No. _____

In The Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT and COUNTY OF LOS ANGELES,

Petitioners,

vs.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Water Act regulates the addition of pollutants to the navigable waters of the United States, including pollutants discharged from municipal stormwater systems. 33 U.S.C. §1342(p). In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, ___ U.S. ___, 133 S. Ct. 710 (2013), this Court reversed the Ninth Circuit judgment imposing liability on petitioner Los Angeles County Flood Control District, holding that the Ninth Circuit erred in finding that polluted water passing through improved portions of the Los Angeles and San Gabriel Rivers constituted a discharge under the Act, noting that in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), the Court had found that the mere transfer of water within a single water body did not constitute such a discharge. This Court refused to address respondents' argument, considered and rejected by the Ninth Circuit, that under the permit at issue evidence from monitoring stations in the rivers *ipso facto* established the District's liability without proof of a discharge, because it was not within the scope of the question on which certiorari was granted and respondents had not otherwise preserved it for review.

On remand, the Ninth Circuit again imposed liability on the District, this time based on respondents' previously rejected *ipso facto* monitoring argument. The Ninth Circuit also *sua sponte* imposed liability on

QUESTIONS PRESENTED – Continued

petitioner County of Los Angeles – even though the Ninth Circuit's prior opinion had affirmed judgment in favor of the County.

The questions presented by this petition are:

1. Does *Calderon v. Thompson*, 523 U.S. 538 (1998) bar a circuit court from reconsidering an issue after the time in which to seek rehearing in the circuit court and certiorari in this Court has passed, and where this Court relied on the finality of the circuit court decision in exercising its jurisdiction?

2. Can a multi-jurisdiction municipal storm-water permit issued under the Clean Water Act be construed to impose liability on a co-permittee without evidence that the co-permittee discharged pollutants in violation of the permit, where federal regulations provide that each co-permittee is only responsible for its own discharges and where the monitoring specified in the permit measures pollutants discharged by multiple upstream sources without any means to measure the contribution of any individual co-permittee?

PARTIES TO THE PROCEEDINGS 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 and County of Los Angeles, defendants, appellees below, and petitioners here.

There are no publicly held corporations involved in this proceeding.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

APPENDIX

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

FEDERAL STATUTES & REGULATIONS

TABLE OF AUTHORITIES – Continued

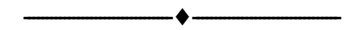
STATE CODES

U.S. SUPREME COURT RULE

OPINIONS BELOW

The August 8, 2013 opinion of the United States Court of Appeals for the Ninth Circuit following reversal by this Court in *Los Angeles County Flood Control District v. National Resources Defense Council, Inc.*, ___ U.S. ___, 133 S. Ct. 710 (2013), that is the subject of this petition, is reported at 725 F.3d 1194 (9th Cir. 2013) and reproduced in the Appendix hereto ("App.") at pages 1-37. The Ninth Circuit's prior opinion was published at 673 F.3d 880 (9th Cir. 2011) and reproduced in the Appendix at pages 43-92. The Ninth Circuit's initial opinion was published at 636 F.3d 1235 (9th Cir. 2011) and is reproduced in the Appendix at pages 93-139.

The district court's two orders granting petitioner's motion for summary judgment with respect to the claims involved in this petition are unpublished and are reproduced in the Appendix at pages 140-44 and 145-74, respectively.



BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit filed its opinion and judgment on August 8, 2013. (App.1-2.) Petitioners timely filed a petition for panel and en banc rehearing. On September 26, 2013, the Ninth Circuit denied the petition. (App.175.) On December 5, 2013, the Honorable Justice Anthony M. Kennedy extended the time for petitioners to file a petition for writ of certiorari to and including January 24, 2014. (Dkt. No. 13A530.)

28 U.S.C. §1254(1) confers jurisdiction on this Court to review the Ninth Circuit judgment.

STATUTORY PROVISIONS AT ISSUE

The Clean Water Act (33 U.S.C. §1342) provides in pertinent part:

> (a) Permits for discharge of pollutants
>
> > (1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311 (a) of this title, upon condition that such discharge will meet either
> >
> > > (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or
> > >
> > > (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.
> >
> > * * *
>
> (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.

40 C.F.R. §122.26 provides in pertinent part:

(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.

(1) 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.

* * *

(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.

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"). 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).

Congress established the National Pollution Discharge Elimination System ("NPDES") (33 U.S.C. §1342) as a 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." 33 U.S.C. §1362(12) 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 other floating craft." The EPA Administrator may delegate NPDES permit authority to a state. 33 U.S.C. §1342(b)-(c). That authority has been delegated to California, where NPDES permits are issued by the State Water Resources Control Board or a regional water quality control board. *See* Cal. Water Code §§13370, 13377.

In 1987 Congress amended the CWA, establishing a new statutory scheme for regulating stormwater runoff. 33 U.S.C. §1342(p). Among other things, the amendments enacted special provisions addressing municipal stormwater permits, providing that permits for discharges from municipal separate storm sewer systems ("MS4s"):

> (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)(B).

MS4s are systems that handle only stormwater and not sewage. Recognizing that it may be impracticable, or undesirable, to issue individual permits for MS4s operated by multiple municipalities within a large geographic area, EPA promulgated regulations concerning issuance of a single permit covering multiple MS4s. *See* 40 C.F.R. §122.26(a)(3)(i)-(vi).

B. The Permit Underlying This Litigation.

In December 2001, the California Regional Water Quality Control Board, Los Angeles Region ("RWQCB") issued an NPDES permit to petitioner County of Los Angeles ("County"), petitioner Los Angeles County Flood Control District ("District"), and 84 cities ("Permit"). (Excerpt of Record, "ER" 180-281.) The Permit regulated stormwater and urban runoff discharges from each of the 86 MS4s operated by the permittees. (*Id*.)

The Permit 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." (ER 182, Permit ¶B.2.) The Permit noted 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." (ER 187, 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." (ER 182, Permit ¶B.1.)

The Permit was issued to the 86 separate entities as co-permittees, and 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." (ER 199, Permit ¶G.4.) This provision was dictated by federal regulation: "Co-permittee means a permittee to an 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* ER 204, Permit, Part 3 D.1 (providing that petitioner District, designated as principal permittee, "is not responsible for ensuring compliance of any individual Permittee").

The Permit also included a monitoring and reporting program. (ER 258-79.) The primary objectives of the monitoring and reporting program were: assessing compliance with the Permit; measuring and improving the effectiveness of the stormwater quality management plans; assessing the chemical, physical and biological impacts to receiving waters resulting from urban runoff; undertaking the characterization of stormwater discharges; identifying sources of pollutants; and assessing the overall health and evaluating long-term trends in receiving water quality. (ER 263.) These objectives would be accomplished through various activities, including the monitoring of "mass emissions" at seven watershed monitoring stations. (ER 263.)

C. The Lawsuit.

On March 3, 2008, respondents Natural Resources Defense Council and Santa Monica Baykeeper filed a complaint against petitioner County, individual members of its Board of Supervisors in their official capacity, the Director 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 District's MS4s caused or contributed to exceedances of water quality standards at 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. (ER 453-58; *see also* ER 414, 426, 430-45.) The district court referred to these allegations as the "watershed claims."

D. The District Court's Decision.

Petitioners moved for summary judgment as to all watershed claims. (App.146-47; ER 9.) Respondents moved for partial summary judgment against petitioner District with respect to exceedances of water quality standards in the Los Angeles and San Gabriel Rivers. (App.146; ER 9.)[1]

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 (respondents' "*ipso facto* monitoring argument" or "monitoring argument"). (App.159-60.) Petitioners contended that the mass-emissions monitoring station data could not be used to determine compliance with the Permit and that in any event, there was no evidence of a "discharge" from petitioners' MS4s that violated the Permit. (App.158.)

The district court initially denied both motions for summary judgment, concluding that an issue of fact existed as to whether pollutants in discharges from either petitioners' MS4 exceeded the water

[1] The parties moved for summary judgment with respect to other claims that are irrelevant to this petition.

quality standards set by the Permit. (App.147, 163-64.)

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 petitioners' "outflows" at or near the time the exceedances were observed in the monitoring station data. (App.164.)

On April 26, 2010, the district court granted summary judgment to petitioners on all watershed claims. (App.140-41.) The court found that respondents had failed to present evidence that standards-exceeding pollutants passed through the County's or District's MS4 outflows at or near the time the exceedances were observed. (App.142.) The court further found that respondents adduced no evidence that the mass-emissions monitoring stations themselves were located at or near one of the County's or District's outfalls. (*Id*.) The court emphasized that, under the Permit and the federal regulations, the County and District were each responsible only for their own discharges. (App.143-44.)

E. The Ninth Circuit's Prior Decisions.

Respondents appealed. On March 10, 2011, the Ninth Circuit issued a published opinion affirming the district court in part, and reversing in part. (App.93-94, 135-36, 138-39.) The court agreed with

the district court that, contrary to respondents' contention, the detection of standards-exceeding pollutants at the mass-emissions monitoring stations did not *ipso facto* establish petitioners' liability. (App.130-31.) The Ninth Circuit affirmed summary judgment in favor of the County with respect to all four watershed claims and in favor of the District on the claims involving the Santa Clara River and Malibu Creek. (App.136-38.)

The Ninth Circuit held that the district court had erred, however, in concluding that there had not been a "discharge" in violation of the Permit from the District's MS4. The court held that the monitoring stations were in concrete channels maintained by the District in the Los Angeles and San Gabriel Rivers and that water exited these channels and flowed into the "naturally occurring" portions of the "rivers," constituting a "discharge" from an "outfall" within the meaning of the CWA. (App.133-34.)

The District filed a petition for panel rehearing and rehearing en banc. The District noted, among other things, that because it was undisputed that the monitoring stations were within the rivers themselves, the opinion conflicted with this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), since the court was finding a permit violation based on transfer of water within a single navigable body of water.

The Ninth Circuit requested respondents to respond to the petition for rehearing. Respondents

did so without acknowledging that the court either was mistaken as to the location of the monitoring stations or had misinterpreted *Miccosukee Tribe*. Respondents did not request the Ninth Circuit to reverse its holding that the monitoring could not *ipso facto* establish a violation of the permit.

On July 13, 2011, the Ninth Circuit issued a new opinion. (App.43-44.) The only significant difference between this opinion and the first concerned the appropriate remedy in the event violations were found. (App.79-80.) The court repeated, verbatim, its reasoning from the prior opinion that the District was liable for "discharges" from "outfalls" because standards-exceeding pollutants passed through concrete portions of the Los Angeles and San Gabriel Rivers. (App.86-87, 89.) The Ninth Circuit also repeated its rejection of respondents' *ipso facto* monitoring argument and affirmed judgment as to the County on all watershed claims and as to the District on the Malibu Creek and Santa Clara River claims. (App.83-84, 89-91.)

F. This Court Reverses The Ninth Circuit And Declines To Address Respondents' Monitoring Argument Because It Was Rejected By The Ninth Circuit And Respondents Had Not Preserved The Issue For Further Review.

After obtaining a stay of mandate in the Ninth Circuit, the District filed a petition for writ of certiorari in this Court, arguing, among other issues, that the Ninth Circuit's finding of a "discharge" was

inconsistent with *Miccosukee Tribe*. Respondents did not file a cross-petition for certiorari on the Ninth Circuit's rejection of their *ipso facto* monitoring argument as to the County's liability with respect to all four watershed rivers, the District's liability with respect to Malibu Creek and the Santa Clara River, or even as a ground for otherwise affirming liability against the District in regard to the Los Angeles and San Gabriel Rivers. Instead, in their opposition to certiorari, respondents defended the Ninth Circuit's opinion, contending that it "correctly applied *Miccosukee Tribe*." (Brief In Opposition, No. 11-460, at 10.) This Court granted certiorari on a single issue, which it phrased as:

> Under the Clean Water Act (CWA), 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq*., does the flow of water out of a concrete channel within a river rank as a "discharge of a pollutant"?

133 S. Ct. at 711.

Following grant of certiorari, respondents acknowledged for the first time that, to the extent the Ninth Circuit's decision suggested that a "discharge" occurred when water passed through the rivers' concrete channels, the decision would be contrary to *Miccosukee Tribe*, and they posited that the Ninth Circuit may have been mistaken about the location of the monitoring stations, believing they were not within the rivers themselves. (Brief for Respondents, No. 11-460, at 30.) Respondents urged this Court to affirm the Ninth Circuit based on different grounds,

namely, the *ipso facto* monitoring argument rejected by the Ninth Circuit, i.e., that the District and County (and by implication, all 84 other co-permittees) were liable under the CWA based solely upon standards-exceeding pollutants detected at the monitoring stations, without any evidence of a discharge that caused those exceedances. (*Id*. at 33-59.)

In reply, the District noted that respondents' monitoring argument was not properly before this Court because it was not embraced within the question on which certiorari had been granted and respondents had not filed a cross-petition. (Reply Brief of Petitioner, No. 11-460, at 8, 16.) The District also argued that the Ninth Circuit's rejection of the monitoring argument was the very basis for its having affirmed judgment as to the County, and this Court's precedent made it clear that the Court should not address an issue that would otherwise affect the rights of a party that was not properly before it and was not presented in a petition for writ of certiorari. (*Id*. at 8-17.) The District further noted that respondents' concession of error as to the Ninth Circuit's decision effectively ended the case because respondents had raised only their monitoring argument in the Ninth Circuit, that argument had been rejected by the Ninth Circuit, and respondents had not sought further review of that argument either in the Ninth Circuit or in this Court. (*Id*. at 1, 6-8.)

Given respondents' concession of error, oral argument focused on the posture of the case following reversal by this Court. The United States, which had

filed an amicus curiae brief in support of neither party, urged "the Court to do what it normally does when it vacates an erroneous part of a judgment and sends it back, that is, leave it open to the court of appeals, to address any issues consistent with this Court's opinion." (Transcript of Oral Argument, No. 11-460 ("Transcript"), at p. 27, lns. 3-7; *see also* p. 31, ln. 23-p. 32, ln. 2.) Several members of the Court speculated about what could possibly remain on remand, since the Ninth Circuit had already rejected respondents' monitoring argument. Justice Sotomayor noted:

> The Ninth Circuit agreed that the permittee is only liable for its own discharges. It held the permittee liable because it believed that the discharges were within their source – within their outflow. So what are we remanding for? The legal question of whether the – the – monitoring stations automatically create liability has been answered in the negative by both courts.

(*Id*. at p. 26, lns. 18-25.)

Justice Scalia observed:

> I do not see how this Court – how the – how the court of appeals is going to be able to do anything different, other than say there's no liability here, unless, of course, it adopts another fanciful interpretation of the statute, which is something I worry about.

(*Id*. at p. 28, ln. 25-p. 29, ln. 5.)

As Justice Scalia further noted in response to the suggestion of the United States that the Ninth Circuit might, on remand, adopt respondents' monitoring argument:

> So you're going to impose a shared thing? I see no way for the court of appeals to do this in – in a fashion that will not bring the case right back here, and you'll be asking us to send it back to the same panel.

(*Id*. at p. 30, lns. 10-14.)

On January 8, 2013, this Court issued its opinion reversing the Ninth Circuit. *Los Angeles Flood Control Dist. v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710 (2013). Writing for the court, Justice Ginsburg noted that regardless of whether the Ninth Circuit's reasoning was based upon a misconstruction of the CWA or upon a mistake about the location of the monitoring stations, that court's conclusion that a discharge occurred when water passed through the improved portions of the rivers was contrary to *Miccosukee Tribe*. *Id*. at 713. The Court declined to address respondents' monitoring argument, finding that:

> This argument failed below. See 673 F.3d at 898, 901. . . . It is not embraced within, or even touched by, the narrow question on which we granted certiorari. We therefore do not address, and indicate no opinion on, the issue the NRDC and Baykeeper seek to substitute for the question we took up for review.

Id. at 714.

The Court's disposition stated:

> For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded.
>
> It is so ordered.

Id.

G. The Ninth Circuit Reconsiders And Effectively Grants Rehearing On The Monitoring Argument, And Imposes Liability On Both The District And The County With Respect To The Los Angeles And San Gabriel Rivers.

Following remand from this Court, the Ninth Circuit granted respondents' motion requesting leave to file supplemental briefing concerning the posture of the case on remand. (App.41-42.) In their supplemental briefing, respondents urged the court to reconsider its rejection of their monitoring argument, repeating almost verbatim every point that had already been presented to and rejected by the Ninth Circuit. Respondents urged reconsideration of the issue only for the Los Angeles and San Gabriel Rivers and only as to the District, not the County. (Ninth Cir. Dkt. No. 68 at 20; Dkt. No. 74 at 10.)

Petitioners argued in response that the Ninth Circuit was foreclosed from reconsidering the monitoring argument by this Court's decision in *Calderon v. Thompson*, 523 U.S. 538, 552-53 (1998). In *Calderon,* this Court held that once a case is final for

purposes of invoking certiorari jurisdiction – including either denial of rehearing or expiration of the time to obtain it – prudential interests in establishing a truly final adjudication on which the high court may rely and avoiding piecemeal litigation bar a circuit court from reconsidering an issue that was otherwise final. (Ninth Cir. Dkt. No. 71 at 2, 13-16.) Petitioners also reiterated the arguments they had previously made to the Ninth Circuit, and which that court had accepted, that respondents' argument was inconsistent with the CWA and the Permit itself. (*Id*. at 17-20.)

On August 8, 2013, the Ninth Circuit issued a published opinion affirming the district court in part and reversing in part. (App.1-2.) The court affirmed the district court's grant of summary judgment to petitioners on the Santa Clara River and Malibu Creek claims, based upon respondents' apparent abandonment of those claims. (App.9 n.5.) This time, however, the Ninth Circuit reversed the district court's grant of summary judgment on the Los Angeles and San Gabriel River claims as to both the District *and the County*, concluding that it was free to reconsider respondents' *ipso facto* monitoring argument since the mandate had been stayed pending proceedings in this Court and therefore had not issued. (App.5, 22, 29-37.)

The Ninth Circuit concluded that both the District and County were liable for discharges in violation of Part 2.1 of the Permit based solely on standards-exceeding pollutants detected at the

monitoring stations within the San Gabriel and Los Angeles Rivers with no evidence of a "discharge" under the CWA. (*Id*.) In the Ninth Circuit's latest view, municipal stormwater permits issued under the CWA must require compliance monitoring, and therefore the Permit must be construed to impose liability based on the mass-emissions monitoring even if this monitoring did not identify any County or District's discharges but rather reflected the comingled discharges of every upstream source, including other permitted NPDES discharges, non-permitted discharges and natural sources. (App.30-31.) As to the Permit's provision that, consistent with federal regulations (40 C.F.R. §122.26(b)(1)), each permittee is responsible only for its own discharge, the court held that "liability" under the CWA was not the same as "responsibility" and the District and County could be held liable for violating the CWA even if they were not responsible for the violation. (App.28-29.) The Ninth Circuit did not address this Court's decision in *Calderon*.

Petitioners timely filed a petition for rehearing, noting that the decision failed to address, and was inconsistent with, *Calderon*, particularly as to the County – a party against whom respondents had never sought additional review, including on remand from this Court. On September 26, 2013, the Ninth Circuit denied the petition for panel and en banc rehearing. (App.175.)

REASONS WHY CERTIORARI IS WARRANTED

For the second time in the same case, the Ninth Circuit has issued a decision undermining basic principles governing stormwater regulation under the CWA and spawning uncertainty in an area in which long-term planning is essential and predictability of responsibility is crucial. Worse yet, it has repudiated the basic principles of finality essential to preserve meaningful review by this Court and due respect for this Court's exercise of jurisdiction.

I. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT'S RECONSIDERATION OF AN ISSUE THAT WAS FINAL FOR PURPOSES OF REVIEW BY THIS COURT, AND UPON WHICH THIS COURT RELIED IN RENDERING ITS PRIOR DECISION IN THE CASE, IS CONTRARY TO BASIC PRINCIPLES OF FINALITY ESTABLISHED IN *CALDERON V. THOMPSON*, WHICH ARE ESSENTIAL TO ASSURE DUE REGARD FOR THIS COURT'S JURISDICTION AND AVOID PIECEMEAL LITIGATION.

Supreme Court Rule 10(a) provides that intervention by this Court is warranted when a circuit court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." This is precisely such a case.

The Ninth Circuit has done something unprecedented – it has essentially *sua sponte* granted rehearing on an issue that this Court expressly declined to decide because respondents had lost the issue in the circuit court and had not sought either rehearing in that court or cross-petitioned for certiorari in this Court. Even more outrageously, in doing so, the Ninth Circuit entered judgment against petitioner County, even though respondents failed to seek rehearing in the Ninth Circuit or certiorari in this Court as to the County, and had not even asked the Ninth Circuit to revive their claims against the County in their supplemental briefing on remand to that court.

