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No. 11-460

In the Supreme Court of the United States

LOS ANGELES FLOOD CONTROL DISTRICT,
PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

This Court granted certiorari limited to Question 2 presented by the petition (Pet. i):

> 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, whether there can 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, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

The Court granted certiorari on the question whether the flow of water through a channelized portion of a river to a lower portion of the same river can constitute a "discharge of any pollutant" (33 U.S.C. 1311(a)) under the Clean Water Act (CWA or Act). The United States has a substantial interest in the proper resolution of that question, which implicates the National Pollutant Discharge Elimination System (NPDES) permitting program administered by the Environmental Protection Agency (EPA) in conjunction with individual States. 33 U.S.C. 1342. At the Court's invitation, the United States

filed a brief amicus curiae at the petition stage of this case.

STATEMENT

Petitioner operates a municipal separate storm sewer system (MS4) that discharges pollutants into the Los Angeles and San Gabriel Rivers. In CWA Section 402(p)(3), Congress established a unique and flexible scheme for the regulation of MS4 discharges under the NPDES permitting program. 33 U.S.C. 1342(p)(3). Petitioner, along with its co-permittees, applied for and received an NPDES permit for its MS4 discharges.

Respondents subsequently brought suit against petitioner, alleging that petitioner had violated its NPDES permit. The district court granted summary judgment for petitioner. Pet. App. 98-102. The court recognized that monitoring stations located within the two rivers had detected quantities of pollutants in excess of the amounts allowed by the permit. The district court held, however, that respondents had failed to prove that petitioner was responsible for those exceedances. *Ibid.* The court of appeals reversed in pertinent part. *Id.* at 1-50.

A. Statutory And Regulatory Framework

1. a. The CWA establishes a comprehensive program designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that objective, CWA Section 301(a) prohibits, except as authorized by the Act, the "discharge of any pollutant," *i.e.*, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1311(a), 1362(12). The term "pollutant" encompasses a variety of materials, including "industrial, municipal, and agricultural waste." 33 U.S.C. 1362(6). The term "navigable waters" means "the wa-

ters of the United States." 33 U.S.C. 1362(7). And the term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any * * * channel * * *, from which pollutants are or may be discharged." 33 U.S.C. 1362(14). That definition "includes within its reach point sources that do not themselves generate pollutants." *South Florida Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (*Miccosukee*).

b. For most discharges of pollutants, as relevant here, regulated entities achieve compliance with the Act by obeying the terms of an NPDES permit issued pursuant to CWA Section 402, 33 U.S.C. 1342. NPDES permits contain "[e]ffluent limitations" that restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents" that may be discharged into navigable waters. 33 U.S.C. 1311(e), 1362(11). NPDES permits use effluent limitations in two complementary ways. The first approach is technology based, in which effluent limitations generally reflect the level of pollution control that can be achieved by point sources using various levels of pollution-control technology. 33 U.S.C. 1311, 1314; see *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 126-136 (1977). The second approach is water-quality based, whereby effluent limitations are established to meet ambient-based conditions in the water body as specified in the applicable water-quality standards. 33 U.S.C. 1311(b)(1)(C); 40 C.F.R. 122.44(d)(1); see *Arkansas* v. *Oklahoma*, 503 U.S. 91, 104-105 (1992).

Not all point-source-related activities require an NPDES permit. For example, as the Court recognized in *Miccosukee*, *supra*, pumping pollutant-containing water between two parts of the same water body (or

between bodies of water that are not "meaningfully distinct") does not require an NPDES permit because it does not constitute an "addition" of pollutants to navigable waters. 541 U.S. at 109-110, 112; see 33 U.S.C. 1362(12). Federal regulations implementing the CWA further provide that discharges from a "water transfer"—defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use"—do not require an NPDES permit, whether or not the water bodies in question are distinct from each other. 40 C.F.R. 122.3(i); see 73 Fed. Reg. 33,697, 33,699-33,700 (June 13, 2008) (providing examples of water transfers as well as conveyances within a single water body).[1]

c. Under CWA Section 402(b), state officials may seek EPA authorization to administer the NPDES permitting program with respect to discharges within their States' borders. 33 U.S.C. 1342(b). Since 1974, EPA has authorized the California Water Resources Control Board (State Board) to administer the NPDES program in California. 39 Fed. Reg. 26,061 (July 16, 1974). The State Board, in turn, has delegated that authority to nine Regional Water Quality Control Boards, including the Los Angeles Regional Water Quality Control Board (Regional Board). See *City of Arcadia* v. *State Water Res. Control Bd.*, 119 Cal. Rptr. 3d 232, 240 (Cal. App. 2010). Under California law, a permittee may seek State

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[1] Stormwater discharges identified under Section 402(p)(2) and (6), 33 U.S.C. 1342(p)(2) and (6), are not water transfers and remain subject to the NPDES permit program, as reflected in EPA's regulations. See, *e.g.*, 73 Fed. Reg. at 33,705 ("[T]his interpretation regarding water transfers [as not requiring NPDES permits] does not affect EPA's longstanding regulation of [stormwater discharges from MS4s].").

