counties and flood control agencies will have to take into account potential liability for MS4 "discharges" of pollutants through an improved portion of a river, even if the local agency does not operate a MS4 system. The agencies will further have to consider the hefty costs of regulatory compliance, a difficult task in the best of circumstances, but one made infinitely more complex by adding still additional layers of regulatory authority and even more punishing on the public fisc given the inevitable need to determine, likely through costly litigation, precisely which agency regulates what stretch of the channels.

The Ninth Circuit's decision is bad law and worse policy. It does nothing to further the basic purposes underlying the CWA, nor management of storm water through MS4s, while imposing substantial, unnecessary costs on the crucial public service of flood control. The decision and judgment of the Ninth Circuit should be reversed.

CONCLUSION

For the foregoing reasons, petitioner requests that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed with directions that judgment for petitioner be reinstated.

Respectfully submitted,

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