Given respondents' concession of error by the Ninth Circuit in the prior proceedings in this Court, a substantial portion of oral argument was devoted to discussing whether respondents' monitoring argument was properly before the Court, as well as what issues could conceivably be left in the case upon reversal of the Ninth Circuit's judgment. Petitioner District argued that, upon reversal, nothing remained but to affirm the district court judgment for petitioners, since the only argument respondents raised – the monitoring argument – had been rejected by the Ninth Circuit and was not properly before this Court. (*Supra*, pp. 16-17.) The United States, as amicus curiae, took the position that the Court should simply use what it termed its typical disposition, i.e., that the case be reversed and remanded. (*Id*.) Respondents requested the Court to remand for further proceedings in the hope that the Ninth Circuit, which had

already ruled for respondents on grounds that even they acknowledged were indefensible, would give them another bite at the apple. (Transcript at p. 58, ln. 18-p. 59, ln. 7.)

The Court ultimately ordered that the case be "reversed and remanded," assuming that the Ninth Circuit would proceed consistent with the governing law. This was not to be.

A. Under *Calderon v. Thompson*, Basic Principles Of Finality That Assure Due Regard For The Jurisdiction Of This Court And Avoid Piecemeal Litigation Bar A Circuit Court From Reconsidering An Issue That Is Final As To This Court, Where This Court Relied On That Finality In Exercising Its Jurisdiction.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), a Ninth Circuit panel denied habeas relief to the defendant in a death penalty case. *Id*. at 545-46. The defendant timely filed a petition for rehearing and suggestion for rehearing en banc, which was denied with the notation that the full court was advised of the suggestion for rehearing en banc and no active judge had requested a vote to rehear the matter. *Id*. at 546. The defendant filed a petition for certiorari, which this Court denied. *Id*. The Ninth Circuit then issued its mandate. *Id*.

A little over a month later, the defendant filed a motion requesting the Ninth Circuit to recall its

mandate. *Id*. The court denied the motion. *Id*. at 547. Two days later, the full court voted to consider en banc whether to recall the earlier mandate and whether the panel decision would result in a fundamental miscarriage of justice. *Id*. Following argument, the court issued its opinion *sua sponte* recalling the mandate, granting en banc review of the underlying panel decision, and reversing that decision. *Id*. at 547-48. The court justified recalling its mandate and granting rehearing based upon procedural misunderstandings within the court that had resulted in two judges having been unable to call for en banc review when defendant's initial petition had been filed. *Id*. at 548.

This Court reversed, holding that the Ninth Circuit had abused its discretion in recalling the mandate solely for purposes of granting rehearing after all proper avenues for granting rehearing had been exhausted. The Court premised its decision on the finality requirements of the habeas corpus statute (*id*. at 553-58), as well as "grave doubts about the actions taken by the Court of Appeals" based on "ordinary concerns of finality." *Id*. at 552-53. As the Court noted, under the Ninth Circuit's rules, the two judges that were initially unable to call for rehearing en banc could have requested the full court to suspend the time limits for voting to rehear the case, and thus could have secured a rehearing vote before the defendant sought further review in the Supreme Court. As this Court observed:

> They chose not to do so, instead waiting another four months to make what was, in effect an identical request. The Court of Appeals for all practical purposes lay in wait while this Court acted on the petition for certiorari, the State scheduled a firm execution date for Thompson, and the Governor conducted an exhaustive clemency review. Then, only two days before Thompson was scheduled to be executed, the court came forward to recall the judgment on which the state, *not to mention this Court, had placed heavy reliance.*

Id. at 552 (emphasis added).

The same principles are at issue here. Indeed, respondents are in a worse position than the defendant in *Calderon,* who at least timely sought rehearing in the Ninth Circuit and certiorari in this Court. Here, respondents made no effort to challenge the Ninth Circuit's previous adjudication of their monitoring argument either by way of timely petition for rehearing, or cross-petition for certiorari. They did not request the Ninth Circuit to reconsider the issue until their Supplemental Brief on remand, filed 20 months after the Ninth Circuit's prior decision, and long after this Court had granted certiorari and expended its resources in reviewing the Ninth Circuit's "final" decision.

Although *Calderon* involved a recall of mandate, the finality concerns identified by this Court concerned not the power of the court to recall its

mandate – the Court acknowledged that the court had the power to do so (*id*. at 549-50) – but the closure that must necessarily occur when the orderly time periods for seeking rehearing and subsequent review in this Court have expired. The Court emphasized that the Ninth Circuit had abused its discretion in recalling the mandate because it did so solely for purposes of granting rehearing long after the initial request had been denied and the time for en banc rehearing had expired, and after this Court had relied on the finality of those prior proceedings.

That is the situation here. This Court took this case after respondents had failed to seek rehearing with respect to the Ninth Circuit's rejection of their monitoring arguments or to cross-petition to invoke the jurisdiction of this Court to address that issue. The Court relied on the finality of that issue in rendering its decision – expressly declining to address the argument because it had "failed" in the Ninth Circuit, and respondents had not properly preserved it for review in this Court. 133 S. Ct. at 714.

The Ninth Circuit decision fails to address *Calderon*, even though petitioners cited it in their Response to respondents' Supplemental Brief on remand and in their Petition for Rehearing. Nor do any of the cases cited by the Ninth Circuit as allowing modification of an opinion until mandate issues involve reconsideration of an issue following remand from this Court. In *Carver v. Lehman*, 558 F.3d 869, 878 (9th Cir. 2009), the panel changed composition while a petition for rehearing was still pending. *United States v. Foumai*,

910 F.2d 617, 620 (9th Cir. 1990), concerned the finality of district court decisions in reviewing magistrate rulings. In *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 9 F.3d 893, 896, 900 (11th Cir. 1993), the mandate was stayed pending a petition for rehearing en banc, and after granting the petition, the en banc panel concluded the case was moot, and directed the panel to dismiss the appeal and remand to the district court for dismissal.

While this Court has recognized that a "court has the power to revisit prior decisions of its own . . . in any circumstance," *Christianson v. Colt Industries Operating Corp*., 486 U.S. 800, 817 (1988), the Court has cautioned that lower courts "should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous or would work a manifest injustice." *Id*. (internal quotation marks omitted). Here, there was no change in the facts or the law between the Ninth Circuit's prior opinion and its current opinion. The Ninth Circuit nowhere suggests that its prior rejection of the monitoring argument was "clearly erroneous." The only change in circumstances is that this Court reversed the Ninth Circuit.

Nor does leaving the prior adjudication of that issue intact result in manifest injustice. As the First Circuit observed in *Kotler v. American Tobacco Co*., 981 F.2d 7, 13 (1st Cir. 1992), in a "civil case, pure and simple," where a plaintiff "has had her full day in court," allowing the "previous decision to stand does not appear to work a gross injustice." As that court

noted in declining to address an issue beyond the scope of this Court's remand order: "In our view, a decision gratuitously to reopen this issue, like any decision belatedly to reopen a judgment that is arguably in error, would deprive the defendants of their rightful sense of repose and frustrate the judicial system's core principles of finality and efficiency." *Id*. at 13-14.

That is exactly this case. Both petitioners had every reason to rely on the Ninth Circuit's previous rejection of respondents' monitoring argument given that respondents did not challenge that result either by way of petition for rehearing in the Ninth Circuit or cross-petition for writ of certiorari in this Court. The District expended considerable resources in seeking review of, and ultimately briefing and arguing, the single issue properly presented for review in this Court, only to have the Ninth Circuit's unprecedented about-face on the monitoring argument render those efforts, and this Court's expenditure of its own time and resources, essentially meaningless.

The County had no reason to anticipate that it would be dragged back into the case on these claims, years after they had been resolved in its favor and respondents had not sought further review in this Court. Indeed, respondents did not attempt to revive their claims against the County in their supplemental briefing on remand in the Ninth Circuit, instead seeking reconsideration of the monitoring argument only as to the District. Although the Ninth Circuit affirmed judgment for both petitioners on the Malibu

Creek and Santa Clara River claims because respondents only sought reconsideration with respect to the San Gabriel and Los Angeles River claims (App.9 n.5), the court does not explain why all of respondents' watershed claims against the County were not similarly forfeited.

Moreover, the mere fact that the mandate had not issued in no way undermines petitioners' justifiable reliance on the finality of the Ninth Circuit's decision, given respondents' clear abdication of any intent to seek further review as to their monitoring argument through the accepted procedures for doing so. Indeed, were it otherwise, any party who has prevailed on some claims in an action where certiorari is sought on other, unrelated issues, would have to make certain that the mandate issued from the circuit court even while a petition for certiorari is pending, simply to "lock in" the favorable determination of particular issues. Such a result is bad law, and worse policy.

Calderon, and the basic principles of finality that this Court recognized as essential to afford repose to parties to the litigation and more critically to protect its own jurisdiction and avoid piecemeal litigation, foreclose exactly what the Ninth Circuit did here – grant rehearing on an issue long after the proper time for doing so had passed, and after this Court had relied upon the finality of the circuit court's determination of that issue.

B. The Ninth Circuit's Departure From *Calderon* Warrants Summary Reversal Or Review By This Court.

The Ninth Circuit's departure from *Calderon* warrants summary reversal by this Court. The posture of the case is clear. No change in facts or law occurred between issuance of the Ninth Circuit's prior decision and its current opinion. The court readily admitted that it reconsidered an issue that was previously settled in petitioners' favor. (App.5, 21-22.) This Court expressly refused to address that issue because respondents had not preserved it for review. Since respondents raised no other arguments in the Ninth Circuit, and this Court reversed the Ninth Circuit's prior decision, the proper disposition is to reverse with directions to affirm judgment for petitioners on all claims.

At the very least, certiorari is warranted to clarify application of *Calderon* in the context of a civil case in order to provide guidance on the authority of circuit courts to resurrect settled issues following remand from this Court. If it is "open season" on virtually any issue adjudicated in a circuit court opinion so long as the mandate has not issued pending disposition by this Court of other issues, this Court can never be confident that a decision is truly final for purpose of exercising jurisdiction. In addition, as noted, there will be chaos, with parties, depending upon their interests, battling over whether the mandate should be stayed pending review in this Court, and spawning ancillary proceedings in both

circuit and district courts as the parties litigate the resulting stay motions.

The Ninth Circuit's decision is unprecedented and directly repudiates the principles of finality established in *Calderon*. This Court should grant review.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S IMPOSITION OF LIABILITY ON A CO-PERMITTEE IN A MULTI-JURISDICTION MUNICIPAL STORMWATER PERMIT WITHOUT PROOF THAT THE CO-PERMITTEE DISCHARGED POLLUTANTS IN VIOLATION OF THE PERMIT, IS CONTRARY TO THIS COURT'S PREVIOUS DECISION IN THIS CASE AND THE PROVISIONS OF THE CWA, REQUIRING PROOF OF A DISCHARGE FOR LIABILITY, AS WELL AS FEDERAL REGULATIONS ESTABLISHING THAT A CO-PERMITTEE IS ONLY RESPONSIBLE FOR ITS OWN DISCHARGES.

As this Court recognized in previously granting review in this case, application of the CWA to municipal stormwater systems is an issue of vital importance that directly impacts cities, counties, flood control districts and other public entities that manage stormwater throughout the country. Municipal stormwater systems, by their nature, require the expenditure of significant resources in planning, construction and operation of stormwater facilities.

In making decisions concerning commitment of these resources, it is essential that policymakers be able to evaluate potential liability.

For the second time in this case, the Ninth Circuit has issued a decision that creates confusion in an area of law that demands clarity. The Ninth Circuit's decision is flatly at odds with governing case authority, including decisions by this Court, as well as applicable statutes and regulations concerning regulation of municipal stormwater discharges under the CWA. As with the Ninth Circuit's prior decision, the relatively few appellate decisions addressing liability for municipal stormwater discharge means that the Ninth Circuit opinion will necessarily have a disproportionate impact on both regulators and the regulated community, in planning, implementing and operating stormwater systems. It is again essential that this Court grant review.

A. The Ninth Circuit Decision Improperly Imposes Liability Without Proof Of A "Discharge."

The Ninth Circuit asserted that the Permit must be interpreted like a contract (App.24-25) and, because the Permit's monitoring program provides that one of its objectives is assessing compliance with the Permit, exceedances detected at the mass-emission monitoring stations must be construed as establishing violations of the Permit (App.25-26). The Ninth Circuit further concluded that NPDES permittees are

required to engage in compliance monitoring (App.33-35) and that petitioners chose these locations (App.36). The Ninth Circuit thus held that the Permit imposes liability on all permittees, including petitioners, without proof that a permittee's discharges in fact caused or contributed to the exceedances. (App.36-37.) This holding is squarely contrary to the CWA and indeed this Court's prior decision in this case.

The district court and the Ninth Circuit in its prior opinion correctly rejected the notion that there could be liability without proof of a discharge. As the Ninth Circuit previously held, the Permit and the CWA do not prohibit "exceedances" but rather "discharges that are *not* in compliance with the Act." (App.83 (citing 33 U.S.C. §1311(a)) (emphasis in original).) The Ninth Circuit found that respondents "were obligated to . . . spotlight how the flow of water from an ms4 'contributed' to a water-quality exceedance detected at the Monitoring Stations." (App.90.)

This Court reaffirmed this principle in this very case, reversing the Ninth Circuit because it improperly found such a "discharge" based upon the flow of water from an "improved portion of a navigable waterway into an unimproved portion of the very same waterway." 133 S. Ct. at 713. *See also Miccosukee,* 541 U.S. at 112 (no CWA permit required if no "discharge").

The Ninth Circuit's latest decision eliminates the CWA's requirement that there be proof of a

"discharge" that adds pollutants to a navigable waterway because it imposes liability on a permittee based solely on results from downstream monitoring, even though that monitoring includes pollutants in the river from *all* upstream sources, natural, permitted and unpermitted, including sources that were never in the District's or County's MS4. That holding simply cannot be squared with the basic provisions of the CWA. In addition, the entire premise of the Ninth Circuit's decision – that monitoring is a statutory substitute for proof of a discharge – is legally and logically untenable.

B. Municipal Stormwater Dischargers Are Not Subject To The Same Monitoring Requirements As Industrial Dischargers; Nor Could Downstream Monitoring Accurately Assess A Permittee's Discharges, Given The Thousands Of Other Discharges – Natural, Permitted And Unpermitted – Upstream From The Monitoring Stations.

The essential premise underlying the Ninth Circuit's decision is the assumption that municipal stormwater dischargers are necessarily subject to the same monitoring requirements as other NPDES dischargers. (App.30-32.) This premise ignores the fact that municipal stormwater dischargers are treated differently under the CWA, and that the practical realities of downstream monitoring preclude its use for determining the compliance of any individual permittee.

In characterizing the requirements of 33 U.S.C. §1342(p)(3)(B)(iii) in the preamble to the final stormwater regulations, 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 "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).

NPDES permits issued to municipal stormwater dischargers are in fact vastly different from those issued to industrial dischargers. Congress provided that municipal permits could be issued either to individual municipalities or on a system-wide basis. 33 U.S.C. §1342(p)(3)(B)(i). Instead of the strict control technology required of industrial dischargers, municipal stormwater permits require only controls to reduce pollutants to the "maximum extent practicable." 33 U.S.C. §1342(p)(3)(B)(iii). Municipal stormwater permits need not require compliance with water quality standards, a requirement which is

imposed on industrial NPDES dischargers, including industrial stormwater dischargers. *Compare* 33 U.S.C. §1342(p)(3)(B)(iii) *with* 33 U.S.C. §1342(a)(1) and §1342(p)(3)(A). The Ninth Circuit itself has recognized that this difference in statutory language indicates that Congress intended to treat municipal stormwater dischargers differently from other NPDES permittees. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-65 (9th Cir. 1999).

This sharp distinction is also reflected in monitoring requirements. 33 U.S.C. §1342(p)(3)(A) states that "Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title." Pursuant to 33 U.S.C. §1342(a)(1), included among the "applicable provisions of this section" are the monitoring requirements of 33 U.S.C. §1318. Significantly, there is no similar requirement to "meet all applicable provisions of this section" for municipal dischargers. 33 U.S.C. §1342(p)(3)(B). Instead, municipal dischargers are subject to more flexible requirements as the "Administrator or the State determines appropriate for the control of . . . pollutants." 33 U.S.C. §1342(p)(3)(B)(iii).

While the Ninth Circuit cites 40 C.F.R. §122.44(i)(1), which provides that each NPDES permit shall include monitoring requirements to assure compliance with permit limitations (App.30, 35), this regulatory subsection is a subpart of 40 C.F.R. §122.44, which only provides that each NPDES permit shall include these requirements, including

monitoring, "*when applicable*." (Emphasis added.) As discussed, in enacting 33 U.S.C. §1342(p)(3) Congress did not make the compliance monitoring requirements of §1342(a)(1) applicable to municipal stormwater permits.

The Ninth Circuit also erroneously cites 40 C.F.R. §122.26(d)(2)(i)(F) as requiring permit applications to include monitoring procedures necessary to determine compliance. (App.30.) That regulation instead addresses a permit applicant's legal authority, and requires only that applicants demonstrate sufficient legal authority "by statute, ordinance or series of contracts" to "[c]arry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer." 40 C.F.R. §122.26(d)(2)(i)(F).

Even if a compliance monitoring requirement could be read into the provisions concerning municipal stormwater dischargers, neither the Permit's language, the CWA regulations, nor common sense support the Ninth Circuit's conclusion. As a threshold matter, the mass-emissions monitoring stations do not measure the contribution of any single permittee but the "mass emissions" generated by *all* upstream sources, municipal and non-municipal alike. As the Ninth Circuit acknowledged in its previous decisions, in the Los Angeles River, at least 1,344 NPDES-permitted industrial and 488 construction stormwater dischargers, three wastewater treatment

plants, and 42 separate incorporated cities discharge upstream of the monitoring station. (App.62.) Discharging upstream from the San Gabriel River monitoring station are at least 276 industrial and 232 construction stormwater dischargers, two wastewater treatment plants, 21 separate incorporated cities, and to top it off, at least 20 industrial dischargers *specifically permitted to discharge in excess* of the water quality standards referenced in the Permit. (*Id*.) In addition, the stations also measure pollutants from upstream unpermitted dischargers and natural sources, including the Los Angeles and San Gabriel National Forests. Given the sheer number of upstream dischargers, the notion that these stations can detect exceedances attributable to any particular permittee is untenable.

Nor, contrary to the Ninth Circuit's conclusion, did petitioners agree that the monitoring stations would be used to affix individual liability. (App.36.) While the regulations require a permittee to *propose* an appropriate monitoring site, *see* 40 C.F.R. §122.26(d)(2)(iii)(D), the regulatory agency (here, the RWQCB) retains final authority on the issue. (ER 353.)

The Permit's monitoring program also states that the monitoring sites were designed to assess the contribution of "the MS4," the collection system *for the entire river watershed,* not the discharge of any one permittee: their purpose is to "[e]stimate the mass emissions *from the MS4*; [a]ssess trends in the mass emissions over time; and [d]etermine if *the MS4*

is contributing to exceedances of Water Quality Standards. . . . " (ER 263 (emphasis added).)

This language is consistent with 40 C.F.R. §122.26(d)(2)(iii)(D), which sets forth a deliberate approach for municipal stormwater monitoring which starts with "representative data collection for the term of the permit. . . . " Such monitoring is the first step towards understanding the nature and source of pollutants in municipal stormwater discharges. This is why the Ninth Circuit's assertion that, unless the monitoring is used to determine permittee compliance it would be "meaningless" (App.28), is flatly wrong.[2] Based on these monitoring data, the permitting agency can refine requirements in subsequent permits.[3]

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[2] The Ninth Circuit asserted that the RWQCB rejected petitioners' position, citing an Amicus Brief filed in a lawsuit respondents brought against the City of Malibu. (App.31.) This is incorrect. First, the quoted portion of the brief refers primarily to Permit requirements concerning the Santa Monica Bay Beaches Bacteria TMDL, not mass-emissions monitoring. Second, even though monitoring reports have been submitted to the RWQCB starting in 2002, the RWQCB has *never* asserted that this monitoring establishes a Permit violation. Third, the RWQCB itself recently described the purpose of mass-emissions monitoring as characterizing "*the collective* impact of discharges from multiple MS4 permittees on receiving waters," not to assess liability of individual permittees. (*See* August 15, 2013 Unger letter, p. 3 (emphasis added), Exhibit 1 to Request for Judicial Notice, Ninth Cir. Dkt. No. 82-2.)

[3] Indeed, as this Court noted, a new permit now provides for more location-specific monitoring. 133 S. Ct. at 714 n.2.