Board review of any provision of an NPDES permit issued by a Regional Board. Cal. Water Code § 13320. The permittee may then appeal the State Board's decision to the California state courts. See *County of L.A.* v. *California State Water Res. Control Bd.*, 50 Cal. Rptr. 3d 619, 621-622, 627 (Cal. App. 2006).

2. MS4s serving populations of 100,000 or more are subject to tailored NPDES permitting requirements under Section 402(p). See 33 U.S.C. 1342(p)(2) and (3). This statutory scheme followed fifteen years of failed attempts to accommodate the unique challenges of regulating MS4 discharges under the CWA.

a. Most municipalities have built infrastructure to collect stormwater and to carry it away from homes, businesses, and roads. That infrastructure is comprised of gutters, storm drains, sewers, and numerous other conveyances that run through (and under) inhabited areas. In any given watershed, those conveyances may cross jurisdictional boundaries and discharge to waters of the United States in dozens, or even hundreds, of different places.

Municipal stormwater discharges pose significant water-quality concerns. Water flowing across roads, parking lots, and other structures often picks up pollutants like heavy metals, pathogens, and toxins from those surfaces. Pet. App. 6. Stormwater containing those pollutants flows into the MS4 and is then discharged through various points from the system to receiving waters. Stormwater discharges have long been recognized as a leading cause of water-quality impairment. See *NRDC* v. *EPA*, 966 F.2d 1292, 1295 (9th Cir. 1992); 55 Fed. Reg. 47,990, 47,991-47,992 (Nov. 16, 1990).

b. In 1973, shortly after passage of the 1972 CWA amendments, EPA promulgated regulations under

which discharges from municipal storm sewers, if comprised entirely of stormwater, were exempt from the NPDES permitting requirements. 38 Fed. Reg. 18,000-18,004 (July 5, 1973) (40 C.F.R. 125.4 (1974)); see *NRDC* v. *EPA*, 966 F.2d at 1295; *NRDC* v. *Costle*, 568 F.2d 1369, 1372 & n.5 (D.C. Cir. 1977). EPA maintained that requiring NPDES permits for MS4s, and certain other classes of point sources exempted by the rule, would make administration of CWA Section 402 unworkable. See *Costle*, 568 F.2d at 1377. In particular, EPA anticipated "an intolerable permit load" due, in part, to "approximately 100,000 separate storm sewer point sources." *Id.* at 1380-1381. The D.C. Circuit invalidated that exemption, however, bringing stormwater discharges within the ambit of Section 402. *Id.* at 1383. As a result, "municipal storm water discharges were subject to the same substantive control requirements as industrial and other types of storm water." *NRDC* v. *EPA*, 966 F.2d at 1308.

In 1987, "[r]ecognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations," Congress amended the CWA to provide a new scheme for regulation of stormwater discharges. *NRDC* v. *EPA*, 966 F.2d at 1296 (footnote omitted); see Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 69 (33 U.S.C. 1342(p)). CWA Section 402(p) authorizes EPA to implement a comprehensive national program for addressing stormwater discharges from MS4s in a manner more flexible than the traditional NPDES permitting program.

Federal regulations implementing Section 402(p) define an MS4 as a publicly owned or operated "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs,

gutters, ditches, man-made channels, or storm drains) * * * that discharges to waters of the United States." 40 C.F.R. 122.26(b)(8), (18) and (19). An MS4 typically has numerous "outfalls." An "*[o]utfall*" for purposes of the MS4 regulations is "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." 40 C.F.R. 122.26(b)(9). The term "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." *Ibid.* An MS4 is not a single point source; instead, it is best understood as a collection of point sources, including outfalls, that discharge into waters of the United States.

Pursuant to Section 402(p)(2) and its implementing regulations, discharges from MS4s serving populations of 100,000 or more require NPDES permits. 33 U.S.C. 1342(p)(2)(C) and (D); 40 C.F.R. 122.26. Those MS4 permits contain at least two features that distinguish them from other NPDES permits.