Moreover, §122.26(d)(2)(iii)(D) does not require that the data collection monitoring be used to determine compliance. The only specific sources required to be monitored by a municipal stormwater discharger are pollutants in run-off from municipal landfills or other treatment, storage or disposal facilities for municipal waste, hazardous waste treatment, disposal and recovery sites, SARA section 313 facilities, and facilities that a permittee determines are contributing a substantial load to the storm sewer system. 40 C.F.R. §122.26(d)(2)(iv)(A)(5) and (C).[4]

Nothing in the CWA or pertinent regulations imposes compliance monitoring on municipal stormwater permittees. The Ninth Circuit has created this requirement out of whole cloth.

[4] The Ninth Circuit cites *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated and remanded on other grounds*, 485 U.S. 931 (1988), *reinstated and amended by* 853 F.2d 667 (9th Cir. 1988), for the proposition that the NPDES program relies on self-monitoring. (App.33.) *Sierra Club*, however, involved monitoring designed to characterize industrial and other wastewater from a refinery. This was not a stormwater permit, let alone a municipal stormwater permit, and thus was subject to the "all applicable provisions" requirements of the CWA. *Sierra Club* is inapposite.

C. The Ninth Circuit's Decision Is Contrary To 40 C.F.R. §122.26(b)(1), Which Provides That A Co-Permittee In A Multi-Jurisdiction Permit Is Only Responsible For Its Own Discharge.

The Permit provides that "[t]he Los Angeles County Flood Control District, the County of Los Angeles and the other municipalities *are co-permittees as defined in 40 C.F.R. 122.26(b)(1)*." (ER 199, Permit ¶G.4. (emphasis added).) §122.26(b)(1) defines "Co-Permittee" as "a permittee to a NPDES permit that is only responsible for the permit conditions *relating to the discharge for which it is operator*." (Emphasis added.) Permittees, including petitioners, are thus responsible only for Permit conditions relating to discharges from MS4s they operate.

Rather than giving effect to this regulatory provision, the Ninth Circuit, in a semantic sleight-of-hand, turns it on its head. Declaring "responsibility" as something different than "liability" under the CWA, the court concluded that while all permittees are liable for any exceedance measured at the monitoring stations, each will only be "responsible" in terms of a "remedy" to the extent it contributed to the exceedance. (App.27-29.)

To hold that a permittee can be "liable" but not "responsible" is a non sequitur. Under the Ninth Circuit's reasoning, a permittee would be assessed civil penalties and attorney's fees based on exceedances

detected at monitoring stations, even though the permittee might not be responsible for those exceedances because the permittee's discharges did not contribute to the exceedances. Nothing in law or logic supports such a result. And, not surprisingly, this reasoning finds no support in the Permit, which does not use the term "liable," but only "responsible," and makes it clear that each permittee is only "responsible" for its own discharge. (ER 199, Permit ¶G.4.) This is further compelled by the plain language of the CWA, which premises a party's liability upon its "discharge." 33 U.S.C. §1311(a).

The Ninth Circuit cited no case where a discharger was held liable for pollutants not in their discharge. Indeed, the lower courts that have addressed the issue have found that a discharger is liable only for its own discharges or those over which it has control. *Jones v. E.R. Snell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1348 (N.D. Ga. 2004); *United States v. Sargent Cnty. Water Res. Dist.*, 876 F. Supp. 1081, 1888 (D.N.D. 1992).

40 C.F.R. §122.26(b)(1) provides that a "co-permittee" such as the County or District here, is "only responsible for permit conditions relating to the discharge for which it is operator." The Ninth Circuit was not free to depart from the plain language of 40 C.F.R. §122.26(b)(1). Congress granted EPA the authority to adopt regulations governing applications for industrial and municipal stormwater discharges. (33 U.S.C. §1342(p)(4).) Where Congress has "'explicitly left a gap for the agency to fill,' the agency's

regulation is 'given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.'" *Household Credit Servs., Inc. v. Pfenning*, 541 U.S. 232, 239 (2004) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-44 (1984)).

The Ninth Circuit offered no justification for its blanket imposition of liability on all co-permittees, notwithstanding the plain language of 40 C.F.R. §122.26(b)(1), other than to assert that absent such an interpretation, permittees would be free to exceed discharge standards without fear of liability. (App.28.) Yet, the same panel, in its prior opinion, repudiated that very notion, pointing out that it was merely incumbent on respondents to prove their case: "simply ruling out the other contributors of stormwater to these two rivers or following up to vague answers given by Defendants' witnesses could have satisfied Plaintiffs' evidentiary obligation" and respondents "could heed the district court's sensible observation and, for purposes of their evidentiary burden, 'sample from *at least one* outflow that included a standards-exceeding pollutant.'" (App.90 (emphasis in original).)

The Ninth Circuit's decision subjecting each co-permittee in a multi-jurisdiction permit to potential liability based not upon proof that its own discharge contributed to exceedances but based solely upon the multiple upstream discharges, is unprecedented and unsupportable.

D. The Ninth Circuit's Decision Creates Uncertainty Concerning The Standards For Imposing Liability Under Multi-Jurisdiction Permits, Which, Contrary To Congressional Policy, Will Deter Use Of Such Permits.

In amending the CWA to provide for the issuance of MS4 permits, Congress specifically provided that such permits were to be issued either "on a system- or jurisdiction-wide basis." 33 U.S.C. §1342(p)(3)(B)(i). In promulgating regulations governing such permits, EPA noted that "[t]his provision is an important mechanism for developing the comprehensive storm water management programs envisioned by the Act." 55 Fed. Reg. at 48043. In its regulations, EPA encouraged system-wide, multi-jurisdiction MS4 permits "for a number of reasons. The system-wide approach not only provides an appropriate basis for planning activities and coordinating development, but also provides municipal entities participating in a system-wide application the means to spread the resource burden of monitoring, evaluating water quality impacts, and developing and implementing controls." *Id.*

The Ninth Circuit's decision effectively defeats this policy of encouraging multi-jurisdiction permits by creating massive uncertainty concerning potential liability arising from such permits. Its holding that liability may be imposed without proof of a discharge, that compliance monitoring is required in such permits, and most disturbingly, that a co-permittee

can be held liable for the discharges of other co-permittees, will necessarily deter municipalities from joining such permits, since no rational municipality would agree to be responsible for discharges not its own, nor even risk the possibility that its permit would be interpreted in that manner.

The Ninth Circuit's decision has a devastating impact on the entire multi-jurisdiction permit program and will dissuade municipalities from entering into such permits. This is contrary to the policies underlying adoption of 33 U.S.C. §1342(p)(3)(B). It is essential that the Court grant review to provide clarity on this issue of nationwide importance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.; SANTA MONICA BAYKEEPER,
Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; MICHAEL ANTONOVICH, in his official capacity as Supervisor; YVONNE BURKE, in her official capacity as Supervisor; GLORIA MOLINA, in her official capacity as Supervisor; ZEV YAROSLAVSKY, in his official capacity as Supervisor; DEAN D. EFSTATHIOU, in his official capacity as Acting Director of Los Angeles County Department of Public Works; DON KNABE, in his official capacity as Supervisor,
Defendants-Appellees.

No. 10-56017

D.C. No. 2:08-cv-01467-AHM-PLA

OPINION

On Remand From The United States Supreme Court

Filed August 8, 2013

Before: Harry Pregerson and
Milan D. Smith, Jr., Circuit Judges, and
H. Russel Holland, Senior District Judge.*

Opinion by Judge Milan D. Smith, Jr.

SUMMARY**

Environmental Law

On remand from the United States Supreme Court, the panel reversed the district court's grant of summary judgment and held that pollution exceedances detected at monitoring stations of the County of Los Angeles and the Los Angeles County Flood Control District were sufficient to establish the County defendants' liability as a matter of law for violations of the terms of their National Pollutant Discharge Elimination System permit issued pursuant to the Clean Water Act.

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* The Honorable H. Russel Holland, Senior District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

In *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.,* 133 S. Ct. 710 (2013), the Supreme Court held that a discharge of pollutants does not occur when polluted 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, and then into a lower portion of the same river. The Supreme Court declined to address the plaintiffs' argument that the County defendants' monitoring data established their liability for permit violations as a matter of law. On remand, the panel held that this court's previous rejection of the plaintiffs' argument was not a final decision, nor was it law of the case.

The panel held that, under the plain language of the NPDES permit, the data collected at the monitoring stations was intended to determine whether the permittees were in compliance with the permit. Accordingly, if the District's monitoring data showed that the level of pollutants in federally protected water bodies exceeded those allowed under the permit, then, as a matter of permit construction, the monitoring data conclusively demonstrated that the defendants were not in compliance with the permit conditions and were liable for permit violations. The panel held that extrinsic considerations, including the Clean Water Act's monitoring requirements, also supported its holding. The panel remanded the case to the district court for further proceedings, including a determination of the proper remedy for the County defendants' violations.

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OPINION

M. SMITH, Circuit Judge:

Plaintiffs-Appellants Natural Resources Defense Council and Santa Monica Baykeeper (collectively, the Plaintiffs) filed suit against the County of Los Angeles and the Los Angeles County Flood Control District (collectively, the County Defendants) alleging that the County Defendants are discharging polluted stormwater in violation of the terms of their National Pollutant Discharge Elimination System (NPDES) permit, issued pursuant to the Federal Water Pollution Control Act (the Clean Water Act, Act, or CWA), 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251, *et seq*. The district court granted the County Defendants' motion for summary judgment, reasoning that Plaintiffs failed to prove that any *individual*

defendant had discharged pollutants in violation of the Clean Water Act, where Plaintiffs' only evidence of violations was monitoring data taken downstream of the County Defendants' (and others') discharge points, as opposed to data sampled at the relevant discharge points themselves. On appeal, we affirmed the district court's judgment in part and reversed in part. *Natural Res. Def. Council, Inc. v. Cnty. of L.A.,* 673 F.3d 880 (9th Cir. 2011). On January 8, 2013, the Supreme Court reversed our judgment and remanded this case to us for further proceedings. *L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.,* 133 S. Ct. 710 (2013). On February 19, 2013, we ordered the parties to file supplemental briefs addressing the implications of the Supreme Court's ruling. Having considered the Supreme Court's ruling, the responses of the parties in their supplemental briefs, and other matters noted herein, we now conclude that the pollution exceedances detected at the County Defendants' monitoring stations are sufficient to establish the County Defendants' liability for NPDES permit violations as a matter of law. Accordingly, we once again reverse the district court's grant of summary judgment in favor of the County Defendants, and remand to the district court for a determination of the appropriate remedy for the County Defendants' violations.

FACTUAL BACKGROUND

I. Stormwater Runoff in Los Angeles County

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. When stormwater courses over urban environs, it frequently becomes polluted with contaminants, such as "suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, [and] pesticides[.]"[1] *Envtl. Def. Ctr., Inc. v. EPA,* 344 F.3d 832, 840 (9th Cir. 2003). This polluted stormwater often makes its way into storm drains and sewers, which "generally channel collected runoff into federally protected water bodies," *id.,* such as rivers and oceans. Consequently, stormwater runoff has been recognized as "one of the most significant sources of water pollution in the nation, at times comparable to, if not greater than, contamination from industrial and sewage sources." *Id.* (citation omitted).

Los Angeles County (the County) is home to more than 10 million people and covers a sprawling amalgam of populous incorporated cities and significant swaths of unincorporated land. The Los Angeles

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[1] Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. Paved facilities with particularly high volumes of motor vehicle traffic – such as parking lots, retail gasoline outlets, and fast food restaurants – are typically responsible for producing higher concentrations of pollutants in storm water runoff.

County Flood Control District (the District) is a public entity governed by the Los Angeles County Board of Supervisors and the Los Angeles County Department of Public Works. The District comprises 84 cities and some unincorporated areas of the County. The County and the District are separate legal entities.

Each city in the District operates a municipal separate storm sewer system (ms4)[2] that is composed of gutters, catch basins, storm drains, and pipes that collect and convey stormwater. The County also

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[2] Federal Regulations define an ms4 as:

> 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 . . . 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 . . . ;
>
> (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. . . .

40 C.F.R. § 122.26(b)(8). Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, an ms4 conveys only untreated stormwater. *See* 40 C.F.R. § 122.26(a)(7), (b)(8).

operates its own ms4 that primarily collects and conveys stormwater runoff in the unincorporated areas of the County. Each of these ms4s connects to the District's substantially larger ms4, an extensive flood-control and storm-sewer infrastructure consisting of approximately 500 miles of open channels and 2,800 miles of storm drains. Because a comprehensive map of the County Defendants' storm sewer system does not exist, no one knows the exact size of the LA MS4[3] or the locations of all of its storm drain connections and outfalls.[4] But while the number and location of storm drains and outfalls are too numerous to catalog, it is undisputed that the LA MS4 collects and channels stormwater runoff from across the County. It is similarly undisputed that untreated stormwater is discharged from LA MS4 outfalls into various watercourses, including the Los Angeles and San

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[3] Throughout this Opinion, reference is made to both "ms4" and the "LA MS4." The former is a generic reference to an individual municipal separate storm sewer system without regard to its particular location, while the latter specifically refers to the entire flood control and stormsewer infrastructure described *supra* that exists in Los Angeles County, and which is made up of the various interconnected ms4s that are controlled by the County, the District, and the incorporated cities within the District.

[4] An "outfall" is defined as a "point source . . . at the point where a municipal separate storm sewer discharges to waters of the United States. . . ." 40 C.F.R. § 122.26(b)(9). It is estimated that the LA MS4 contains tens of thousands of outfalls where stormwater runoff is discharged into federally protected water bodies.

Gabriel Rivers.[5] These rivers, in turn, drain into several coastal waters, including, among others, the Santa Monica Bay and the Pacific Ocean.

II. The County Defendants' NPDES Permit

Section 301(a) of the CWA prohibits the "discharge of any pollutant" from any "point source" into "navigable waters" unless the discharge complies with certain other sections of the CWA.[6] *See* 33 U.S.C. § 1311(a). One of those sections is section 402, which provides for the issuance of NPDES permits. 33 U.S.C. § 1342. In nearly all cases, an NPDES permit is required before anyone may lawfully discharge a

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[5] Plaintiffs originally complained about the County Defendants' discharges into four water bodies: the Los Angeles River, the San Gabriel River, the Santa Clara River, and Malibu Creek. *See Natural Res. Def. Council,* 673 F.3d at 883. On remand to this court, however, Plaintiffs only seek review of the district court's summary judgment ruling regarding the County Defendants' discharges into the Los Angeles and San Gabriel Rivers.

[6] A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Throughout this litigation, there has been confusion regarding whether the LA MS4 is a "point source" under the CWA. *See Natural Res. Def. Council,* 673 F.3d at 898 (accepting Plaintiffs' argument that "[u]nder the Clean Water Act, the [LA] MS4 is a 'Point Source.' "). The LA MS4 is *not* a single point source. Rather, the LA MS4 is a collection of point sources, including outfalls, that discharge into the navigable waters of the United States.

pollutant from a point source into the navigable waters of the United States. *See Arkansas v. Oklahoma,* 503 U.S. 91, 101-02 (1992); *Environmental Law Handbook* 323 (Thomas F.P. Sullivan ed., 21st ed. 2011).

Congress has empowered the EPA Administrator to delegate NPDES permitting authority to state agencies. 33 U.S.C. § 1342(b). Pursuant to this authority, the EPA has authorized the State of California to develop water quality standards and issue NPDES permits. Pursuant to the Porter-Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and nine regional boards as the principal state agencies charged with enforcing federal and state water pollution laws and issuing NPDES permits. *See* Cal. Water Code §§ 13000 *et seq*. The entity responsible for issuing permits in the Los Angeles area is the California State Water Resources Control Board for the Los Angeles Region (the Regional Board).

On June 18, 1990, the Regional Board first issued an NPDES permit (the Permit) regulating stormwater discharges by the County, the District, and the 84 incorporated municipalities in the District (collectively, the Permittees). The Permit has subsequently been renewed or amended several times, and the version of the Permit at issue in this litigation came into

force on December 13, 2001.[7] The Permit covers all relevant discharges that occur "within the boundaries of the Permittee municipalities . . . over which [the municipalities have] regulatory jurisdiction as well as unincorporated areas in Los Angeles County within the jurisdiction of the Regional Board."

The Permit runs to 99 pages and contains a myriad of rules, regulations, and conditions regarding the Permittees' operation of the LA MS4. However, only two sets of the Permit's provisions are particularly relevant to this appeal; those contained in Part 2, titled "Receiving Water Limitations," and those contained in the section titled "Monitoring and Reporting Program."

Part 2 places limits on the type and amount of pollutants the Permittees may lawfully discharge from the LA MS4. Specifically, Part 2 prohibits "discharges from the [LA] MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives."[8] The Permit defines "Water Quality Standards and Water Quality Objectives" as "water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule,

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[7] On November 8, 2012, the Regional Board issued a new NPDES permit to the County Defendants and various other permittees.

[8] Part 2 also mandates that "[d]ischarges from the [LA] MS4 of storm water, or non-storm water, for which a Permittee is responsible for [sic], shall not cause or contribute to a condition of nuisance."

the California Toxics Rule, and other state or federal approved surface water quality plans."[9] Succinctly put, the Permit incorporates the pollution standards promulgated in other agency documents such as the Basin Plan, and prohibits stormwater discharges that "cause or contribute to the violation" of those incorporated standards. The Permit further provides that the Permittees "shall comply" with the LA MS4 discharge prohibitions outlined in Part 2 "through timely implementation of control measures and other actions to reduce pollutants in the[ir LA MS4] discharges. . . ."

The Monitoring and Reporting Program complements Part 2. Under that program, the Permittees are required to monitor the impacts of their LA MS4 discharges on water quality and to publish the results of all pollution monitoring at least annually. The primary objectives of the monitoring program include "assessing compliance" with the Permit, "measuring and improving the effectiveness" of the Los Angeles Countywide Stormwater Quality Management Program (SQMP),[10] and assessing the environmental

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[9] Under California law, regional boards are required to formulate water quality plans, called "basin plans," which designate the beneficial uses of protected water bodies within the boards' jurisdiction, establish water quality objectives for those water bodies, and establish a program for implementing the basin plan. *See City of Burbank v. State Water Res. Control Bd.,* 108 P.3d 862, 865 (Cal. 2005) (citing Cal. Water Code § 13050(j)).

[10] The Permit defines the SQMP as "the Los Angeles Countywide Stormwater Quality Management Program, which includes descriptions of programs, collectively developed by the Permittees

(Continued on following page)

impact of urban runoff on the receiving waters in the County.

One of the principal ways the Permittees are required to monitor their LA MS4 discharges is through mass-emissions monitoring. Mass-emissions monitoring measures all constituents present in water, and the readings give a cumulative picture of the pollutant load in a waterbody. The Permit requires the District, as Principal Permittee, to conduct mass-emissions monitoring at seven enumerated monitoring stations located throughout the County. The District is also responsible for analyzing the resulting data and submitting a comprehensive report of its findings.[11] According to the Permit, the purpose of mass-emissions monitoring is to: (1) estimate the mass emissions from the LA MS4; (2) assess trends in the mass emissions over time; and (3) determine if the LA MS4 is contributing to exceedances of Water Quality Standards by comparing the monitoring results to the applicable pollution standards promulgated in the Basin Plan and similar documents.

The Permittees sited a mass-emissions monitoring station in both the Los Angeles and San Gabriel Rivers (collectively, the Monitoring Stations). The Los

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in accordance with the provisions of the NPDES permit, to comply with applicable federal and state law. . . ."

[11] The District publishes these "Stormwater Monitoring Reports" on the internet at: http://ladpw.org/wmd/NPDES/report_directory.cfm. (last accessed August 1, 2013).

Angeles River monitoring station is located in a channelized portion of the Los Angeles River that runs through the City of Long Beach.[12] The San Gabriel River monitoring station is located in a channelized portion of the San Gabriel River that runs through the City of Pico Rivera. The Monitoring Stations are located downstream of numerous LA MS4 outfalls controlled by the County Defendants and various other non-party Permittees.

Between 2002 and 2008, when this case was filed, the District published annual monitoring reports that contain the data that the District collected

[12] In a declaration submitted to the district court, the County Defendants described both Monitoring Stations as being located "in a portion of the District's flood control channel." *See also* "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/npdes/9899_report/SiteDesc.pdf (last accessed August 1, 2013). Thus, it appears that the pertinent river segments are part of *both* the LA MS4 itself *and* "the waters of the United States" that the CWA protects. But regardless of whether the mass-emissions monitoring stations are *also* part of the LA MS4, there is no dispute that the mass-emissions monitoring stations are located *within* the Los Angeles and San Gabriel Rivers, downstream of a significant number of the County Defendants' LA MS4 outfalls. We misconstrued some of the data before us when we previously held otherwise. *See Natural Res. Def. Council,* 673 F.3d at 899 ("As a matter of law and fact, the [LA] MS4 is distinct from the two navigable rivers; the [LA] MS4 is an intra-state man-made construction – not a naturally occurring Watershed River"); *see also* 53 Fed. Reg. 49,416, 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.").

at the Monitoring Stations. According to those reports, the Monitoring Stations identified 140 separate exceedances of the Permit's water quality standards, including excessive levels of aluminum, copper, cyanide, zinc, and fecal coliform bacteria in both the Los Angeles and San Gabriel Rivers. The County Defendants do not dispute the accuracy of the monitoring data.