First, Section 402(p) allows regulators to ameliorate the harmful effects of stormwater discharges by controlling what enters the system though stormwater management requirements, rather than by imposing traditional effluent limitations requiring end-of-pipe treatment. 33 U.S.C. 1342(p)(3)(B)(iii). The Act mandates that permits for discharges from MS4s "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." *Ibid.*; 40 C.F.R. 122.26(d)(2)(iv). MS4 permits therefore may reduce stormwater runoff through provisions such as floodplain management controls, wetland protection measures, best management practices for new subdivisions, and emergency spill response programs. 40 C.F.R. 122.26(d)(1)(v). MS4 permits also may "require strict compliance with state water-quality standards." *Defenders of Wildlife* v. *Browner*, 191 F.3d 1159, 1166 (9th Cir.), amended, 197 F.3d 1035 (9th Cir. 1999).

Second, the Act expressly authorizes the issuance of stormwater discharge permits on a system-wide or jurisdiction-wide basis. 33 U.S.C. 1342(p)(3)(B)(i) and (iii); 40 C.F.R. 122.26(a)(3)(ii). Several local governments therefore may jointly apply for a single permit to govern interconnected systems discharging into the same waters of the United States. 40 C.F.R. 122.26(a)(3)(ii)-(iv) and (d). This provision eliminates the need to identify and individually permit each point source, a task that may be a practical impossibility in particularly large or complex systems. 55 Fed. Reg. at 48,046. It also relieves permittees of the "potentially unmanageable" burden of providing quantitative data for discharges from each point source, as would be required under traditional NPDES permits. *Ibid.* This flexibility is crucial in easing administration of stormwater permits for both permitting authorities and permittees.

Like other NPDES permits, stormwater discharge permits for MS4s serving populations of 100,000 or more also establish monitoring protocols. Those protocols serve a number of purposes, including assessment of permit compliance. Through its implementing regulations, EPA has developed "a permit scheme where the

collection of representative data is primarily a task that will be accomplished through monitoring programs during the terms of the permit. Permit writers have the necessary flexibility to develop monitoring requirements that more accurately reflect the true nature of highly variable and complex discharges." 55 Fed. Reg. at 48,049-48,050. Permit applicants are required to propose a "monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment." 40 C.F.R. 122.26(d)(2)(iii)(D). Accordingly, subject to the permitting authority's approval, a permit applicant may choose between a monitoring scheme that samples at outfalls, one that samples from instream locations, or some combination of the two.

3. Under the CWA, "any citizen may commence a civil action on his own behalf against any person * * * who is alleged to be in violation of * * * an effluent standard or limitation under this chapter." 33 U.S.C. 1365(a). An "effluent standard or limitation" includes any term or condition of an approved NPDES permit. 33 U.S.C. 1365(f)(6). Thus, "[i]n the absence of federal or state enforcement, private citizens may commence civil actions against any person 'alleged to be in violation of' the conditions of either a federal or state NPDES permit." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987) (quoting 33 U.S.C. 1365(a)(1)). A successful enforcement action may result in injunctive relief and monetary penalties, 33 U.S.C. 1365(a), but citizens "may seek civil penalties

only in a suit brought to enjoin or otherwise abate an ongoing violation." *Gwaltney*, 484 U.S. at 59.

The validity of an NPDES permit cannot be challenged during an enforcement proceeding, including a citizen suit. The Act prohibits "judicial review in any civil or criminal proceeding for enforcement" of "[a]ction[s] of the Administrator with respect to which review could have been obtained under [33 U.S.C. 1369(b)(1)]." 33 U.S.C. 1369(b)(2). One such action is "issuing or denying any [NPDES] permit." 33 U.S.C. 1369(b)(1). The bar against collateral attacks on permits during enforcement proceedings extends to permits issued by States. See *General Motors Corp.* v. *EPA*, 168 F.3d 1377, 1383 (D.C. Cir. 1999).

B. Petitioner's Stormwater Discharge Permit

1. In 1990, petitioner, along with Los Angeles County (County) and 84 cities, applied to the Regional Board and obtained a system-wide MS4 permit. Resp. C.A. E.R. 311, 319 (C.A. E.R.).[2] The permit covers stormwater discharges from a vast MS4 comprised of thousands of miles of storm drains, hundreds of miles of open channels, and hundreds of thousands of connections over a large area of Southern California. Pet. App. 106. Petitioner itself owns, operates, and maintains ap-

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[2] The MS4 permit has been modified and reissued over the years, and proceedings for a new permit are currently pending before the Regional Board. Pet. App. 13; see California Reg'l Water Quality Control Bd., L.A. Region, *Tentative Order No. R4-2012-XXXX*, at 13-14 (June 6, 2012) <http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/TENTATIVE LA County MS4 Permit - Order - 6-6-12.pdf>. This brief describes the permit as in effect now and during the period at issue in this case. J.A. 52-254.

proximately 500 miles of open channels and 2800 miles of storm drains—more than all the other co-permittees combined. *Ibid.* The MS4 collects and conveys storm-water runoff from across the County and discharges it into the region's rivers, including the Los Angeles and San Gabriel Rivers, and ultimately into the Pacific Ocean. *Id.* at 8; see California Reg'l Water Quality Control Bd., L.A. Region, *Tentative Order No. R4-2012-XXXX*, Attachment C, Figures C-4 and C-5, http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/Attachment C - 6-6-12.pdf (schematic representations of the Los Angeles and San Gabriel Rivers and the thousands of storm drains that discharge into the rivers).

The MS4 permit prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." J.A. 97; see J.A. 89 ("Permittees are to assure that storm water discharges from the MS4 shall neither cause nor contribute to the exceedance of water quality standards and objectives."); see also Pet. App. 15. The permit contemplates compliance with those standards through, *inter alia*, implementation of the control measures outlined in the permit's stormwater quality management program. J.A. 98. Among the receiving waters protected by the water-quality standards are the Los Angeles and San Gabriel Rivers. J.A. 171, 183; C.A. E.R. 292.

The MS4 permit also establishes a monitoring and reporting program, which was proposed by petitioner and its co-permittees in their application and considered by the Regional Board in developing the permit. J.A. 65-66, 210, 218-221; see 40 C.F.R. 122.26(d)(2)(iii)(D). That program establishes the locations for compliance monitoring at enumerated "mass emissions" stations

downstream of most of the MS4 discharge points, rather than at each outfall. J.A. 219. To determine pollutant levels in the receiving waters to which the MS4 discharges, mass emissions stations collect water samples that are analyzed for certain pollutant constituents. J.A. 219-221. Under the terms of the permit, petitioner, as the Principal Permittee (J.A. 103), is responsible for analyzing the resulting data and submitting a report identifying the possible sources of any exceedances. J.A. 214-221.

Petitioner and respondents have both described the mass emissions stations at issue as being located in the Los Angeles and San Gabriel Rivers.[3] During the proceedings below, the parties sometimes described the same monitoring stations as being located in channelized portions of the MS4 operated by petitioner.[4] That formulation suggested that the pertinent river segments are part of *both* the MS4 itself *and* "the waters of the United States" that the CWA protects. In its brief on the merits, by contrast, petitioner states that certain

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[3] See 2:08-cv-01467 Docket entry No. 140, at 2 (C.D. Cal. Sept. 29, 2009); see also Pet. Br. 11 & n.2; Pet. 26 & n.4; Br. in Opp. 6. The County's publicly available sources provide additional information about the location of the monitoring stations at issue. Both stations are located at existing stream gauge stations. See Los Angeles County Dep't of Pub. Works, *Los Angeles County 2006-07 Stormwater Monitoring Report* 2-2, http://www.ladpw.org/wmd/npdes/2006-07_report/Section 2.pdf. The Los Angeles River monitoring station collects samples at a location where the river "is a concrete-lined trapezoidal channel." *Ibid.* The San Gabriel River monitoring station collects samples from a "grouted rock area along the western levee of the river." *Ibid.*

[4] See Pet. App. 18, 107-108; Docket entry No. 89, at 6 (Sept. 8, 2009) (Resp. SUF para. 24); J.A. 338-339; C.A. Reh'g Pet. 2; see also Pet. 24; Br. in Opp. 6.

channelized portions of the Los Angeles and San Gabriel Rivers are not part of the MS4 itself, but are simply receiving waters that take in discharges *from* the MS4. See Pet. Br. 41-42. The proper disposition of this case does not turn on the choice between those characterizations. Rather, the salient point is that the channelized portions of the rivers are "waters of the United States," whether or not they are *also* part of the MS4.[5]

2. In the California courts, petitioner and other co-permittees challenged the MS4 permit on several

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[5] The determination whether particular waters are "waters of the United States" is governed by the CWA and applicable regulations. The Los Angeles and San Gabriel Rivers are waters of the United States, and the permit describes them as protected receiving waters. J.A. 171, 183; C.A. E.R. 292. While petitioner operates and maintains channelized portions of those rivers as part of its flood-control infrastructure, neither the channelization of the rivers nor their use within that infrastructure alters their status as waters of the United States. Cf. *S.D. Warren Co.* v. *Maine Bd. of Envt'l Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them."); 53 Fed. Reg. 49,453 (Dec. 7, 1988) (EPA observes that "[i]n 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.").