PROCEDURAL BACKGROUND

Using the monitoring data self-reported by the District, Plaintiffs cataloged the water quality exceedances measured in various receiving waters in the County. Beginning on May 31, 2007, Plaintiffs sent a series of notice letters to the County Defendants informing them that Plaintiffs believed that they were violating the terms of the Permit.[13] Specifically, Plaintiffs contended that the water quality exceedances documented in the District's monitoring reports demonstrated liability under the CWA. Dissatisfied with the County Defendants' response to these letters, Plaintiffs brought this citizen-enforcement action on March 3, 2008. After the district court dismissed certain elements of the Plaintiffs' initial complaint because notice of the Permit

[13] The CWA requires plaintiffs to provide 60 days notice to an alleged violator, the State in which the violation is alleged to be occurring, and the EPA, before filing suit. 33 U.S.C. § 1365(b)(1)(A).

violations was defective, Plaintiffs sent the County Defendants an adequate notice letter on July 3, 2008.

Plaintiffs filed their First Amended Complaint on September 18, 2008. In the complaint, Plaintiffs asserted six causes of action under the CWA. Four of the Plaintiffs' claims, which the district court designated the "Watershed Claims," were initially before us on appeal. The first three Watershed Claims allege that, beginning in 2002 or 2003, the County Defendants caused or contributed to exceedances of water quality standards in the Santa Clara River (Claim 1), the Los Angeles River (Claim 2), and the San Gabriel River (Claim 3), in violation of 33 U.S.C. §§ 1311(a), 1342(p). The fourth Watershed Claim alleges that, beginning in 2002, County Defendants caused or contributed to exceedances of the water quality standards and violated the total maximum daily load limits in Malibu Creek. All of the Watershed Claims rest on the same premise: (1) the Permit incorporates water-quality limits for each receiving water body; (2) mass-emissions monitoring stations have recorded pollutant loads in the receiving water bodies that exceed those permitted under the relevant standards; (3) an exceedance constitutes non-compliance with the Permit and, thereby, the Clean Water Act; and (4) County Defendants, as holders of the Permit and joint operators of the LA MS4, are liable for these exceedances under the Act.

Early in the litigation, the district court bifurcated liability and remedy, and all proceedings related to remedy were stayed until liability was

determined. On March 2, 2010, the district court denied all parties' cross-motions for summary judgment with regard to liability. *NRDC v. Cnty. of L.A.,* No. CV 08-1467-AHM, 2010 WL 761287 (C.D. Cal. Mar. 2, 2010), *amended on other grounds,* 2011 WL 666875 (C.D. Cal. Jan. 27, 2011). Although the district court accepted Plaintiffs' arguments that the Permit "clearly prohibits 'discharges from the [LA] MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives,'" 2010 WL 761287, at *6, and that mass-monitoring stations "are the proper monitoring locations to determine if the [LA] MS4 is contributing to exceedances" of the Water Quality Standards or water quality objectives, *id.,* the district court held that Plaintiffs were improperly attempting to use the District's self-reported monitoring data to establish liability without presenting evidence that any individual defendant was discharging pollutants that "cause[d] or contribute[d] to the violation" of the water quality standards. *Id.* The district court observed that although "the District is responsible for the pollutants in the [LA] MS4" at the time they pass the Monitoring Stations, "that does not necessarily determine the question of whether the water passing by these points is a 'discharge' within the meaning of the Permit and the Clean Water Act." *Id.* at *7. Unable to determine whether any of the County Defendants' upstream LA MS4 outflows were contributing polluted stormwater to navigable waters, the district court stated that "Plaintiffs would need to present some evidence (monitoring data or an admission) that some amount

of a standards-exceeding pollutant is being discharged through at least one District outlet." *Id.* at *8.

Following supplemental briefing, the district court again determined that "Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' [LA] MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow." The district court thus entered summary judgment for the County Defendants on the Watershed Claims.

On June 9, 2010, the district court entered a partial final judgment on the Watershed Claims under Fed. R. Civ. P. 54(b). The court reasoned that an interlocutory appeal was appropriate because the Watershed Claims are "factually and legally severable" from the Plaintiffs' other claims and "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." The Plaintiffs timely appealed.

On appeal, the Plaintiffs pressed the same legal argument they advanced in the district court: that the data published in the County Defendants' annual monitoring reports – data which shows undisputed pollution exceedances at the mass-emissions monitoring stations – conclusively establishes the County

Defendants' liability for Permit violations as a matter of law. Like the district court, we rejected this contention and held that the Plaintiffs must submit at least some additional proof of the County Defendants' *individual* contributions to the measured Permit violations. *See Natural Res. Def. Council,* 673 F.3d at 898 (noting that "the Clean Water Act does not prohibit 'undisputed' exceedances; it prohibits 'discharges' that are *not* in compliance with the Act. . . . While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant.").

Nonetheless, we held the District liable for CWA violations in the Los Angeles and San Gabriel Rivers because we concluded that the mass-emissions monitoring stations for each river are "located in a section of the [LA] MS4 owned and operated by the District" and that "when pollutants were detected, they had not yet exited the point source into navigable waters." *Id.* at 899. We further clarified that "[t]he [relevant] 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 LA] MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations." *Id.* at 900.

On October 11, 2011, the District filed a petition for writ of certiorari, 2011 WL 4874090, which was granted in part on June 25, 2012. *L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.,* 133 S.Ct. 23 (2012). The Supreme Court granted review in order to answer a single question: "Under the CWA, does a discharge of pollutants occur when polluted 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, and then into a lower portion of the same river?" *L.A. Cnty. Flood Control Dist.,* 133 S. Ct. at 712-13 (internal quotation marks omitted). The Court answered in the negative, and re-affirmed its holding in *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004), that "pumping polluted water from one part of a water body into another part of the same body is not a discharge of pollutants under the CWA." *L.A. Cnty. Flood Control Dist.,* 133 S. Ct. at 711. The Court did not address any other basis for the District's potential liability for Permit violations and instead reversed our prior judgment and remanded this case to us for additional proceedings. *Id.* at 713-14.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review the district court's grant of summary judgment de novo. *Assoc. to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.,* 299 F.3d 1007, 1009 (9th Cir. 2002).

DISCUSSION

I.

Plaintiffs return from the Supreme Court with the same argument they have consistently advanced throughout this litigation – that the County Defendants' monitoring data establishes their liability for Permit violations as a matter of law. We previously rejected this argument, *see Natural Res. Def. Council,* 673 F.3d at 898, and the Supreme Court explicitly declined to address it.[14]

On remand, the County Defendants argue that we may not reconsider our earlier decision because it has become "final," and because "reconsideration of Appellants' monitoring argument would fly in the face of the finality given to decisions of this Court after denial of rehearing or expiration of the time in which to seek such further review." Alternatively, the County Defendants argue that our earlier disposition should be left undisturbed because it has become the law of the case. The County Defendants are mistaken on both counts.

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[14] *See L.A. Cnty. Flood Control Dist.,* 133 S. Ct. at 713-14 ("Under the permit's terms, the NRDC and Baykeeper maintain, the exceedances detected at instream monitoring stations are by themselves sufficient to establish the District's liability under the CWA for its upstream discharges. This argument failed below. It is not embraced within, or even touched by, the narrow question on which we granted certiorari. We therefore do not address, and indicate no opinion on, the issue NRDC and Baykeeper seek to substitute for the question we took up for review.").

"No opinion of this circuit becomes final until the mandate issues[.]" *Carver v. Lehman,* 558 F.3d 869, 878 (9th Cir. 2009); *see also* Fed R. App. P. 41(c), 1998 Adv. Comm. Note ("A court of appeals' judgment or order is not final until issuance of the mandate[.]"). Thus, we have explained that a "court of appeals may modify or revoke its judgment at any time prior to issuance of the mandate, sua sponte or by motion of the parties." *United States v. Foumai,* 910 F.2d 617, 620 (9th Cir. 1990). The mandate in this case has not issued. Consequently, our earlier judgment is not final. *Carver,* 558 F.3d at 878. Nor can it be considered the law of the case. *See id.* at 878 n.16 ("[U]ntil the mandate issues, an opinion is not fixed as settled Ninth Circuit law, and reliance on the opinion is a gamble." (citation omitted)); *see also Key Enters. of Del., Inc. v. Venice Hosp.,* 9 F.3d 893, 898 (11th Cir. 1993) ("[B]ecause the panel's mandate had not issued, the panel's decision was never the 'law of the case.' "). Put simply, we are free to reconsider the merits of Plaintiffs' argument, and we now do so.

II.

Where a permittee discharges pollutants in compliance with the terms of its NPDES permit, the permit acts to "shield" the permittee from liability under the CWA. 33 U.S.C. § 1342(k). The permit shield is a major benefit to a permittee because it protects the permittee from any obligation to meet more stringent limitations promulgated by the EPA unless and until the permit expires. *See Piney Run Pres. Ass'n v. Cnty.*

Comm'rs of Carroll Cnty., 268 F.3d 255, 266-69 (4th Cir. 2001); *see also The Clean Water Act Handbook* 67 (Mark A. Ryan ed., 3rd ed. 2011). Of course, with every benefit comes a cost: a permittee violates the CWA when it discharges pollutants in excess of the levels specified in the permit, or where the permittee otherwise violates the permit's terms. *See Russian River Watershed Prot. Comm. v. City of Santa Rosa,* 142 F.3d 1136, 1138 (9th Cir. 1998); *see also* 40 C.F.R. § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for [an] enforcement action"); *Nw. Envtl. Advocates v. City of Portland,* 56 F.3d 979, 986 (9th Cir. 1995) (noting that "[t]he plain language of [the CWA citizen suit provision] authorizes citizens to enforce *all* permit conditions"); *Environmental Law Handbook* 327 ("The primary purpose of NPDES permits is to establish enforceable effluent limitations.").

Plaintiffs allege that the County Defendants are violating the terms of the Permit by discharging pollutants into the Los Angeles and San Gabriel Rivers in excess of the permitted levels. County Defendants do not dispute that they are discharging pollutants from the LA MS4 into these rivers. Nor can the County Defendants dispute that their own monitoring reports demonstrate that pollution levels recorded at the Monitoring Stations are in excess of those allowed under the Permit. Rather, the County Defendants focus on their perception of the evidentiary burden Plaintiffs must satisfy in order to hold any individual defendant liable for these pollution

exceedances. Plaintiffs contend that they may rely exclusively on the District's monitoring reports to establish liability. County Defendants, however, argue that they cannot be held liable for Permit violations based solely on the data published in the District's monitoring reports because: (1) the mass-emissions monitoring required under the Permit was "neither designed nor intended" to measure the compliance of any Permittee; and (2) the monitoring data cannot parse out precisely *whose* discharge(s) contributed to any given exceedance because the Monitoring Stations sample pollution levels downstream from a legion of discharge points (*e.g.,* LA MS4 outfalls) controlled by various Permittees and other non-party entities, as opposed to at the discharge points themselves.

To resolve the parties' contentions, we must interpret the language of the Permit. Although the NPDES permitting scheme can be complex, a court's task in interpreting and enforcing an NPDES permit is not – NPDES permits are treated like any other contract. *See Nw. Envtl. Advocates,* 56 F.3d at 982 ("We review the district court's interpretation of the 1984 permit as we would the interpretation of a contract or other legal document.").[15] If the language of the permit, considered in light of the structure of the permit as a whole, "is plain and capable of legal construction, the language alone must determine the

[15] *See also Piney Run Pres. Ass'n.,* 268 F.3d at 269-70; *Am. Canoe Ass'n., Inc. v. D.C. Water & Sewer Auth.,* 306 F. Supp. 2d 30, 42 (D.D.C. 2004).

permit's meaning." *Piney Run Pres. Ass'n,* 268 F.3d at 270 (citation omitted). If, however, the permit's language is ambiguous, we may turn to extrinsic evidence to interpret its terms. *Id.* Our sole task at this point of the case is to determine what Plaintiffs are required to show in order to establish *liability* under the terms of *this particular* NPDES permit.[16]

A. The Plain Language of the Permit

"[NPDES permit] terms are to be given their ordinary meaning, and when the terms of a [permit] are clear, the intent of the parties must be ascertained from the [permit] itself." *Klamath Water Users Protective Ass'n. v. Patterson,* 204 F.3d 1206, 1210 (9th Cir. 1999). Plaintiffs argue that the text of the County Defendants' Permit is clear, and provides that the District's mass-emissions monitoring data will be

[16] The question before us is not whether the Clean Water Act mandates any particular result. An NPDES permitting authority has wide discretion concerning the terms of a permit. It could, for example, lawfully write an ms4 permit that provides that all permittees will share liability in some ratio for any measured exceedance of applicable pollutant limits. Or, as a further example, a permitting authority could lawfully write a permit providing that only the co-permittee(s) whose specific discharges are connected to a particular pollutant exceedance may be held 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.").

used to assess the County Defendants' compliance with the Permit, and particularly Part 2, which prohibits "discharges from the [LA] MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." The County Defendants dispute this notion, and first claim that the District's mass-emissions monitoring is intended to serve only a hortatory purpose. As County Defendants state, "the mass emission monitoring program . . . neither measures nor was designed to measure any individual permittee's compliance with the Permit." This argument is clearly belied by the text of the Permit and is rejected.

The Permit establishes a "Monitoring and Reporting Program" with the stated objectives of *both* characterizing stormwater discharges *and* assessing compliance with water-quality standards. The Permit language could not be more explicit in this regard, stating that "[a]ssessing compliance with this [Permit]" is one of the "primary objectives of the Monitoring Program." "The fact that the parties dispute a [permit's] meaning does not establish that the [permit] is ambiguous; it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation." *Klamath Water Users Protective Ass'n,* 204 F.3d at 1210. No reasonable person could find even the slightest ambiguity in the phrase "[t]he primary objectives of the Monitoring Program include, but are not limited to: Assessing compliance with this [Permit]." Consequently, we decline to embrace the County Defendants' initial argument that

"the mass-emission monitoring stations, as a matter of fact, do not assess the compliance of any permittee with the Permit . . . ."

County Defendants' alternative argument, while more facially appealing, fares no better. Specifically, the County Defendants point to certain Permit language they claim shows that the Regional Board did not intend for the mass-emissions monitoring data to be used to establish liability for Permit violations. For instance, the County Defendants note that the Permit provides that "[e]ach permittee is responsible only for a discharge for which it is the operator." County Defendants also cite language in Part 2 that reads: "Discharges from the [LA] MS4 of storm water, or non-storm water, *for which a Permittee is responsible* for [sic], shall not cause or contribute to a condition of nuisance." The County Defendants read this language as precluding a finding of liability against them – or any other Permittee – without independent monitoring data establishing that discharges from a particular entity's ms4 outfalls exceeded standards.

"[A] court must give effect to every word or term" in an NPDES permit "and reject none as meaningless or surplusage. . . ." *In re Crystal Props., Ltd., L.P.,* 268 F.3d 743, 748 (9th Cir. 2001) (quotations omitted); *see also* Restatement (Second) of Contracts § 203(a) (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."). "Therefore, we must interpret the [Permit] in a manner that gives

full meaning and effect to all of the [Permit's] provisions and avoid a construction of the [Permit] that focuses only on" a few isolated provisions. *In re Crystal Props.,* 268 F.3d at 748.

The County Defendants' interpretation of the Permit ultimately must be rejected because it would create an unreasonable result. Reading the clause that "[e]ach permittee is responsible only for a discharge for which it is the operator" to preclude use of the mass-emission monitoring data to "assess[ ] compliance with this [Permit]" would render the monitoring provisions of the Permit largely meaningless. Under the County Defendants' reading of the Permit, individual Permittees could discharge an unlimited amount of pollutants from the LA MS4 but never be held liable for those discharges based on the results of the mass-emissions monitoring, even though that monitoring is explicitly intended to assess whether Permittees are in compliance with Part 2's discharge limitations. We are unwilling to accept such a strained interpretation. *See Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 63 (1995) (holding that courts should be guided by the "cardinal principle of contract construction: that a document should be read to give effect to all of its provisions and to render them consistent with each other"). A better reading of the Permit's putatively conflicting provisions, therefore, is the one proposed by Plaintiffs. Limiting a Permittee's responsibility to "discharge[s] for which it is the operator" applies to the appropriate *remedy* for Permit violations, not to

liability for those violations. Indeed, Plaintiffs' reading is consistent with the remedial scheme of the Permit itself. If the LA MS4 is found to be contributing to water quality violations, each Permittee must take appropriate remedial measures with respect to its *own* discharges.[17] Thus, a finding of *liability* against the County Defendants would not, as defendants argue, hold any County Defendant responsible for discharges for which they are not "the operator."

In sum, and contrary to the County Defendants' contentions, the language of the Permit is clear – the data collected at the Monitoring Stations is intended to determine whether the Permittees are in compliance with the Permit. If the District's monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the Permit, then, as a matter of permit construction, the monitoring data conclusively demonstrate that the County Defendants are not "in compliance" with the Permit conditions. Thus, the County Defendants are liable for Permit violations.

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[17] The relevant Permit provision states: "Each Permittee is required to comply with the requirements of this Order applicable to discharges within its boundaries . . . and not for the implementation of the provisions applicable to the Principal Permittee or other Permittees."

B. Extrinsic Considerations

Although we believe the plain language of the Permit clearly contemplates that the County Defendants' monitoring data will be used to assess Permit compliance (*i.e.,* establish liability for CWA violations), we note that numerous extrinsic considerations also undercut the County Defendants' position.

First and foremost, the Clean Water Act *requires* every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) ("[E]ach NPDES permit shall include conditions meeting the following . . . monitoring requirements . . . to assure compliance with permit limitations."). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. *See* 40 C.F.R. § 122.26(d)(2)(i)(F) ("Permit applications for discharges from large and medium municipal storm sewers . . . shall include . . . monitoring procedures necessary to determine compliance and noncompliance with permit conditions. . . ."). As previously noted, the County Defendants contend that the mass-emissions monitoring program "neither measures nor was designed to measure any individual permittee's compliance with the Permit." But if the County Defendants are correct, the Permit would be unlawful under the CWA. We must interpret the provisions of the Permit like any other contract and reject an interpretation that would render the Permit unenforceable. *See*

Walsh v. Schlecht, 429 U.S. 401, 408 (1977) (noting that "contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable"); *see also Nw. Envtl. Advocates,* 56 F.3d at 984; Restatement (Second) of Contracts § 203.

Second, the County Defendants' position has been explicitly rejected by the Regional Board, the entity that issued the Permit. This is important because one of our obligations in interpreting an NPDES permit is "to determine the intent of the permitting authority. . . ." *Piney Run Pres. Ass'n,* 268 F.3d at 270. Thus, we give significant weight to any extrinsic evidence that evinces the permitting authority's interpretation of the relevant permit. *See Nw. Envtl. Advocates,* 56 F.3d at 985 (relying on "significant evidence from [the state permitting agency], the permit author," to determine the proper scope of an NPDES permit).

Here, the record contains an amicus brief filed by the Regional Board in a lawsuit nearly identical to this one.[18] In that suit, these same Plaintiffs sued the City of Malibu, one of the County Defendants' co-permittees, for violating the NPDES Permit at issue in this case. In its brief, the Regional Board stated its position that:

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[18] *Santa Monica Baykeeper, et al. v. City of Malibu,* No. CV-08-01465 (AHM) (C.D. Cal. Mar. 3, 2008).

> The Permit recognizes that the interconnected nature of the system means that it may be difficult to determine exactly where [pollutants] originated within the [LA] MS4. This does not mean, however, that the Permit assumes only one permittee may be responsible. Instead, it recognizes that in such an integrated storm sewer system, one or more Permittees may have caused or contributed to violations. . . . Having constructed a joint sewer system that, by design, comingles the [Permittees'] discharges, they cannot avoid enforcement because one cannot determine the original source of pollutants in the waste stream.