So long as the rivers' status as waters of the United States is properly understood, it makes no substantive difference whether channelized portions of the rivers are also viewed as being part of the MS4. Regardless, the relevant pollutant discharges occur when stormwater enters the rivers from petitioner's upstream outfalls, rather than when the water flows past the monitoring stations. See pp. 19-23, *infra*. The determination whether a particular permittee may be held liable for measured pollutant exceedances at a particular monitoring station (see pp. 24-26, *infra*) likewise does not depend on whether the pertinent river segments are viewed as part of the MS4 or not. Characterization of the pertinent river segments as part of the MS4 *would* confuse the analysis, however, if a court erroneously infers from that characterization that the segments are *not* waters of the United States.

grounds. See *County of L.A.*, 50 Cal. Rptr. 3d at 622, 628-636. Petitioner did not dispute, however, that it was discharging pollutants to navigable waters and therefore was required to obtain a permit. Nor did it object to the monitoring requirements, including the location of the monitoring stations. The trial court upheld the permit, and the state appeals court affirmed. *Id.* at 621-622.

C. Procedural History

1. Respondents commenced this action under the CWA's citizen-suit provision. They alleged *inter alia* that petitioner and the County were in violation of the MS4 permit by causing or contributing to exceedances of water-quality standards in the Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek, referred to as the "watershed claims" by the courts below. Respondents moved for summary judgment on the Los Angeles River and San Gabriel River claims, and petitioner moved for summary judgment on all four watershed claims. Pet. App. 103-105. The following facts were not disputed: (1) the mass-emissions monitoring data collected by petitioner repeatedly showed exceedances for five different pollutants, *id.* at 108 (citing Resp. SUF paras. 33-37); (2) the mass emissions stations were downstream from where petitioner's and others' storm drains discharged into the Los Angeles and San Gabriel Rivers, *id.* at 116; and (3) the mass emissions stations for the Los Angeles and San Gabriel Rivers are located in channelized sections of the rivers that the parties considered to be part of the MS4,

id. at 107-108; Docket entry No. 140, at 2 (Sept. 29, 2008).[6]

After initially denying both sides' motions for summary judgment (Pet. App. 114-123), and after receiving supplemental briefing, the district court ultimately granted summary judgment for petitioner on all four watershed claims. *Id.* at 98-102. The court recognized that "the mass emissions station data may be the appropriate way to determine whether the MS4 in its entirety is in compliance with the Permit or not." *Id.* at 121. The court found, however, that the monitoring data were "not sufficient to enable the Court to determine that [petitioner] is responsible for 'discharges from the MS4 that cause or contribute to the violation' of standards under Part 2.1 of the Permit, since a co-permittee is responsible 'only for a *discharge* for which it is the operator.'" *Ibid.* (quoting J.A. 93 (Permit para. G.4), 97 (Permit § 2.1)) (emphasis added by district court). The court also determined that other monitoring data showing standards-exceeding pollutants from sampling of petitioner's storm drains, which discharged into the Los Angeles River upstream of the mass emissions stations, were insufficient to establish petitioner's liability because there was no clear indication that the samples were collected at or near an "outflow" rather than in a storm drain or watercourse. *Id.* at 100-101.

2. The court of appeals reversed in relevant part. Pet. App. 1-50.[7]

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[6] As noted above (pp. 12-13, *supra*), petitioner no longer considers the channelized sections of the rivers at issue to be part of the MS4.

[7] With respect to respondents' claims of CWA violations in the Santa Clara River and Malibu Creek watersheds, the court of appeals affirmed the district court's grant of summary judgment in petitioner's

The court of appeals stated that resolution of respondents' claims against petitioner and the County "require[d] [the court] to examine whether an exceedance at a mass-emission monitoring station is a Permit violation, and, if so, whether it is beyond dispute that Defendants discharged pollutants that caused or contributed to water-quality exceedances." Pet. App. 25. With respect to the first inquiry, the court of appeals agreed with the district court that, under the terms of the MS4 permit, "an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers." *Id.* at 40; see *id.* at 27-40.

With respect to the second inquiry, the court of appeals found the evidence sufficient to establish that petitioner had discharged stormwater that caused or contributed to the permit violations. Pet. App. 40-49. The court stated that the monitoring stations for the Los Angeles and San Gabriel Rivers are located in a portion of the MS4 owned and operated by petitioner; that the monitoring stations had detected pollutants in excess of the amounts authorized by the permit; and that the polluted stormwater was discharged from the MS4 into the rivers. *Id.* at 44-45, 47, 49. The court concluded that "the MS4 is distinct from the two navigable rivers," and that a "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." *Id.* at 44-45.

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favor. Pet. App. 5-6, 47-48. Because respondents did not seek review of that aspect of the court of appeals' judgment, those claims are not before this Court.

3. Petitioner filed a petition for rehearing. Petitioner argued, *inter alia*, that the panel had made a factual error in assuming that the channelized infrastructure in which the mass emissions stations are located is distinct from the Los Angeles and San Gabriel Rivers. See C.A. Reh'g Pet. 3-4. The court of appeals denied the petition. Pet. App. 2.[8]

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that a "discharge of pollutants" occurred in the Los Angeles and San Gabriel Rivers "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." Pet. App. 45. Petitioner contends that the error is attributable to the court's misunderstanding of the applicable law—and, in particular, to the court's mistaken belief that the flow of polluted water between channelized and unchannelized portions of the same river can constitute a pollutant "discharge." In the government's view, the more likely explanation for the error is that the court misunderstood where the monitoring stations are located in relation to the rivers. In either event, it would be appropriate for this Court to vacate the judgment of the court of appeals and remand for further proceedings to determine whether petitioner is liable for violating its NPDES permit.

A. 1. In *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), this Court recognized that a "discharge of pollutants" does not occur when water is pumped between "two

[8] At that time, the panel amended its initial opinion, but only to address and reject an unrelated argument raised in the petition for rehearing. Pet. App. 37-38.

hydrologically indistinguishable parts of a single water body." *Id.* at 109. It necessarily follows that no discharge occurs when polluted stormwater that has already been discharged into a river simply flows from a channelized portion (past an instream monitoring station) to a downstream portion of the same river.

2. In petitioner's view, the court of appeals found petitioner liable for permit violations because the court determined, contrary to *Miccosukee*, that a "discharge of pollutants" had occurred when polluted water flowed from channelized portions of the Los Angeles and San Gabriel Rivers into unchannelized segments of those same water bodies. The court of appeals' opinion provides no sound reason for concluding that the court committed such an obvious legal error. Rather, the court seems to have based its decision on a mistaken factual premise: that the monitoring stations were sampling water from a portion of the MS4 that was distinct from the rivers themselves and from which discharges through an outfall to the rivers subsequently occurred. *E.g.*, Pet. App. 44.

B. Although the court of appeals' analysis was faulty, the court's ultimate finding of liability is not necessarily incorrect. Whether petitioner is liable for the pollutant exceedances observed at the instream mass-emission stations depends on analysis of the pertinent record evidence and on the proper construction of petitioner's MS4 permit. In particular, that liability determination may turn on whether, and to what extent, the terms of the permit require a link between the measured exceedances and specific discharges of standards-exceeding pollutants from petitioner's outfalls. That interpretive question, however, is outside the scope of the question on which this Court granted certiorari. It

therefore would be appropriate for this Court to vacate the judgment of the court of appeals and remand the case for further proceedings.

ARGUMENT

FOR PURPOSES OF THE CWA'S PERMITTING REQUIREMENTS, THE FLOW OF STORMWATER FROM ONE CHANNELIZED PORTION OF A RIVER TO A LOWER PORTION OF THE SAME RIVER DOES NOT CONSTITUTE A "DISCHARGE OF ANY POLLUTANT"

This Court granted certiorari on the question whether a CWA "discharge of pollutants" occurs when water flows from a channelized portion of a river into a lower portion of the same river. The Court's decision in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 109-112 (2004), makes clear that the answer to that question is "no." Contrary to petitioner's contention, there is no sound reason to believe that the court of appeals misunderstood or misapplied the relevant legal principle recognized in *Miccosukee*. Rather, the court appears to have decided this case on a mistaken factual premise. Regardless of the explanation for the court of appeals' error, however, it would be appropriate to vacate the court's judgment and remand for further proceedings to determine whether petitioner can be held liable for permit violations from MS4 discharges to the Los Angeles and San Gabriel Rivers.

A. The Court Of Appeals Erred In Deeming The Water Flows At Issue To Be Discharges Of Pollutants

1. The flow of water within a single water body, without any intervening use or event, does not constitute a "discharge of any pollutant" within the meaning of the CWA

Under the CWA, a "discharge of a pollutant" is an "addition of a pollutant to navigable waters from any point source." 33 U.S.C. 1311(a), 1362(12). In *Miccosukee*, this Court recognized that an "addition" of pollutants does not occur when water is pumped between "two hydrologically indistinguishable parts of a single water body." 541 U.S. at 109; see *id.* at 109-112. The Court's opinion indicated that the mere movement of polluted water within a single water body does not constitute a pollutant "discharge" even when the movement results from human intervention (there, the operation of a pump station). See *id.* at 109-112; see also *S.D. Warren Co.* v. *Maine Bd. of Envt'l Prot.*, 547 U.S. 370, 381 (2006) (noting that in *Miccosukee* "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 constitution an "addition" of pollutants'") (quoting 541 U.S. at 109). *A fortiori*, no discharge occurs when water simply flows down a single river.