The Regional Board also noted that "the monitoring program that the permittees requested (and were granted) does not readily generate the permittee-by-permittee outfall data that the [County Defendants] would require as a precondition to enforcement." As a result, the Regional Board disagreed with any construction of the Permit that would require individualized proof of a Permittees' discharges in order to establish liability. Simply put, the Regional Board indicated that it "does not agree" that the "burden [of proving Permit violations] rests upon the enforcing entity." Although we do not defer to the Regional Board's interpretation of the Permit, *see Orthopaedic Hosp. v. Belshe,* 103 F.3d 1491, 1495 (9th Cir. 1997), its rejection of the County Defendants' position is clearly instructive.

Finally, the County Defendants' arguments run counter to the purposes of the CWA, and ignore the inherent complexity of ensuring an ms4's compliance with an NPDES permit that covers thousands of different point sources and outfalls. As we have previously recognized, "[t]he NPDES program fundamentally relies on self-monitoring." *Sierra Club v. Union Oil Co. of Cal.,* 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated and remanded on other grounds,* 485 U.S. 931 (1988), *and reinstated and amended by* 853 F.2d 667 (9th Cir. 1988). Congress' purpose in adopting this self-monitoring mechanism was to promote straightforward enforcement of the Act. *See id.* at 1492 (noting that Congress wished to "avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay") (quoting S. Rep. No. 92-414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3730).[19] Or, as one treatise writer has described enforcement of the Act:

> The CWA is viewed by many as the easiest of the federal environmental statutes to enforce. This is because persons regulated under the act normally must report their own

[19] *See also* 44 Fed. Reg. 32,854, 32,863 (June 7, 1979) ("Congress intended that prosecution for permit violations be swift and simple.").

> compliance and noncompliance to the regulating agency. For example, holders of NPDES permits must file periodic discharge monitoring reports (or DMRs), which must contain the results of all monitoring of discharges, and must indicate where those discharges exceed permit limitations. . . . Thus, enforcement actions may be brought based on little, if anything, more than the DMRs and other reports submitted by the permittee itself.

Environmental Law Handbook at 357-58.

Admittedly, regulating pollution from ms4s is substantially more complicated than regulating pollution from a few defined point sources. Like the LA MS4 at issue here, municipal separate storm sewer systems often cover many square miles and comprise numerous, geographically scattered, and sometimes uncharted sources of pollution, including streets, catch basins, gutters, man-made channels, and storm drains. Faced with the difficult task of regulating millions of storm-sewer point sources, Congress amended the CWA in 1987 to grant the EPA the express authority to create a separate permitting program for ms4s. 33 U.S.C. § 1342(p)(2), (3). In enacting these amendments, Congress recognized that for large urban areas like Los Angeles, ms4 permitting cannot be accomplished on a source-by-source basis. The amendments therefore give the EPA, or a state like California to which the EPA has delegated permitting authority, broad discretion to issue permits "on a system-wide or jurisdiction-wide basis," 40 C.F.R.

§ 122.26(a)(1)(v), rather than requiring cities and counties to obtain separate permits for millions of individual stormwater discharge points. This increased flexibility is crucial in easing the burden of issuing stormwater permits for both permitting authorities and permittees.[20]

But while otherwise more flexible than the traditional NPDES permitting system, nothing in the ms4 permitting scheme relieves permittees of the obligation to monitor their compliance with their NPDES permit in some fashion. *See* 33 U.S.C. § 1342(a)(2) ("The Administrator shall prescribe conditions for [NPDES] permits to assure compliance with the requirements of [the permit], including conditions on data and information collection, reporting, and such other requirements as he deems appropriate."); 40 C.F.R. § 122.44(i)(1) (establishing that every permit "shall include" monitoring "[t]o assure compliance with the permit limitations"). Rather, EPA regulations make clear that while ms4 NPDES permits need not require monitoring of each stormwater source at the precise point of discharge, they may

[20] *See* 55 Fed. Reg. 47,990, 48,046 (Nov. 16, 1990) (noting that issuing individual permits to cover all ms4 discharges to the waters of the United States is "unmanageable"); *id.* at 48,049-48,050 ("Given the complex, variable nature of storm water discharges from municipal systems, EPA favors a permit scheme where the . . . [p]ermit writers have the necessary flexibility to develop monitoring requirements that more accurately reflect the true nature of highly variable and complex discharges.").

instead establish a monitoring scheme "sufficient to yield data which are *representative of the monitored activity*. . . . " 40 C.F.R. § 122.48(b) (emphasis added). In fact, EPA regulations require permittees, like the County Defendants here, 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*)" and explain "why the [chosen] location is *representative*. . . ." 40 C.F.R. § 122.26(d)(2)(iii)(D) (emphases added). Here, the County Defendants did just that. County Defendants themselves chose the locations of the Monitoring Stations, locations that are downstream from a significant number of their outfalls.[21] And, as required by law, the County Defendants chose locations that they certified were necessarily "representative" of the monitored activity (*i.e.,* the Permittees' discharges of stormwater runoff into the navigable waters of the United States).[22]

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[21] "Q: Does the County's ms4 outlet to any tributaries of the Los Angeles River? A: Yes. Q: Does it outlet to tributaries of the Los Angeles River upstream of the mass emissions station? A: Yes. . . . Q: Does [the County's ms4] outlet to the San Gabriel River upstream of the mass emissions station? A: Yes." Pestrella Dep. 697:7-698:6, June 2, 2009.

[22] "Q: Who selected the location of those stations, do you know? A: The County selected those locations for a particular purpose. And the purpose was [to be] far enough away from tidal influence *so that you would be characterizing the stormwater runoff as opposed to ocean waters.* Q: And the locations were then approved by Regional Board staff; is that correct? A: Correct." Wamikannu Dep. 130:13-130:19, July 1, 2009 (emphasis added).

Now, however, County Defendants claim that their compliance with the Permit cannot be measured using the results of the representative monitoring they themselves agreed to, that the Regional Board approved, and that the Permit itself contemplates is to be used to assess compliance with its terms. We take this opportunity to reevaluate and reject County Defendants' arguments.

CONCLUSION

Because the results of County Defendants' pollution monitoring conclusively demonstrate that pollution levels in the Los Angeles and San Gabriel Rivers are in excess of those allowed under the Permit, the County Defendants are *liable* for Permit violations as a matter of law. This case is remanded to the district court for further proceedings consistent with this opinion, including a determination of the appropriate *remedy* for the County Defendants' violations.

REVERSED and REMANDED.

APPENDICES

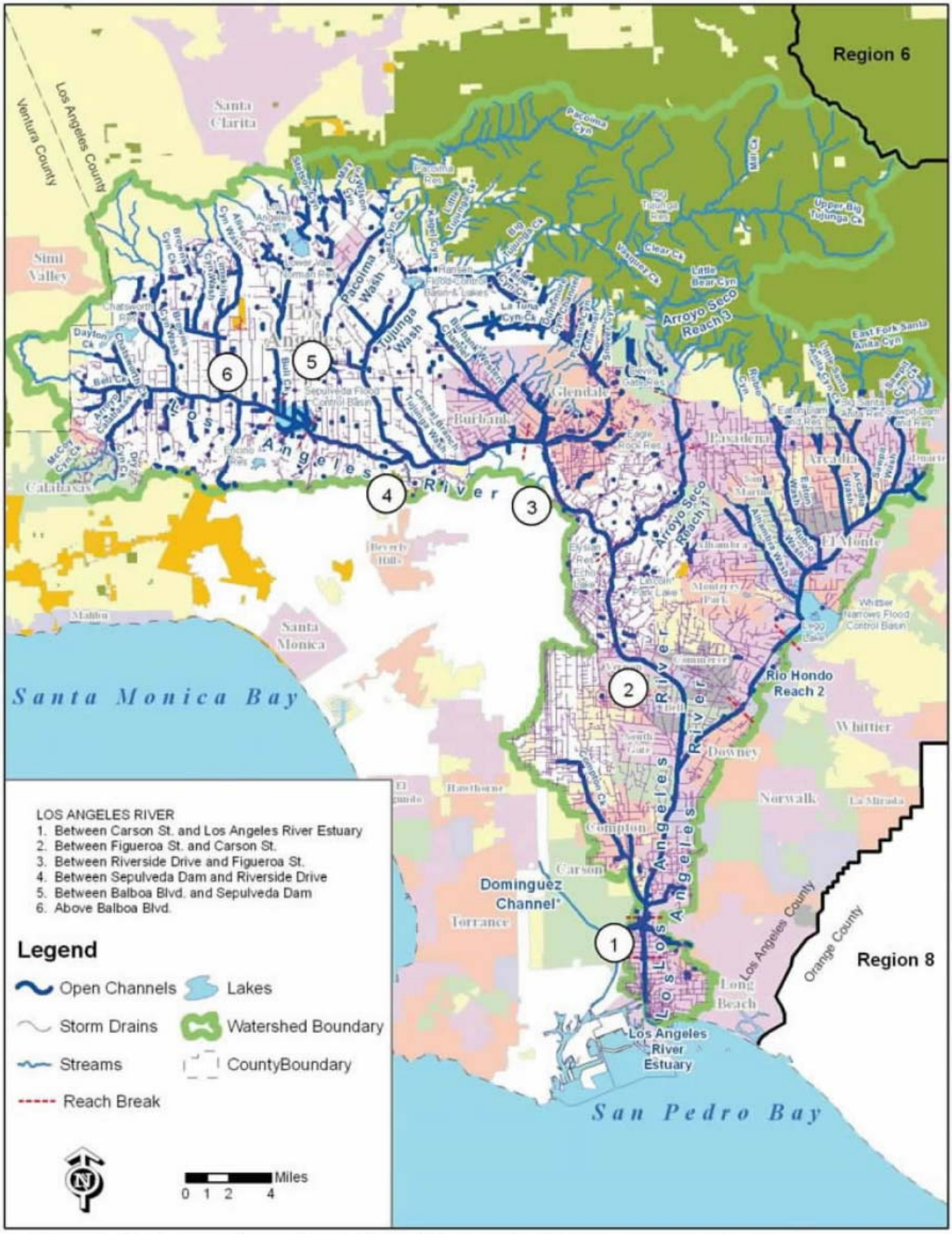

Figure C-4: Los Angeles River Watershed Management Area Flow Schematic.

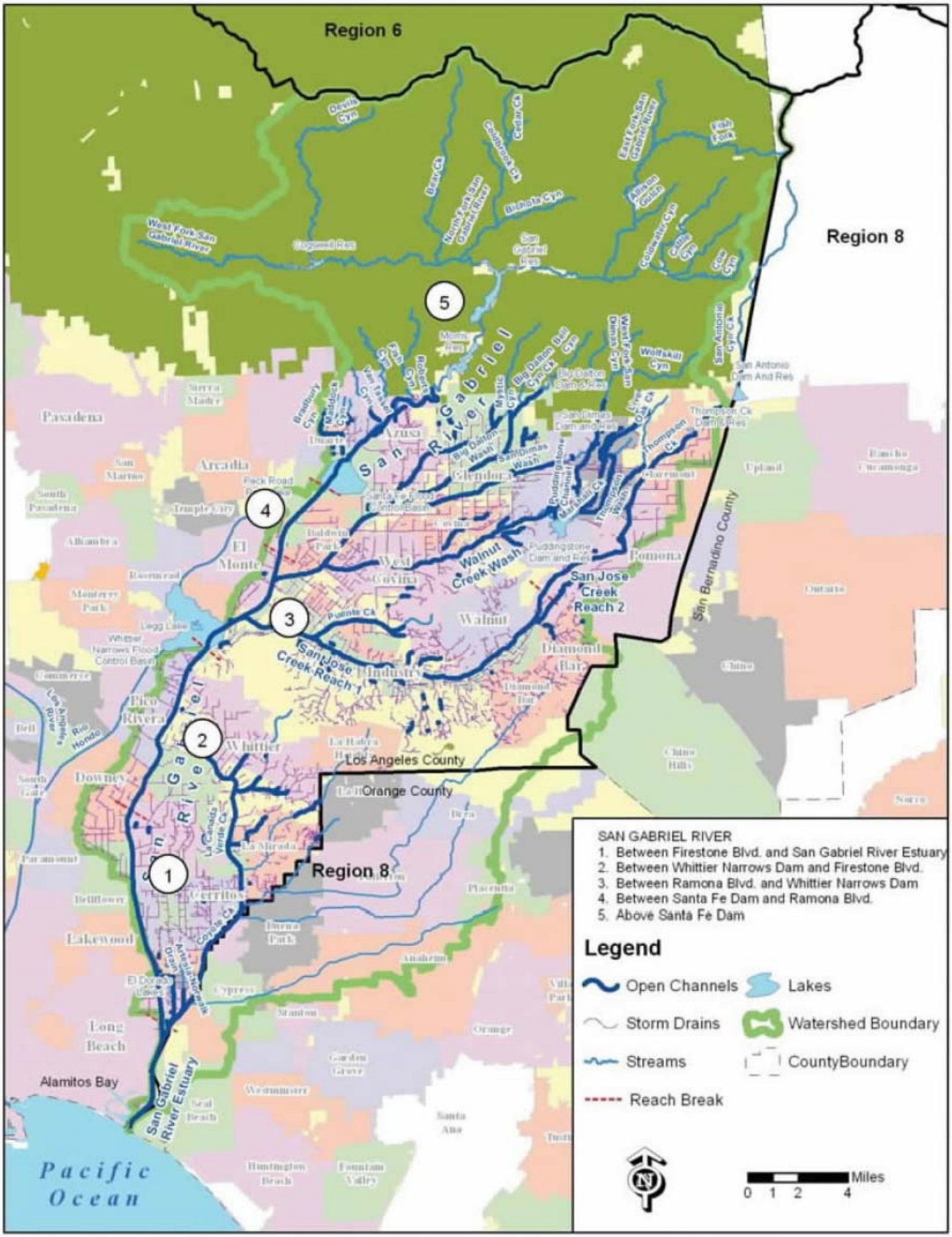

Figure C-5: San Gabriel River Watershed Management Area Flow Schematic.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; MICHAEL ANTONOVICH, in his official capacity as Supervisor; YVONNE BURKE, in her official capacity as Supervisor; GLORIA MOLINA, in her official capacity as Supervisor; ZEV YAROSLAVSKY, in his official capacity as Supervisor; DEAN D. EFSTATHIOU, in his official capacity as Acting Director of Los Angeles County Department of Public Works; DON KNABE, in his official capacity as Supervisor,

Defendants-Appellees.

No. 10-56017

D.C. No. 2:08-cv-01467-AHM-PLA Central District of California, Los Angeles

ORDER

(Filed Feb. 19, 2013)

Before: PREGERSON and M. SMITH, Circuit Judges, and HOLLAND, Senior District Judge.*

Appellants' Motion for Leave to File Supplemental Brief on Remand From the Supreme Court (Docket No. 65) is GRANTED.

Appellants shall file a supplemental brief, not to exceed twenty (20) pages, within twenty one (21) days of the filed date of this Order. Appellees may file an optional response brief, not to exceed twenty (20) pages, within fourteen (14) days from the filed date of Appellants' supplemental brief. Appellants may file an optional reply brief, not to exceed ten (10) pages, within fourteen (14) days from the filed date of Appellees' response brief, if any.

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* The Honorable H. Russel Holland, Senior District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

FOR PUBLICATION

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ORDER and OPINION

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted
December 10, 2010 – Pasadena, California

Filed July 13, 2011

ORDER

This Court's Opinion, filed March 10, 2011, and published at 636 F.3d 1235 (9th Cir. 2011), is withdrawn and replaced by the attached Opinion.

With this filing, the panel has voted unanimously to deny Appellees' petition for panel rehearing. Judge Pregerson and Judge M. Smith have voted to deny Appellees' petition for rehearing en banc, and Judge Holland so recommends.

The full court has been advised of the Opinion and petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Accordingly, Appellees' petition for rehearing or for rehearing en banc is DENIED.

No further petitions for rehearing or rehearing en banc will be entertained in this case.

OPINION

Before: Harry Pregerson, and
Milan D. Smith, Jr., Circuit Judges, and
H. Russel Holland, Senior District Judge.*

Opinion by Judge Milan D. Smith, Jr.

COUNSEL

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Gregory Thomas Broderick, Downey Brand, LLP, Sacramento, California, for amicus curiae California State Association of Counties.

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* The Honorable H. Russel Holland, Senior United States District Judge for the District of Alaska, sitting by designation.

Kamala D. Harris, Attorney General of California; Kathleen A. Kenealy, Senior Assistant Attorney General; James R. Potter, Jennifer Novak, Deputy Attorneys General, Office of the California Attorney General, Los Angeles, California, for amicus curiae California Regional Water Quality Control Board, Los Angeles Region.

OPINION

M. SMITH, Circuit Judge:

Plaintiffs-Appellants Natural Resources Defense Council and Santa Monica Baykeeper appeal the district court's grant of summary judgment in favor of two municipal entities that Plaintiffs allege are discharging polluted stormwater in violation of the Federal Water Pollution Control Act (the Clean Water Act, Act, or CWA), 86 Stat. 816, codified as amended at 33 U.S.C. § 1251 *et seq*. Plaintiffs contend that Defendants-Appellees County of Los Angeles (County) and Los Angeles County Flood Control District (District) are discharging polluted urban stormwater runoff collected by municipal separate storm sewer systems (ms4) into navigable waters in Southern California. The levels of pollutants detected in four rivers – the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek (collectively, the Watershed Rivers) – exceed the limits allowed in a National Pollutant Discharge Elimination System (NPDES) permit which governs municipal stormwater discharges in the County. Although all parties

agree that numerous water-quality standards have been exceeded in the Watershed Rivers, Defendants contend that there is no evidence establishing their responsibility for, or discharge of, stormwater carrying pollutants to the rivers. The district court agreed with Defendants and entered a partial final judgment.

We conclude that the district court erred with respect to the evidence of discharges by the District into two of the Watershed Rivers – the Los Angeles River and San Gabriel River. Specifically, Plaintiffs provided evidence that the monitoring stations for the Los Angeles and San Gabriel Rivers are located in a section of ms4 owned and operated by the District and, after stormwater known to contain standards-exceeding pollutants passes through these monitoring stations, this polluted stormwater is discharged into the two rivers. Accordingly, Plaintiffs were entitled to summary judgment on the District's liability for discharges into the Los Angeles River and San Gabriel River, and therefore we reverse the district court's grant of summary judgment in favor of the District on these claims.

Plaintiffs, however, failed to meet their evidentiary burden with respect to discharges by the District into the Santa Clara River and Malibu Creek. Plaintiffs did not provide evidence sufficient for the district court to determine if stormwater discharged from an ms4 controlled by the District caused or contributed to pollution exceedances located in these two rivers. Similarly, Plaintiffs did not delineate how

stormwater from ms4s controlled by the County caused or contributed to exceedances in any of the Watershed Rivers. Accordingly, we affirm the district court's grant of summary judgment in favor of the Defendants on these claims.

FACTUAL AND PROCEDURAL BACKGROUND

I. Stormwater Runoff in Los Angeles County

A. The MS4

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. When stormwater flows over urban environs, it collects "suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants[.]" *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 840 (9th Cir. 2003). This runoff is a major contributor to water pollution in Southern California rivers and the Pacific Ocean and contributes to the sickening of many ocean users each year.

The County is a sprawling 4,500 square-mile amalgam of populous incorporated cities and significant swaths of unincorporated land. The District is a public entity governed by the Los Angeles County Board of Supervisors and the Department of Public Works. The District is comprised of 84 cities and some

unincorporated areas of the County. The County and the District are separate legal entities.

In the District, stormwater runoff is collected by thousands of storm drains located in each municipality and channeled to a storm sewer system. The municipalities in the District operate ms4s[1] to collect and channel stormwater. The County also operates an ms4 for certain unincorporated areas. Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, ms4s contain and convey only untreated stormwater. *See* 40 C.F.R. § 122.26(a)(7), (b)(8). In the County, municipal ms4s

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[1] Under Federal Regulations, an ms4 is:

> 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 . . . 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 . . .
>
> (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). . . .

40 C.F.R. § 122.26(b)(8).

are "highly interconnected" because the District allows each municipality to connect its storm drains to the District's extensive flood-control and storm-sewer infrastructure (the MS4).[2] That infrastructure includes 500 miles of open channels and 2,800 miles of storm drains. The length of the MS4 system and the locations of all storm drain connections are not known exactly because a comprehensive map of the storm drain system does not exist. While the number and location of storm drains are too numerous to catalogue, it is undisputed that the MS4 collects and channels stormwater runoff from across the County. That stormwater is channeled in the MS4 to various watercourses including the four Watershed Rivers at the heart of this litigation: the Los Angeles River, the San Gabriel River, the Santa Clara River, and Malibu Creek. The Watershed Rivers drain into the Pacific Ocean at Santa Monica Bay, Los Angeles Harbor, and Long Beach Harbor.

The gravamen of Plaintiffs' action is that by allowing untreated and heavily-polluted stormwater to flow unabated from the MS4 into the Watershed Rivers, and eventually into the Pacific Ocean, Defendants have violated the Clean Water Act.

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[2] Throughout this Opinion, reference is made to both "ms4" and "*the* MS4." The former is a generic reference to municipal separate storm sewer systems without regard to their particular location, while the latter specifically refers to the flood control and storm-sewer infrastructure described *supra* that exists in the County and is controlled by the District.

B. The Clean Water Act and NPDES Permit

The Clean Water Act is the nation's primary water-pollution-control law. The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "To serve those ends, the Act prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." *S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1311(a)). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12); *see Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (characterizing "discharge" as "'add[ing]' pollutants from the outside world to navigable water").

Under the Clean Water Act, ms4s fall under the definition of "point sources." 33 U.S.C. § 1362(14). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

A person or entity wishing to add pollutants to navigable waters must comply with the NPDES, which "requires dischargers to obtain permits that place

limits on the type and quantity of pollutants that can be released into the Nation's waters." *Miccosukee Tribe*, 541 U.S. at 102; 33 U.S.C. § 1342(a), (p). The Act "generally prohibits the 'discharge of any pollutant' . . . *from a 'point source*' into the navigable waters of the United States'" unless the point source is covered by an NPDES permit. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (quoting 33 U.S.C. §§ 1311(a), 1362(12)(A)) (emphasis added); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992) (describing NPDES permitting system). An NPDES permit requires its holder – the "permittee" – to follow the requirements of numerous Clean Water Act provisions, *see* 33 U.S.C. § 1342(a), which include effluent limitations, water-quality standards, water monitoring obligations, public reporting mechanisms, and certain discharge requirements. *See id.* §§ 1311, 1312, 1314, 1316, 1317, 1318, 1343.

The Act uses two water-quality-performance standards, by which a discharger of water may be evaluated – "effluent limitations" and "water quality standards." *Arkansas v. Oklahoma*, 503 U.S. at 101 (citing 33 U.S.C. §§ 1311, 1313, 1314); *see also Sierra Club v. Union Oil Co. of Calif.*, 813 F.2d 1480, 1483 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988). An effluent limitation is "any restriction established by a State or the [Environmental Protection Agency (EPA)] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources

into navigable waters. . . ." 33 U.S.C. § 1362(11). An effluent-limitation guideline is determined in light of "'the best practicable control technology currently available.'" *Union Oil*, 813 F.2d at 1483 (quoting 33 U.S.C. § 1311(b)(1)(A)).

Water-quality standards "are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels." *Union Oil*, 813 F.2d at 1483 (citing *EPA v. Calif. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 n.12 (1976) (hereafter *EPA v. Calif.*)). Water-quality standards are developed in a two-step process. First, the EPA, or state water authorities establish a waterway's "beneficial use." *Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993); *see also* Cal. Water Code § 13050(f) ("'Beneficial uses' of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."). Once the beneficial use is determined, water quality criteria that will yield the desired water conditions are formulated and implemented. *See NRDC v. EPA*, 16 F.3d at 1400; *see also* 33 U.S.C. § 1313(a), (c)(2)(A); 40 C.F.R. § 131.3(i) ("Water quality standards are provisions of State or Federal law which consist of a designated use or uses

for the waters of the United States and water quality criteria for such waters based upon such uses.").

Unlike effluent limitations, which are promulgated by the EPA to achieve a certain level of pollution reduction in light of available technology, water-quality standards emanate from the state boards charged with managing their domestic water resources. *See Arkansas v. Oklahoma*, 503 U.S. at 101. The EPA gives the states guidance in drafting water-quality standards and "state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards." *Id*.

The EPA has authorized the State of California to develop water-quality standards and issue NPDES permits. Under the Porter-Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and nine regional boards as the principal state agencies for enforcing federal and state water pollution law and for issuing permits. *See* Cal. Water Code §§ 13000, 13001, 13140, 13240, 13370, 13377. Beginning in 1990, the California State Water Resources Control Board for the Los Angeles Region (the Regional Board) issued an NPDES permit (the Permit) to cover stormwater discharges by the County, the District, and 84 incorporated municipalities in the County (collectively the

Permittees or Co-Permittees).[3] *See City of Arcadia v. State Water Res. Control Bd.*, 119 Cal. Rptr. 3d 232, 240-41 (Cal. Ct. App. 2010). The Permit was renewed in 1996, 2001, 2006, and 2007.

The Permit is divided into two broad sections: findings by the Regional Board and an order authorizing and governing the Permittees' discharges (Order). The findings cover many introductory and background subjects, including a history of NPDES permitting in the County; applicable state and federal laws governing stormwater discharges; studies conducted by the County and researchers about the deleterious effects of polluted stormwater; coverage and implementation provisions; and guidelines for administrative review of Permit provisions. The Permit covers "all areas within the boundaries of the Permittee municipalities . . . over which they have regulatory jurisdiction as well as unincorporated areas in Los Angeles County within the jurisdiction of the Regional Board." In total, the Permit governs municipal stormwater discharge across more than 3,100 square miles of land in the County.

The Permit relates the many federal and state regulations governing stormwater discharges to Southern California's watercourses. Among these regulations is the Water Quality Control Plan for the Los

[3] "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).

Angeles Region (the Basin Plan). Under California law, the regional boards' "water quality plans, called 'basin plans,' must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation." *City of Arcadia*, 119 Cal. Rptr. 3d at 240 (quoting *City of Burbank v. State Water Res. Control Bd.*, 108 P.3d 862, 865 (Cal. 2005) (citing Cal. Water Code § 13050(j))). The Permit provides that "[t]he Basin Plan designates beneficial uses of receiving waters and specifies both narrative and numerical water quality objectives for the receiving water in Los Angeles County." "Receiving waters" are defined as all surface water bodies in the Los Angeles Region that are identified in the Basin Plan. 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 nor create conditions of nuisance in the receiving waters, and that the discharge of non-storm water to the MS4 has been effectively prohibited. The Permit incorporates and adopts the Basin Plan, which sets limits on bacteria and contaminants for the receiving waters of Southern California. The water-quality standards limit, among other pollutants, the levels of ammonia, fecal coliform bacteria, arsenic, mercury, and cyanide in Southern California's inland rivers.

The Permit contains myriad prohibitions and conditions regarding discharges into and from the MS4. Under Part 1, the Permittees are directed to "effectively prohibit non-storm water discharges into the

MS4 and watercourses" unless allowed by an NPDES permit. Under Part 2, titled "Receiving Water Limitations," "discharges from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives are prohibited." The "Water Quality Standards and Water Quality Objectives" are defined in the Permit as "water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federal approved surface water quality plans. Such plans are used by the Regional Board to regulate all discharges, including storm water discharges."

The Permit, in Part 2.3, provides that Permittees "shall comply" with the MS4 discharge prohibitions, set forth in Parts 2.1 and 2.2, "through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with [the Los Angeles Stormwater Quality Management Program (SQMP)] and its components and other requirements of this Order. . . ." The SQMP includes "descriptions of programs, collectively developed by the Permittees in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law." Part 2.3 further provides that "[i]f exceedances of Water Quality Objectives or Water Quality Standards [ ] persist, notwithstanding implementation of the SQMP and its components and other requirements of this permit," Permittees "shall assure compliance with discharge prohibitions and

receiving water limitations" by engaging in an "iterative process" procedure:

> a) Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report . . . to the Regional Board that describes [Best Management Practices (BMPs)] that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedances of Water Quality Standards.
>
> . . .
>
> c) Within 30 days following the approval of the RWL Compliance Report, the Permittee shall revise the SQMP and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required.
>
> d) Implement the revised SQMP and its components and monitoring program according to the approved schedule.
>
> [Part 2.4] So long as the Permittee has complied with the procedures set forth above and is implementing the revised SQMP and its components, the Permittee does not have to repeat the same procedure for continuing or

> recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.

When a violation arises, a Permittee must adhere to the procedures in its Compliance Report until the exceedances abate.

Part 3 of the Permit, titled "Storm Water Quality Management Program (SQMP) Implementation," provides that "[e]ach Permittee shall, at a minimum, implement the SQMP." Part 3.A.3 requires Permittees to "implement additional controls, where necessary, to reduce the discharge of pollutants in storm water to the [Maximum Extent Practicable (MEP)]." Part 3.B requires the implementation of BMPs by the Permittees. Part 3.G specifies that each Permittee is vested with the "necessary legal authority" to prohibit discharges to the MS4, and the Permittees are directed to develop storm-water and urban runoff ordinances for its jurisdiction.

The Permit has both self-monitoring and public-reporting requirements, which include: (1) monitoring of "mass emissions" at seven mass emission monitoring stations; (2) Water Column Toxicity Monitoring; (3) Tributary Monitoring; (4) Shoreline Monitoring; (5) Trash Monitoring; (6) Estuary Sampling; (7) Bioassessment; and (8) Special Studies.

This case concerns high levels of pollutants, particularly heavy metals and fecal bacteria, identified by mass-emissions monitoring stations for the four Watershed Rivers (the Monitoring Stations).

Mass-emissions monitoring measures *all* constituents present in water, and the readings give a cumulative picture of the pollutant load in a waterbody. According to the Permit, the purpose of mass-emissions monitoring is to (1) estimate the mass emissions from the MS4, (2) assess trends in the mass emissions over time, and (3) determine if the MS4 is contributing to exceedances of Water Quality Standards by comparing results to the applicable standards in the Basin Plan. The Permit establishes that the Principal Permittee, which is the District, shall monitor the mass-emissions stations. The Permit requires that mass-emission readings be taken five times per year for the Watershed Rivers.

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 the District. *See* Excerpts of Record at 11; *see also* Dist. Ct. Docket No. 101: Declaration of Aaron Colangelo Ex. N: Deposition of Mark Pestrella at 476-78. The Los Angeles River Monitoring Station is located in the City of Long Beach in "a concrete lined trapezoidal channel."[4] The Los Angeles River Monitoring Station measures "total upstream tributary drainage"

[4] "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/npdes/9899_report/SiteDesc.pdf (last accessed July 6, 2011); *see also* "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/NPDES/2006-07_report%5CSection%202.pdf (last accessed July 6, 2011).

of 825 square miles, as the Los Angeles River is the largest watershed outlet in the County. The San Gabriel River Monitoring Station is located in Pico Rivera and measures an upstream tributary watershed of 450 square miles.

The Malibu Creek Monitoring Station is not located within a channelized portion of the MS4 but at an "existing stream gage station" near Malibu Canyon Road. It measures 105 miles of tributary watershed. The Santa Clara River Monitoring Station is located in the City of Santa Clara and measures an upstream tributary area of 411 square miles.[5]

C. Water-Quality Exceedances in the Watershed Rivers

Between 2002 and 2008, the four Monitoring Stations identified hundreds of exceedances of the Permit's water-quality standards. These water-quality exceedances are not disputed. For instance, monitoring for the Los Angeles and San Gabriel Rivers showed 140 separate exceedances. These included high levels of aluminum, copper, cyanide, fecal coliform bacteria, and zinc in the rivers. Further, ocean monitoring at Surfrider Beach showed that there were 126 separate bacteria exceedances on 79 days,

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[5] "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/NPDES/2006-07_report%5CSection%202.pdf (last accessed July 6, 2011).

including 29 days where the fecal coliform bacteria limit was exceeded.

The District admits that it conveys pollutants via the MS4, but contends that its infrastructure alone does not generate or discharge pollutants. According to Defendants, the District conveys the collective discharges of the numerous "up-sewer" municipalities. Moreover, Defendants identify thousands of permitted dischargers whose pollutants are reaching the Watershed Rivers:

> (1) Los Angeles River watershed: (a) at least 1,344 NPDES-permitted industrial and 488 construction stormwater dischargers allowed to discharge during the time period relevant to the case; (b) three wastewater treatment plants; and (c) 42 separate incorporated cities within the Los Angeles River watershed discharging into the river upstream of the mass emission station.
>
> (2) San Gabriel River watershed: (a) at least 276 industrial and 232 construction stormwater dischargers during the relevant time period; (b) at least 20 other industrial dischargers that were specifically permitted to discharge pollutants in excess of the water quality standards at issue in this action; (c) two wastewater treatment plants; and (d) 21 separate incorporated cities discharging into the watershed upstream of the mass emission station.

(3) Santa Clara River watershed: (a) eight dischargers permitted by industrial wastewater discharge permits where the limits in the permit allowed discharges of pollutants at concentrations higher than the water quality standards which plaintiffs contend were exceeded; (b) approximately 26 industrial and 187 construction stormwater dischargers; and (c) the Saugus Wastewater Reclamation Plant.

(4) Malibu Creek watershed: (a) seven industrial wastewater dischargers; and (b) at least five permitted discharges under the general industrial storm-water permit and at least 16 construction sites permitted to discharge under the general construction stormwater permit.

II. Proceedings before the District Court

Based on data self-reported by Defendants, Plaintiffs catalogued the water-quality exceedances in the Watershed Rivers. Beginning on May 31, 2007, Plaintiffs sent a series of notice letters to Defendants concerning these exceedances. On March 3, 2008, based on these purported violations, Plaintiffs commenced this citizen-enforcement action. After the district court dismissed certain elements of Plaintiffs' initial complaint because notice of the Permit violations was defective, Plaintiffs sent Defendants an adequate notice letter on July 3, 2008.

Plaintiffs filed the First Amended Complaint (Complaint) on September 18, 2008. In the Complaint, Plaintiffs assert six causes of action under the Clean Water Act. Only the first four of Plaintiffs' claims, which relate to the exceedances in the Watershed Rivers, and which the district court designated the "Watershed Claims," are before us. The first three Watershed Claims allege that, beginning in 2002 or 2003, the District and the County caused or contributed to exceedances of water-quality standards in the Santa Clara River (Claim 1), the Los Angeles River (Claim 2), and the San Gabriel River (Claim 3), in violation of 33 U.S.C. §§ 1311(a), 1342(p). The fourth Watershed Claim alleges that, beginning in 2002, Defendants caused or contributed to exceedances of the water quality standards and violated the Total Maximum Daily Load (TMDL) limits in Malibu Creek. Plaintiffs' four Watershed Claims each rest on the same premise: (1) the Permit sets water-quality limits for each of the four rivers; (2) the mass-emissions stations have recorded exceedances of those standards; (3) an exceedance is non-compliance with the Permit and, thereby, the Clean Water Act; and (4) Defendants, as holders of the Permit and operators of the MS4, are liable under the Act.

Before the district court, Plaintiffs moved for partial summary judgment on two of the Watershed Claims: the Los Angeles River and San Gabriel River exceedances. Defendants cross-moved for summary judgment on all four Watershed Claims.

In a March 2, 2010 Order, the district court denied each cross-motion for summary judgment on the Watershed Claims. *NRDC v. County of Los Angeles*, No. 08 Civ. 1467 (AHM), 2010 WL 761287 (C.D. Cal. Mar. 2, 2010), *amended on other grounds*, 2011 WL 666875 (C.D. Cal. Jan. 27, 2011). Although the district court accepted Plaintiffs' arguments that the Permit "clearly prohibits 'discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives,'" 2010 WL 761287, at *6, and that mass-monitoring stations "are the proper monitoring locations to determine if the MS4 is contributing to exceedances [of the Water Quality Standards or water quality objectives,]" *id.*, the district court held that Plaintiffs were attempting to establish liability without presenting evidence of who was responsible for the stormwater discharge. The district court observed that although "the District is responsible for the pollutants in the MS4" at the time they pass the mass-emissions stations, "that does not necessarily determine the question of whether the water passing by these points is a 'discharge' within the meaning of the Permit and the Clean Water Act." *Id.* at *7. Unable to decipher from the record where the MS4 ended and the Watershed Rivers begin, or whether any upstream outflows were contributing stormwater to the MS4, the district court stated that "Plaintiffs would need to present some evidence (monitoring data or an admission) that some amount of a standards-exceeding pollutant is being discharged though at least one District outlet." *Id.* at *8.

Following supplemental briefing, the district court again determined that "Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow." The district court thereupon entered summary judgment for Defendants on all four Watershed Claims.

Under Fed. R. Civ. P. 54(b), the district court entered a partial final judgment on the Watershed Claims because they were "factually and legally severable" from the other claims and "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." Plaintiffs timely appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291.

We review the district court's grant of summary judgment in a Clean Water Act enforcement action de novo. *Assoc. to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002) (citing *Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428 (9th Cir. 1998)).

DISCUSSION

Determining whether the County or the District violated the Permit's conditions, and thereby the Clean Water Act, requires us 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.

I. Whether Exceedances at Mass-Emission Stations Constitute Permit Violations

"The Clean Water Act regulates the discharge of pollutants into navigable waters, prohibiting their discharge unless certain statutory exceptions apply." *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1138 (9th Cir. 1998) (citing 33 U.S.C. § 1311(a)). One such exception is for discharges by entities or individuals who hold NPDES permits. *Id.* The NPDES permitting program is the "centerpiece" of the Clean Water Act and the primary method for enforcing the effluent and water-quality standards established by the EPA and state governments. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997); *see also Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986-90 (9th Cir. 1995) ("Citizen suits to enforce water quality standards effectuate complementary provisions of the CWA and the underlying purpose of the statute as a whole."); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1225 (11th Cir. 2009)

(citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175-76 (D.C. Cir. 1982) ("There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution.")).

To decipher the meaning and enforceability of NPDES permit terms, we interpret the unambiguous language contained in the permit. *Russian River*, 142 F.3d at 1141. We review a permit's provisions and meaning as we would any contract or legal document. *See Nw. Envtl. Advocates*, 56 F.3d at 982. As described *supra*, the Permit prohibits MS4 discharges into receiving waters that exceed the Water Quality Standards established in the Basin Plan and elsewhere. Specifically, Section 2.1 provides: "[D]ischarges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Section 2.2 of the Permit reads: "Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance."

Nevertheless, Defendants contend that exceedances observed at mass-emissions stations cannot establish liability on behalf of any individual Permittee. Their argument in this respect, as we discuss more thoroughly *infra*, relies heavily on their belief that the record is bereft of evidence connecting Defendants to the water-quality exceedances. Defendants also assert that the mass-emissions stations are "neither designed nor intended" to measure the compliance of

any Permittee and, therefore, cannot form the basis for a Permit violation. Defendants also argue that municipal compliance with an NPDES stormwater permit cannot be reviewed under the same regulatory framework as a private entity or an individual. In support of this contention, Defendants cite to a 1990 EPA rule:

> 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 "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.

Brief of Appellees 33 (quoting "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges," 55 Fed. Reg. 47,990, 48,037-38 (Nov. 16, 1990)).

As we detail *infra*, neither the statutory development of the Clean Water Act nor the plain language of EPA regulations supports Defendants' arguments that NPDES permit violations are less enforceable or unenforceable in the municipal stormwater context. In fact, since the inception of the NPDES, Congress

has expanded NPDES permitting to bring municipal dischargers within the Clean Water Act's coverage.

A. Regulating MS4 Operators

The NPDES permitting program originated in the 1972 amendments to the Clean Water Act. Pub. L. 92-500, § 2, 86 Stat. 88, *reprinted in* 1972 U.S.C.C.A.N. 3668 (codified as amended at 33 U.S.C. § 1342). At the time, the NPDES program was viewed "as the primary means of enforcing the Act's effluent limitations." *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1371 (D.C. Cir. 1977); *see also Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1295 (9th Cir. 1992) (examining statutory history of 1972 amendments to the Clean Water Act) (hereafter *NRDC v. EPA*). The permitting program is codified at Section 402 of the Clean Water Act. 33 U.S.C. § 1342. In 1973, the EPA promulgated regulations categorically exempting "discharges from a number of classes of point sources . . . including . . . separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity." *Costle*, 568 F.2d at 1372 (citing 40 C.F.R. § 125.4 (1975)). The EPA's exemption of certain point sources, including ms4s, from Section 402's blanket requirement was invalidated by the United States Court of Appeals for the District of Columbia Circuit in *Costle*. *Id.* at 1376-77. The *Costle* court highlighted that "[t]he wording of the [CWA], legislative history, and precedents are clear: the EPA Administrator does not have authority

to exempt categories of point sources from the permit requirements of § 402." *Id.* at 1377.

In the ten-year period following the *Costle* decision, the EPA did not promulgate regulations addressing discharges by ms4 operators. *See NRDC v. EPA*, 966 F.2d at 1296 (citing "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines," 56 Fed. Reg. 56,548 (1991)). In 1987, after continued nonfeasance by the EPA, Congress enacted the Water Quality Act amendments to the Clean Water Act to regulate stormwater discharges from, *inter alia*, ms4s. *See Defenders of Wildlife*, 191 F.3d at 1163 ("Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA."); *NRDC v. EPA*, 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987[.]") (internal citations omitted); *see also* 55 Fed. Reg. 47,994 ("[P]ermits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls, and must include a requirement to effectively prohibit non-storm water discharges into the storm sewers. Furthermore, EPA in consultation with State and local officials must develop a comprehensive program to designate and regulate other storm water discharges to protect water quality.").