That principle applies with full force when water flows between channelized and unchannelized portions of the same river. To be sure, there will be cases, such as *Miccosukee* itself, where it is difficult to determine whether a transfer of water involves the same water body or two separate bodies of navigable waters. 541 U.S. at 111. In some such cases, the presence of a con-

crete channel or other human improvement—*e.g.*, one that alters or diverts water flow in a hydrologically significant manner, or one that facilitates the flow of water at a location where no such flow occurred in nature—may be relevant to the question whether a single water body exists. But nothing in the record suggests that is the case here, and there is no warrant for a *per se* rule that lining a pre-existing river segment with concrete inherently transforms a single water body into two.

In this case, the parties agree that the monitoring stations were located within the Los Angeles and San Gabriel Rivers. No party has contended that the river segments where the monitoring stations are located are "meaningfully distinct" from downstream portions of the rivers. Cf. *Miccosukee*, 541 U.S. at 111-112 (explaining that the question whether two allegedly different water bodies are "meaningfully distinct" is a factual issue to be decided by a district court in the first instance). To be sure, pollutant discharges did occur when stormwater flowed into the two rivers from outfalls operated by petitioner and others that are located above the monitoring stations. The subsequent flow of the rivers past the monitoring stations, however, did not constitute a "discharge of any pollutant."

2. The court of appeals' decision appears to reflect a factual misunderstanding rather than an error of law

The court of appeals stated that "[t]he discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations were located, through an outfall, and into the navigable waters." Pet. App. 45. As we explain above, the court erred in concluding that pollutant discharges occurred at the monitoring stations

themselves. Petitioner's attack on the court of appeals' decision assumes that the court accurately understood that the monitoring stations were located within the Los Angeles and San Gabriel Rivers. Based on that assumption, petitioner reads the court's decision to hold, *sub silentio* and in clear contravention of *Miccosukee*, that a pollutant "discharge" occurs when stormwater flows from a channelized portion of a river to a downstream portion of the same river.

A much more likely explanation for the court of appeals' error, however, is that the court mistakenly believed that the monitoring stations at issue were sampling water from a portion of the MS4 distinct from the rivers themselves, *i.e.*, that they sampled from a storm drain, sewer, or other channelized conveyance operated by petitioner that had not yet discharged into the rivers. Several statements in the court's opinion support that inference. See Pet. App. 44 ("[T]he MS4 is distinct from the two navigable rivers."); see also, *e.g.*, *id.* at 5 ("[T]he monitoring stations for the Los Angeles and San Gabriel Rivers are located in a section of ms4 owned and operated by [petitioner], and, after stormwater known to contain standards-exceeding pollutants passes through these monitoring stations, this polluted stormwater is discharged into the two rivers."); *id.* at 18 ("The Los Angeles River and San Gabriel River Monitoring Stations are located in a channelized portion of the MS4 that is owned and operated by [petitioner]."); *id.* at 47 ("[T]he Los Angeles River and San Gabriel River below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations."). Indeed, petitioner's own request for rehearing in the court of appeals suggested that the panel had committed precisely that factual error. See

C.A. Reh'g Pet. 2 ("[C]ontrary to the Court's conclusion, [petitioner's] MS4 and the Los Angeles and San Gabriel Rivers downstream from each [mass-emissions monitoring station] are one and the same."); *id.* at 3-4.

This reading of the court of appeals' opinion is bolstered by the court's rationale for holding that petitioner could be held liable for pollutant exceedances in the Los Angeles and San Gabriel Rivers, but not for those in the Santa Clara River and Malibu Creek. The court explained that it could not "mete out responsibility for exceedances detected in the Santa Clara River and Malibu Creek" because "it appears that both monitoring stations are located within the rivers themselves." Pet. App. 47. That explanation for distinguishing among the various water bodies would make no sense if the court had understood that the monitoring stations for the Los Angeles and San Gabriel Rivers are *also* "located within the rivers themselves."

Alternatively, the court of appeals' opinion could reflect an assumption that the MS4 is one large point source with one place of discharge into navigable waters. See Pet. App. 44 ("Because the mass-emissions stations * * * 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."). Such an assumption would also be mistaken. An MS4 is not one large point source but instead is a collection of many (in this case, possibly thousands of) point sources, each of which would require an NPDES permit—generally with individual monitoring requirements—if Section 402(p) had not been added to the CWA to authorize more flexible system-wide and jurisdiction-wide permits. See pp. 5-8, *supra*; *NRDC* v. *Costle*, 568 F.2d 1369, 1383 (D.C. Cir. 1977).

Regardless of the source of the court of appeals' mistake, the court erred in determining that a "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." Pet. App. 45. Because the court of appeals' finding of liability rested on that erroneous premise, the court's judgment should be vacated.

B. The Case Should Be Remanded To Allow The Courts Below To Determine, Based On Their Interpretation Of The MS4 Permit, Whether Petitioner Can Properly Be Held Liable For Pollutant Exceedances In The Los Angeles And San Gabriel Rivers

For the foregoing reasons, the flow of polluted water past the monitoring stations in the Los Angeles and San Gabriel Rivers did not constitute the "discharge of any pollutant" within the meaning of the CWA. It does not necessarily follow, however, that petitioners face no liability in this case. It therefore would be appropriate to remand the case to allow the court of appeals to reconsider its liability determination, free from any misconceptions concerning either the location of the relevant monitoring stations or the relevant legal principle recognized in *Miccosukee*.

The NPDES permit that currently governs petitioner's MS4 prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." J.A. 97 (Permit § 2.1). Respondents' claims are based (in relevant part) on the theory that petitioner violated its NPDES permit by causing or contributing to exceedances of water-quality standards in the Los Angeles and San Gabriel

Rivers. See Pet. App. 104. Petitioner is unquestionably responsible for numerous pollutant discharges at the many outfalls under its control where stormwater is discharged into those rivers. See Pet. Br. 44 ("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 Waters Act's proscriptions."). It is undisputed, moreover, that pollutant levels in excess of those allowed by the permit were regularly detected at the mass emissions monitoring stations. See Pet. App. 108 (citing Resp. SUF paras. 33-37).

If (as the court of appeals appeared to believe) the monitoring stations had been located at outfalls subject to petitioner's control, petitioner's liability under the MS4 permit would be difficult to dispute. Under any plausible construction of the permit language, it would then be clear that petitioner's own discharges had "cause[d] or contribute[d] to the violation of Water Quality Standards or water quality objectives." J.A. 97 (Permit § 2.1). It appears, however, that the monitoring stations are instead located in portions of the rivers downstream from many outfalls operated by several different co-permittees, including petitioner. On remand, the court of appeals' liability determination will depend on the court's interpretation of the MS4 permit to identify the precise causal or other connection, if any, the permit requires to be established between elevated pollutant levels and the discharges of a particular permittee.

That question is one of permit construction as to which the CWA does not mandate any particular result. An MS4 permit issued to multiple permittees could validly provide that all permittees (or at least all permittees who have discharged the specific pollutant

involved) will share liability for any measured exceedance of applicable pollutant limits. But such an MS4 permit could also validly provide that only the co-permittee(s) to whose discharges the pollutant exceedance is connected are liable for the permit violation. See 33 U.S.C. 1342(a)(2) ("The Administrator shall prescribe conditions for [NPDES] permits to assure compliance with the requirements of [33 U.S.C. 1342(a)(1)], including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.").

In determining what nexus (if any) between an exceedance and a co-permittee's discharges a particular permit requires, a court should construe the permit by reference to ordinary principles of contract interpretation. See *Piney Run Pres. Ass'n* v. *County Comm'rs*, 268 F.3d 255, 269-270 (4th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); *Northwest Envtl. Advocates* v. *City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995), cert. denied, 518 U.S. 1018 (1996); *American Canoe Ass'n* v. *District of Columbia Water & Sewer Auth.*, 306 F. Supp. 2d 30, 42 (D.D.C. 2004), appeal dismissed, No. 04-7046, 2004 WL 2091485 (D.C. Cir. Sept. 17, 2004). If the language of the permit, in light of the structure of the permit as a whole, "'is plain and capable of legal construction, the language alone must determine' the permit's meaning." *Piney Run Pres. Ass'n*, 268 F.3d at 270 (citation omitted). If the permit is ambiguous, a court should turn to extrinsic evidence to interpret its terms. *Ibid.* And because the goal "is to determine the intent of the permitting authority," *ibid.*, the interpretation of the permitting authority (here, the State Board) is an important, and often dispositive, type of extrinsic evidence. See *Northwest Envtl. Advocates*, 56 F.3d at 985 (relying on

"significant evidence from [the state environmental agency], the permit author"); *American Canoe Ass'n*, 306 F. Supp. 2d at 46 (relying on an EPA manual advising permitting authorities on the meaning of certain permit provisions).

The interpretive issue described above is well outside the question on which this Court granted certiorari. It therefore would be appropriate for the Court to vacate the judgment of the court of appeals and remand for further proceedings to determine whether petitioner may properly be held liable under the permit for the measured pollutant exceedances.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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