The principal effect of the 1987 amendments was to expand the coverage of Section 402's permitting requirements. *NRDC v. EPA*, 966 F.2d at 1296. Section 402(p) established a "phased and tiered approach" for NPDES permitting. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1081-82 (9th Cir. 2011) (citing 33 U.S. § 1342(p)). "The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first." *NRDC v. EPA*, 966 F.2d at 1296. "Phase I" included "five categories of storm-water discharges," deemed "the most significant sources of stormwater pollution," who were required to obtain an NPDES permit for their stormwater discharge by 1990. *Brown*, 640 F.3d at 1082 (citing 33 U.S. § 1342(p)(2)). The five categories of the most serious discharge were:

> (p) Municipal and industrial stormwater discharges . . .
>
> (2) . . .
>
> . . .
>
> (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.

33 U.S.C. § 1342(p)(2) (emphases added). Of the five categories of Phase I dischargers required to obtain the first permits, two are ms4 operators: municipalities with populations over 250,000, and municipalities with populations between 100,000 and 250,000. *Id.* § 1342(p)(2)(C)-(D). Indeed, as noted *supra*, the Permit at issue here was first authorized in 1990 pursuant to the 1987 amendments.

Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential "nightmare"),[6] and as regulations prior to 1987 theoretically required, Congress put the NPDES permitting

[6] *See* 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop) ("[The regulations] can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source. . . . Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.").

requirement at the municipal level to ease the burden of administering the program. *Brown*, 640 F.3d at 1085-86. That assumption of municipal control is found in the Permit at issue here – Part 3.G.2 of the Permit states that "Permittees shall possess adequate legal authority to . . . [r]equire persons within their jurisdiction to comply with conditions in Permittee's ordinances, permits, contracts, model programs, or orders (i.e. hold dischargers to its MS4 accountable for their contributions of pollutants and flows.)[.]"

Defendants' position that they are subject to a less rigorous or unenforceable regulatory scheme for their storm-water discharges cannot be reconciled with the significant legislative history showing Congress's intent to bring ms4 operators under the NPDES-permitting system. Even the selectively excerpted regulatory language Defendants present to us – "Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers . . . [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" – does not support Defendants' view. Indeed, this excerpt is but one paragraph from a longer section titled, "Site-Specific Storm Water Quality Management Programs for Municipal Systems." 55 Fed. Reg. 48,037-38. The quoted language follows a paragraph which reads:

> Section 402(p)(3)(iii) of the CWA *mandates* that permits for discharges from municipal separate storm sewers *shall require controls*

> *to reduce the discharge of pollutants* to the maximum extent practicable (MEP), including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Director determines appropriate for the control of such pollutants.

55 Fed. Reg. 48,038 (emphasis added). The use of such language – employing "mandates" and commands to regulate – hardly supports Defendants' notion that NPDES permits are unenforceable against municipalities for their stormwater discharges. Moreover, the paragraphs that follow the excerpt explain why developing system-wide controls to manage municipal stormwater is preferable to controlling pollution through end-of-pipe effluent technologies. *Id.* The regulations highlight that "Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges." *Id.* Rather than evincing any intent to treat permitting "differently" for municipalities, the EPA merely explains why state authorities that issue permits should draft site-specific rules, as the Regional Board did here, and why water-quality standards may be preferable over more-difficult-to-enforce effluent limitations. Avoiding wooden permitting requirements and granting states flexibility in setting forth requirements is not equivalent to immunizing municipalities for stormwater discharges that violate the provisions of a permit.

B. Enforcement of Mass-Emissions Violations

Part and parcel with Defendants' argument that they are subject to a relaxed regulatory structure is their view that the Permit's language indicates that mass-emissions monitoring is not intended to be enforcement mechanism against municipal dischargers. Defendants claim that measuring water-quality serves only an hortatory purpose – as Defendants state, "the mass emission monitoring program . . . neither measures nor was designed to measure any individual permittee's compliance with the Permit." This proposition, which if accepted would emasculate the Permit, is unsupported by either our case law or the plain language of the Permit conditions.

"The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions." *Nw. Envtl. Advocates*, 56 F.3d at 986 (emphasis in original). We used these words and emphasized *all* permit conditions because the language of the Clean Water Act is clear in its intent to guard against all sources and superintendents of water pollution and "clearly contemplates citizen suits to enforce 'a permit or condition thereof.'" *Id.* (citing 33 U.S.C. § 1365(f)(2), (f)(6)); *see also W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) ("In other words, the statute takes the water's point of view: water is indifferent about who initially polluted it so long as pollution continues to occur.").

We have previously addressed, and rejected, municipal attempts to avoid NPDES permit enforcement. In *Northwest Environmental Advocates*, we considered a citizen-suit challenging the City of Portland's operation of a combined sewer system which periodically overflowed and discharged raw sewage into two rivers. 56 F.3d at 981-82. The plaintiffs brought suit on the basis of an NPDES permit condition which "prohibit[ed] any discharges that would violate Oregon water quality standards." *Id.* at 985. Reviewing the history of the 1972 amendments and the Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), we recognized that Congress had authorized enforcement of state water-quality standards, lest municipalities be immunized on the technicality that not all water standards can be expressed as effluent limitations. *Id.* at 988-89. The overflows from the Portland sewer system were "caused primarily by uncontrollable events – *i.e.*, the amount of stormwater entering the system[.]" *Id.* at 989. Because the total amount of water entering and leaving the sewer system was unknown, it was impossible to articulate effluent standards which would "ensure that the gross amount of pollution discharged [would] not violate water quality standards." *Id.* Only by enforcing the water-quality standards themselves as the limits could the purpose of the CWA and the NPDES system be effectuated. *Id.* at 988-90. Indeed, we noted that prior to the 1972 incorporation of effluent limitations, the Clean Water Act depended entirely on enforcement based on water-quality

standards. *Id*. at 986. However, troubled by the "'almost total lack of enforcement'" under the old system, Congress added the effluent limitation standards "not to supplant the old system" but to "improve enforcement." *Id.* at 986 (quoting S. Rep. No. 414, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671).

Our prior case law emphasizes that NPDES permit enforcement is not scattershot – each permit term is simply enforced as written. *See Union Oil*, 813 F.2d at 1491 ("It is unclear whether the court intended to excuse these violations under the upset defense or under a de minimis theory. In either event, the district court erred. The Clean Water Act and the regulations promulgated under it make no provision for 'rare' violations."); *see also United States v. CPS Chem. Co.*, 779 F. Supp. 437, 442 (D. Ark. 1991) ("For enforcement purposes, a permittee's [Discharge Monitoring Reports] constitute admissions regarding the levels of effluents that the permittee has discharged."). As we explained in *Union Oil*, Congress structured the CWA to function by self-monitoring and self-reporting of violations to "'avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement.'" 813 F.2d at 1492 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730). When self-reported exceedances of an NPDES permit occur, the Clean Water Act allows citizens to bring suit to enforce the terms of the Permit.

The plain language of the Permit countenances enforcement of the water-quality standards when exceedances are detected by the various compliance mechanisms, including mass-emissions monitoring. First, the Permit incorporates and adopts the Basin Plan, which sets the water-quality standards for bacteria and contaminants for the receiving waters of Southern California, including the Watershed Rivers. The Permit then sets out a multi-part monitoring program for those standards, the goals of which explicitly include "[a]ssessing compliance with this Order[.]" "Compliance" under the Clean Water Act primarily means adhering to the terms and conditions of an NPDES permit. *EPA v. Calif.*, 426 U.S. at 223 ("Thus, the principal means of enforcing the pollution control and abatement provisions of the Amendments is to enforce compliance with a permit."). The first monitoring program listed in the Permit is "Mass Emissions." While Defendants are correct to note that mass-emissions monitoring has as one of its goals "estimat[ing] the mass emissions from the MS4," Defendants fail to mention that another goal, listed just below "estimating," is "[d]etermin[ing] if the MS4 is contributing to exceedances of Water Quality Standards."

Although Defendants argue that compliance with other Permit provisions, in particular Part 2.3's iterative process, forgives violations of the discharge prohibitions in Parts 2.1 and 2.2, no such "safe harbor" is

present in this Permit.[7] Rather, Part 2.3 first provides that Permittees shall comply with the Water Quality Standards "through timely implementation of control measures and other actions . . . in accordance with the SQMP and its components." Part 2.3 clarifies that Parts 2 and 3 of the Permit interact, but it offers no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions. As opposed to absolving noncompliance or exclusively adopting the MEP standard, the iterative process ensures that if water quality exceedances "persist," despite prior abatement efforts, a process will commence whereby a responsible Permittee amends its SQMP. Given that Part 3 of the Permit states that SQMP implementation is the "minimum" required of each Permittee, the discharge prohibitions serve as additional requirements that operate as enforceable water-quality-based performance standards required by the Regional Board. *See e.g., Bldg. Indus. Ass'n of San Diego Cnty. v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128, 141 (Cal. Ct. App. 2004) (rejecting arguments

[7] We also note, as did the district court, that when the validity of this Permit was challenged in California state court by various municipal entities, including the District, the argument that the Permit's discharge prohibitions were invalid for not containing a "safe harbor" was rejected. *See In re L.A. Cnty. Mun. Storm Water Permit Litig.,* No. BS 080548, at 4-5, 7 (L.A. Super. Ct. Mar. 24, 2005) ("In sum, the Regional Board acted within its authority when it included Parts 2.1 and 2.2. in the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard.").

that "under federal law the 'maximum extent practicable' standard is the 'exclusive' measure that may be applied to municipal storm sewer discharges and [that] a regulatory agency may not require a Municipality to comply with a state water quality standard if the required controls exceed a 'maximum extent practicable' standard").

Part 6.D of the Permit, titled "Duty to Comply," lays any doubts about municipal compliance to rest: "Each Permittee must comply with all terms, requirements, and conditions of this Order. Any violation of this order constitutes a violation of the Clean Water Act . . . and is grounds for enforcement action, Order termination, Order revocation and reissuance, denial of an application for reissuance; or a combination thereof[.]" This unequivocal language is unsurprising given that all NPDES permits must include monitoring provisions ensuring that permit conditions are satisfied. *See* 33 U.S.C. § 1318(a)(A) ("[T]he Administrator [of the EPA] shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), [and] (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe)[.]"); 40 C.F.R. § 122.44(i)(1) (specifying the monitoring requirements for compliance, "mass . . . for each pollutant limited in the permit," and volume of effluent discharged); *Ackels v.*

EPA, 7 F.3d 862, 866 (9th Cir. 1993) ("[T]he Act grants EPA broad authority to require NPDES permitees [sic] to monitor, at such intervals as the Administrator shall prescribe, whenever it is required to carry out the objectives of the Act.").

In sum, the Permit's provisions plainly specify that the mass-emissions monitoring is intended to measure compliance and that "[a]ny violation of this Order" is a Clean Water Act violation. The Permit is available for public inspection to aid this purpose. Accordingly, we agree with the district court's determination that an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers.

II. Evidence of Discharge

We next turn to the factual issue on which the district court granted summary judgement in favor of Defendants – whether any evidence in the record shows Defendants discharged stormwater that caused or contributed to water-quality violations. The district court determined that a factual basis was lacking:

> Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow. Plaintiffs do represent in their supplemental briefing that their monitoring data reflects sampling

> conducted at or near Defendants' outflows. . . . However, the declarations on which Plaintiffs rely do *not* clearly indicate that the sampling in question was conducted at an outflow (as opposed to in-stream).
>
> . . .
>
> In short, Plaintiffs have failed to follow the Court's instructions and present data which could establish that "standards-exceeding pollutants . . . passed through Defendants' MS4 *outflows* at or near the time the exceedances were observed." That the pollutants must have passed through an outflow is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit.

Plaintiffs have argued throughout this litigation that the measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations by Defendants. Because these points are designated in the Permit for purposes of assessing "compliance," this argument is facially appealing. But the Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act, which means in compliance with the NPDES. *See* 33 U.S.C. § 1311(a); *see also Miccosukee Tribe*, 541 U.S. at 102. While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant. Indeed, the Permit specifically

states that "*discharges* from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives *are prohibited*."

"[D]ischarge of pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12). Under the Clean Water Act, the MS4 is a "Point Source." *See* 33 U.S.C. § 1342(p)(2), 1362(14). "Navigable waters" is used interchangeably with "waters of the United States." *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001). Those terms mean, *inter alia*, "[a]ll 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[.]" 40 C.F.R. § 122.2. The Watershed Rivers are all navigable waters.

Thus, the primary factual dispute between the parties is whether the evidence shows any *addition* of pollutants by Defendants to the Watershed Rivers. Defendants contend that the "District does not generate any of the pollutants in the system, but only transports them from other permitted and non-permitted sources." Moreover, Defendants contend that by measuring mass-emissions downstream from where the pollutants entered the sewer system, it is not possible to pinpoint which entity, if any, is responsible for adding them to the rivers. In the words of the district court, there is no evidence that "standards-exceeding pollutants . . . passed through Defendants' MS4 *outflows* at or near the time the

exceedances were observed." Plaintiffs counter that the Monitoring Stations are downstream from hundreds of miles of storm drains which have generated the pollutants being detected. To Plaintiffs, it is irrelevant which of the thousands of storm drains were the source of polluted stormwater – as holders of the Permit, Defendants bear responsibility for the detected exceedances.

Resolving this dispute over whether Defendants added pollutants depends heavily on the level of generality at which the facts are viewed. At the broadest level, all sides agree with basic hydrology – upland water becomes polluted as it runs over urbanized land and begins a downhill flow, first through municipal storm drains, then into the MS4 which carries the water (and everything in it) to the Watershed Rivers, which flow into the Pacific Ocean. More narrowly, it is, as Plaintiffs concede, impossible to identify the particular storm drains that had, for instance, some fecal bacteria which contributed to a water-quality violation. Ultimately, each side fails to rebut the other's arguments. Defendants ignore their role as controllers of thousands of miles of MS4 and the stormwater it conveys[8] by demanding that

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[8] Defendants' untenable position about their responsibility for discharges is confirmed by the testimony of their Rule 30(b)(6) witness:

> *Question*: What if those flows [which exceeded water-quality standards] were so polluted with oil and grease that they were on fire as they came out of the

(Continued on following page)

Plaintiffs engage in the Sisyphean task of testing particular storm drains in the County for the source of each pollutant. Likewise, Plaintiffs did not enlighten the district court with sufficient evidence for certain claims and assumed it was obvious to anyone how stormwater makes its way from a parking lot in Pasadena into the MS4, through a mass-emissions station, and then to a Watershed River.

Despite shortcomings in each side's arguments, there 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 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 intra-state man-made construction – not a naturally occurring Watershed River. *See Headwaters*, 243 F.3d

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system? Would your view be the same, that the District is not contributing to exceedances?

Answer: That the system the District maintains is not contributing to, yes.

at 533 ("The EPA has interpreted 'waters of the United States' to include 'intrastate lakes, rivers, streams (including intermittent streams) . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce' and 'tributaries of [those] waters.'" (quoting 40 C.F.R. § 122.2(c), (e)). At least some outfalls for the MS4 were downstream from the mass-emissions stations. *See* 40 C.F.R. § 122.26(9) ("Outfall means a point source . . . at the point where a municipal separate storm sewer discharges to waters of the United States . . . ."). 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 MS4 eventually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Although the District argues that merely channeling pollutants created by other municipalities or industrial NPDES permittees should not create liability because the District is not an instrument of "addition" or "generation,"[9] the Clean Water Act does

[9] This issue does not usually arise in Clean Water Act litigation because it is generally assumed that ms4s "discharge" stormwater. *See, e.g.*, *Miss. River Revival v. Adm'r, E.P.A.*, 107 F. Supp. 2d 1008, 1009 (D. Minn. 2000) ("These lawsuits involve the discharge of storm water into the Mississippi River through the Cities' storm sewers. Thus, and this is not in dispute, the

(Continued on following page)

not distinguish between those who add and those who convey what is added by others – the Act is indifferent to the originator of water pollution. As Judge Wilkinson of the Fourth Circuit cogently framed it: "[The Act] bans 'the discharge of any pollutant by any person' regardless of whether that 'person' was the root cause or merely *the current superintendent of the discharge*." *Huffman*, 625 F.3d at 167 (emphasis added). "Point sources" include instruments that channel water, such as "any pipe, ditch, *channel*, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). The EPA's regulations further specify that ms4 operators require permits for channeling: "Discharge of a pollutant . . . includes additions of pollutants into waters of the United States from: surface runoff which is collected or *channelled* by man; discharges through pipes, sewers, or other conveyances owned by a State [or] municipality." 40 C.F.R. § 122.2 (emphasis added). "[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program." 55 Fed. Reg. 47,991. Finally, the Supreme Court stated in *Miccosukee Tribe* that "the definition of 'discharge of a pollutant' contained in § 1362(12)

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storm water discharge is subject to the NPDES permitting requirements.").

. . . *includes* within its reach point sources that do not themselves generate pollutants." 541 U.S. at 105 (emphasis added).

Accordingly, the district court erred in stating that "Plaintiffs have not provided the Court with the necessary evidence to establish that the Los Angeles River and the San Gabriel River below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations." In light of the evidence that the Los Angeles River and San Gabriel River mass-emission stations are in concrete portions of the MS4 controlled by the District, it is beyond dispute that the District is discharging pollutants from the MS4 to the Los Angeles River and San Gabriel River in violation of the Permit. Thus, Plaintiffs are entitled to summary judgment on Claims 2 and 3.

However, we agree with the district court that, as the record is currently constituted, it is not possible to mete out responsibility for exceedances detected in the Santa Clara River and Malibu Creek (Claims 1 and 4). Like the district court, we are unable to identify the relationship between the MS4 and these mass-emissions stations. From the record, it appears that both monitoring stations are located within the rivers themselves. Plaintiffs have not endeavored to provide the Court with a map or cogent explanation of the inter-workings or connections of this complicated drainage system. We recognize that both the Santa Clara and Malibu Creek Monitoring Stations are downstream from hundreds or thousands of storm

drains and MS4 channels. It is highly likely, but on this record nothing more than assumption, that polluted stormwater exits the MS4 controlled by the District and the County, and flows downstream in these rivers past the mass-emissions stations. To establish a violation, Plaintiffs were obligated to spell out this process for the district court's consideration and to spotlight how the flow of water from an ms4 "contributed" to a water-quality exceedance detected at the Monitoring Stations. *See, e.g.*, *Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 846-47 (5th Cir. 1983) ("We wish to emphasize most strongly that it is foolhardy for counsel to rely on a court to find disputed issues of material fact not highlighted by counsel's paperwork; a party that has suffered the consequences of summary judgment below has a definite and specific duty to point out the thwarting facts . . . . Judges are not ferrets!"). Contrary to Plaintiffs' contention, this would not require independent sampling of the District's outfalls. Indeed, simply ruling out the other contributors of stormwater to these two rivers or following up to vague answers given by Defendants' witnesses could have satisfied Plaintiffs' evidentiary obligation. In the alternative, prior to commencing actions such as this one, Plaintiffs could heed the district court's sensible observation and, for purposes of their evidentiary burden, "sample from *at least one* outflow that included a standards-exceeding pollutant[.]"

Finally, for all four Watershed Rivers, the record is silent regarding the path stormwater takes from

the unincorporated land controlled by the County to the Monitoring Stations. The district court correctly demanded evidence for the County's liability, which Plaintiffs did not proffer.

In sum, Plaintiffs were entitled to summary judgment on Claims 2 and 3 against the District for the Los Angeles River and San Gabriel River because (1) the Monitoring Stations for these two rivers are located in a portion of the MS4 owned and operated by the District, (2) these Monitoring Stations detected pollutants in excess of the amount authorized by the NPDES permit, and (3) this polluted water "discharged" into the Los Angeles River and San Gabriel River. The Plaintiffs, however, have not met their burden on summary judgment for their other claims because they did not provide the district court with evidence that the MS4 controlled by the District "discharged" pollutants that passed through the Monitoring Stations in the Santa Clara River and Malibu Creek, or that ms4s controlled by the County "discharged" pollutants that passed through the Monitoring Stations in any of the four rivers in question.

CONCLUSION

The district court's judgment for Defendant District on Claims 2 and 3 of the First Amended Complaint is REVERSED, and this matter is REMANDED to the district court for further proceedings consistent with this opinion. The district court's grant of summary judgment for Defendant District

on Claims 1 and 4 and for Defendant County on all Watershed Claims is AFFIRMED.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Each side shall bear its own costs.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; MICHAEL ANTONOVICH, in his official capacity as Supervisor; YVONNE BURKE, in her official capacity as Supervisor; GLORIA MOLINA, in her official capacity as Supervisor; ZEV YAROSLAVSKY, in his official capacity as Supervisor; DEAN D. EFSTATHIOU, in his official capacity as Acting Director of Los Angeles County Department of Public Works; DON KNABE, in his official capacity as Supervisor,

Defendants-Appellees.

No. 10-56017

D.C. No. 2:08-cv-01467-AHM-PLA

OPINION

Appeal from the United States District Court
for the Central District of California
Howard Matz, District Judge, Presiding

Argued and Submitted
December 10, 2010 – Pasadena, California

Filed March 10, 2011

Before: Harry Pregerson, and
Milan D. Smith, Jr., Circuit Judges, and
H. Russel Holland, Senior District Judge.*

Opinion by Judge Milan D. Smith, Jr.

COUNSEL

Aaron Colangelo, Esquire, Natural Resources Defense Council, Washington, D.C.; Daniel Cooper, Esquire, Lawyers for Clean Water, San Francisco, California, for plaintiffs-appellants Natural Resources Defense Council, Inc. and Santa Monica Baykeeper.

Andrea Sheridan Ordin, Esquire, Judith A. Fries, Esquire, Laurie Dods, Esquire, Los Angeles County Department of County Counsel, Los Angeles, California; Howard Gest, Esq., David W. Burhenn, Esq., Burhenn & Gest LLP, Los Angeles, California, for defendants-appellees County of Los Angeles, et al.

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* The Honorable H. Russel Holland, Senior United States District Judge for the District of Alaska, sitting by designation.

OPINION

M. SMITH, Circuit Judge.

Plaintiffs-Appellants Natural Resources Defense Council and Santa Monica Baykeeper appeal the district court's grant of summary judgment in favor of two municipal entities that Plaintiffs allege are discharging polluted stormwater in violation of the Federal Water Pollution Control Act (the Clean Water Act, Act, or CWA), 86 Stat. 816, codified as amended at 33 U.S.C. § 1251 *et seq*. Plaintiffs contend that Defendants-Appellees County of Los Angeles (County) and Los Angeles County Flood Control District (District) are discharging polluted urban stormwater runoff collected by municipal separate storm sewer systems (ms4) into navigable waters in Southern California. The levels of pollutants detected in four rivers – the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek (collectively, the Watershed Rivers) – exceed the limits allowed in a National Pollutant Discharge Elimination System (NPDES) permit which governs municipal stormwater discharges in the County. Although all parties agree that numerous water-quality standards have been exceeded in the Watershed Rivers, Defendants contend that there is no evidence establishing their responsibility for, or discharge of, stormwater carrying pollutants to the rivers. The district court agreed with Defendants and entered a partial final judgment.

We conclude that the district court erred with respect to the evidence of discharges by the District into two of the Watershed Rivers – the Los Angeles River and San Gabriel River. Specifically, Plaintiffs provided evidence that the monitoring stations for the Los Angeles and San Gabriel Rivers are located in a section of ms4 owned and operated by the District and, after stormwater known to contain standards-exceeding pollutants passes through these monitoring stations, this polluted stormwater is discharged into the two rivers. Accordingly, Plaintiffs were entitled to summary judgment on the District's liability for discharges into the Los Angeles River and San Gabriel River, and therefore we reverse the district court's grant of summary judgment in favor of the District on these claims.

Plaintiffs, however, failed to meet their evidentiary burden with respect to discharges by the District into the Santa Clara River and Malibu Creek. Plaintiffs did not provide evidence sufficient for the district court to determine if stormwater discharged from an ms4 controlled by the District caused or contributed to pollution exceedances located in these two rivers. Similarly, Plaintiffs did not delineate how stormwater from ms4s controlled by the County caused or contributed to exceedances in any of the Watershed Rivers. Accordingly, we affirm the district court's grant of summary judgment in favor of the Defendants on these claims.

FACTUAL AND PROCEDURAL BACKGROUND

I. Stormwater Runoff in Los Angeles County

A. The MS4

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. When stormwater flows over urban environs, it collects "suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants[.]" *Envtl. Def. Ctr., Inc. v. EPA,* 344 F.3d 832, 840 (9th Cir. 2003). This runoff is a major contributor to water pollution in Southern California rivers and the Pacific Ocean and contributes to the sickening of many ocean users each year.

The County is a sprawling 4,500 square-mile amalgam of populous incorporated cities and significant swaths of unincorporated land. The District is a public entity governed by the Los Angeles County Board of Supervisors and the Department of Public Works. The District is comprised of 84 cities and some unincorporated areas of the County. The County and the District are separate legal entities.

In the District, stormwater runoff is collected by thousands of storm drains located in each municipality and channeled to a storm sewer system. The municipalities in the District operate ms4s[1] to collect and channel stormwater. The County also operates an ms4 for certain unincorporated areas. Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, ms4s contain and convey only untreated stormwater. *See* 40 C.F.R. § 122.26(a)(7), (b)(8). In the County, municipal ms4s are "highly interconnected" because the District allows each municipality to connect its storm drains to

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[1] Under Federal Regulations, an ms4 is:

> 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 . . . 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 . . .
>
> (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). . . .

40 C.F.R. § 122.26(b)(8).

the District's extensive flood-control and storm-sewer infrastructure (the MS4).[2] That infrastructure includes 500 miles of open channels and 2,800 miles of storm drains. The length of the [MS4] system, and the locations of all storm drain connections, are not known exactly, as a comprehensive map of the storm drain system does not exist. While the number and location of storm drains are too numerous to catalogue, it is undisputed that the MS4 collects and channels stormwater runoff from across the County. That stormwater is channeled in the MS4 to various watercourses including the four Watershed Rivers at the heart of this litigation: the Los Angeles River, the San Gabriel River, the Santa Clara River, and Malibu Creek. The Watershed Rivers drain into the Pacific Ocean at Santa Monica Bay, Los Angeles Harbor, and Long Beach Harbor.

The gravamen of Plaintiffs' action is that by allowing untreated and heavily-polluted stormwater to flow unabated from the MS4 into the Watershed Rivers, and eventually into the Pacific Ocean, Defendants have violated the Clean Water Act.

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[2] Throughout this Opinion, reference is made to both "ms4" and "*the* MS4." The former is a generic reference to municipal separate storm sewer systems without regard to their particular location, while the latter specifically refers to the flood control and storm-sewer infrastructure described *supra* that exists in the County and is controlled by the District.

B. The Clean Water Act and NPDES Permit

The Clean Water Act is the nation's primary water-pollution-control law. The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "To serve those ends, the Act prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." *S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1311(a)). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12); see *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.,* 13 F.3d 305, 308 (9th Cir. 1993) (characterizing "discharge" as "'add[ing]' pollutants from the outside world to navigable water").

Under the Clean Water Act, ms4s fall under the definition of "point sources." 33 U.S.C. § 1362(14). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

A person or entity wishing to add pollutants to navigable waters must comply with the NPDES, which "requires dischargers to obtain permits that place limits on the type and quantity of pollutants

that can be released into the Nation's waters." *Miccosukee Tribe,* 541 U.S. at 102; 33 U.S.C. § 1342(a), (p). The Act "generally prohibits the 'discharge of any pollutant' . . . *from a 'point source*' into the navigable waters of the United States'" unless the point source is covered by an NPDES permit. *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1163 (9th Cir. 1999) (quoting 33 U.S.C. §§ 1311(a), 1362(12)(A)) (emphasis added); *see also Arkansas v. Oklahoma,* 503 U.S. 91, 101-02 (1992) (describing NPDES permitting system). An NPDES permit requires its holder – the "permittee" – to follow the requirements of numerous Clean Water Act provisions, *see* 33 U.S.C. § 1342(a), which include effluent limitations, water-quality standards, water monitoring obligations, public reporting mechanisms, and certain discharge requirements. *See id.* §§ 1311, 1312, 1314, 1316, 1317, 1318, 1343.

The Act uses two water-quality-performance standards, by which a discharger of water may be evaluated – "effluent limitations" and "water quality standards." *Arkansas v. Oklahoma,* 503 U.S. at 101 (citing 33 U.S.C. §§ 1311, 1313, 1314); *see also Sierra Club v. Union Oil Co. of Calif.,* 813 F.2d 1480, 1483 (9th Cir. 1987), *vacated on other grounds,* 485 U.S. 931 (1988), *reinstated,* 853 F.2d 667 (9th Cir. 1988). An effluent limitation is "any restriction established by a State or the [Environmental Protection Agency (EPA)] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters. . . ." 33 U.S.C. § 1362(11). An

effluent-limitation guideline is determined in light of "'the best practicable control technology currently available.'" *Union Oil,* 813 F.2d at 1483 (quoting 33 U.S.C. § 1311(b)(1)(A)).

Water-quality standards "are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels." *Union Oil,* 813 F.2d at 1483 (citing *EPA v. Calif. ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 205 n.12 (1976) (hereafter *EPA v. Calif.*)). Water-quality standards are developed in a two-step process. First, the EPA, or state water authorities establish a waterway's "beneficial use." *Natural Res. Def. Council, Inc. v. EPA,* 16 F.3d 1395, 1400 (4th Cir. 1993); *see also* Cal. Water Code § 13050(f) ("'Beneficial uses' of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."). Once the beneficial use is determined, water quality criteria that will yield the desired water conditions are formulated and implemented. *See NRDC v. EPA,* 16 F.3d at 1400; *see also* 33 U.S.C. § 1313(a), (c)(2)(A); 40 C.F.R. § 131.3(i) ("Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water

quality criteria for such waters based upon such uses.").

Unlike effluent limitations, which are promulgated by the EPA to achieve a certain level of pollution reduction in light of available technology, water-quality standards emanate from the state boards charged with managing their domestic water resources. *See Arkansas v. Oklahoma,* 503 U.S. at 101. The EPA gives the states guidance in drafting water-quality standards and "state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards." *Id.*

The EPA has authorized the State of California to develop water-quality standards and issue NPDES permits. Under the Porter-Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and nine regional boards as the principal state agencies for enforcing federal and state water pollution law and for issuing permits. *See* Cal. Water Code §§ 13000, 13001, 13140, 13240, 13370, 13377. Beginning in 1990, the California State Water Resources Control Board for the Los Angeles Region (the Regional Board) issued an NPDES permit (the Permit) to cover stormwater discharges by the County, the District, and 84 incorporated municipalities in the County (collectively

the Permittees or Co-Permittees).[3] *See City of Arcadia v. State Water Res. Control Bd.,* 119 Cal. Rptr. 3d 232, 240-41 (Cal. Ct. App. 2010). The Permit was renewed in 1996, 2001, 2006, and 2007.

The Permit is divided into two broad sections: findings by the Regional Board and an order authorizing and governing the Permittees' discharges (Order). The findings cover many introductory and background subjects, including a history of NPDES permitting in the County; applicable state and federal laws governing stormwater discharges; studies conducted by the County and researchers about the deleterious effects of polluted stormwater; coverage and implementation provisions; and guidelines for administrative review of Permit provisions. The Permit covers "all areas within the boundaries of the Permittee municipalities . . . over which they have regulatory jurisdiction as well as unincorporated areas in Los Angeles County within the jurisdiction of the Regional Board." In total, the Permit governs municipal stormwater discharge across more than 3,100 square miles of land in the County.

The Permit relates the many federal and state regulations governing stormwater discharges to Southern California's watercourses. Among these regulations is the Water Quality Control Plan for the Los

[3] "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).

Angeles Region (the Basin Plan). Under California law, the regional boards' "water quality plans, called 'basin plans,' must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation." *City of Arcadia,* 119 Cal. Rptr. 3d at 240 (quoting *City of Burbank v. State Water Res. Control Bd.,* 108 P.3d 862, 865 (Cal. 2005) (citing Cal. Water Code § 13050(j))). The Permit provides that "[t]he Basin Plan designates beneficial uses of receiving waters and specifies both narrative and numerical water quality objectives for the receiving water in Los Angeles County." "Receiving waters" are defined as "all surface water bodies in the Los Angeles Region that are identified in the Basin Plan." "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 nor create conditions of nuisance in the receiving waters, and that the discharge of non-storm water to the MS4 has been effectively prohibited." The Permit incorporates and adopts the Basin Plan, which sets limits on bacteria and contaminants for the receiving waters of Southern California. The water-quality standards limit, among other pollutants, the levels of ammonia, fecal coliform bacteria, arsenic, mercury, and cyanide in Southern California's inland rivers.

The Permit contains myriad prohibitions and conditions regarding discharges into and from the MS4. Under Part 1, the Permittees are directed to "effectively prohibit non-storm water discharges into

the MS4 and watercourses" unless allowed by an NPDES permit. Under Part 2, titled "Receiving Water Limitations," "discharges from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives are prohibited." The "Water Quality Standards and Water Quality Objectives" are defined in the Permit as "water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federal approved surface water quality plans. Such plans are used by the Regional Board to regulate all discharges, including storm water discharges."

The Permit provides that Permittees "shall comply" with the MS4 discharge prohibitions "through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with [the Los Angeles Stormwater Quality Management Program (SQMP)] and its components and other requirements of this Order. . . ." The SQMP includes "descriptions of programs, collectively developed by the Permittees in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law." The Permit sets out a procedure to ensure Permittee compliance when any water-quality standards are breached:

> a) Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the

> Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report . . . to the Regional Board that describes [Best Management Practices (BMPs)] that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedances of Water Quality Standards.
>
> . . .
>
> c) Within 30 days following the approval of the RWL Compliance Report, the Permittee shall revise the SQMP and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required.
>
> d) Implement the revised SQMP and its components and monitoring program according to the approved schedule.
>
> . . . So long as the Permittee has complied with the procedures set forth above and is implementing the revised SQMP and its components, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.

When a violation arises, a Permittee must adhere to the procedures in its Compliance Report until the exceedances abate.

The Permit requires the Permittees, *inter alia,* to reduce pollution in stormwater to the "maximum extent practicable [(MEP)]." Each Permittee is vested with the "necessary legal authority" to prohibit discharges to the MS4, and is directed to develop stormwater and urban runoff ordinances for its jurisdiction.

The Permit has both self-monitoring and public-reporting requirements, which include: (1) monitoring of "mass emissions" at seven mass emission monitoring stations; (2) Water Column Toxicity Monitoring; (3) Tributary Monitoring; (4) Shoreline Monitoring; (5) Trash Monitoring; (6) Estuary Sampling; (7) Bioassessment; and (8) Special Studies.

This case concerns high levels of pollutants, particularly heavy metals and fecal bacteria, identified by mass-emissions monitoring stations for the four Watershed Rivers (the Monitoring Stations). Mass-emissions monitoring measures *all* constituents present in water, and the readings give a cumulative picture of the pollutant load in a waterbody. According to the Permit, the purpose of mass-emissions monitoring is to (1) estimate the mass emissions from the MS4, (2) assess trends in the mass emissions over time, and (3) determine if the MS4 is contributing to exceedances of Water Quality Standards by comparing results to the applicable standards in the Basin Plan. The Permit establishes that the Principal Permittee, which is the District, shall monitor the mass-emissions stations. The Permit requires that mass-emission readings be taken five times per year for the Watershed Rivers.

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 the District. *See* Excerpts of Record at 11; *see also* Dist. Ct. Docket No. 101: Declaration of Aaron Colangelo Ex. N: Deposition of Mark Pestrella at 476-78. The Los Angeles River Monitoring Station is located in the City of Long Beach in "a concrete lined trapezoidal channel."[4] The Los Angeles River Monitoring Station measures "total upstream tributary drainage" of 825 square miles, as the Los Angeles River is the largest watershed outlet in the County. The San Gabriel River Monitoring Station is located in Pico Rivera and measures an upstream tributary watershed of 450 square miles.

The Malibu Creek Monitoring Station is not located within a channelized portion of the MS4 but at an "existing stream gage station" near Malibu Canyon Road. It measures 105 miles of tributary watershed. The Santa Clara River Monitoring Station is located in the City of Santa Clara and measures an upstream tributary area of 411 square miles.[5]

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[4] "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/npdes/9899_report/SiteDesc.pdf (last accessed Mar. 2, 2011); *see also* "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/NPDES/2006-07_report%5CSection%202.pdf (last accessed Mar. 2, 2011).

[5] "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, available at http://dpw.lacounty.gov/wmd/NPDES/2006-07_report%5CSection%202.pdf (last accessed Mar. 2, 2011).

C. Water-Quality Exceedances in the Watershed Rivers

Between 2002 and 2008, the four Monitoring Stations identified hundreds of exceedances of the Permit's water-quality standards. These water-quality exceedances are not disputed. For instance, monitoring for the Los Angeles and San Gabriel Rivers showed 140 separate exceedances. These included high levels of aluminum, copper, cyanide, fecal coliform bacteria, and zinc in the rivers. Further, ocean monitoring at Surfrider Beach showed that there were 126 separate bacteria exceedances on 79 days, including 29 days where the fecal coliform bacteria limit was exceeded.

The District admits that it conveys pollutants via the MS4, but contends that its infrastructure alone does not generate or discharge pollutants. According to Defendants, the District conveys the collective discharges of the numerous "up-sewer" municipalities. Moreover, Defendants identify thousands of permitted dischargers whose pollutants are reaching the Watershed Rivers:

> (1) Los Angeles River watershed: (a) at least 1,344 NPDES-permitted industrial and 488 construction stormwater dischargers allowed to discharge during the time period relevant to the case; (b) three wastewater treatment plants; and (c) 42 separate incorporated cities within the Los Angeles River watershed discharging into the river upstream of the mass emission station.

(2) San Gabriel River watershed: (a) at least 276 industrial and 232 construction stormwater dischargers during the relevant time period; (b) at least 20 other industrial dischargers that were specifically permitted to discharge pollutants in excess of the water quality standards at issue in this action; (c) two wastewater treatment plants; and (d) 21 separate incorporated cities discharging into the watershed upstream of the mass emission station.

(3) Santa Clara River watershed: (a) eight dischargers permitted by industrial wastewater discharge permits where the limits in the permit allowed discharges of pollutants at concentrations higher than the water quality standards which plaintiffs contend were exceeded; (b) approximately 26 industrial and 187 construction stormwater dischargers; and (c) the Saugus Wastewater Reclamation Plant.

(4) Malibu Creek watershed: (a) seven industrial wastewater dischargers; and (b) at least five permitted discharges under the general industrial stormwater permit and at least 16 construction sites permitted to discharge under the general construction stormwater permit.

II. Proceedings before the District Court

Based on data self-reported by Defendants, Plaintiffs catalogued the water-quality exceedances

in the Watershed Rivers. Beginning on May 31, 2007, Plaintiffs sent a series of notice letters to Defendants concerning these exceedances. On March 3, 2008, based on these purported violations, Plaintiffs commenced this citizen-enforcement action. After the district court dismissed certain elements of Plaintiffs' initial complaint because notice of the Permit violations was defective, Plaintiffs sent Defendants an adequate notice letter on July 3, 2008.

Plaintiffs filed the First Amended Complaint (Complaint) on September 18, 2008. In the Complaint, Plaintiffs assert six causes of action under the Clean Water Act. Only the first four of Plaintiffs' claims, which relate to the exceedances in the Watershed Rivers, and which the district court designated the "Watershed Claims," are before us. The first three Watershed Claims allege that, beginning in 2002 or 2003, the District and the County caused or contributed to exceedances of water-quality standards in the Santa Clara River (Claim 1), the Los Angeles River (Claim 2), and the San Gabriel River (Claim 3), in violation of 33 U.S.C. §§ 1311(a), 1342(p). The fourth Watershed Claim alleges that, beginning in 2002, Defendants caused or contributed to exceedances of the water quality standards and violated the Total Maximum Daily Load (TMDL) limits in Malibu Creek. Plaintiffs' four Watershed Claims each rest on the same premise: (1) the Permit sets water-quality limits for each of the four rivers; (2) the mass-emissions stations have recorded exceedances of those standards; (3) an exceedance is non-compliance with the

Permit and, thereby, the Clean Water Act; and (4) Defendants, as holders of the Permit and operators of the MS4, are liable under the Act.

Before the district court, Plaintiffs moved for partial summary judgment on two of the Watershed Claims: the Los Angeles River and San Gabriel River exceedances. Defendants cross-moved for summary judgment on all four Watershed Claims.

In a March 2, 2010 Order, the district court denied each cross-motion for summary judgment on the Watershed Claims. *NRDC v. County of Los Angeles,* No. 08 Civ. 1467 (AHM), 2010 WL 761287 (C.D. Cal. Mar. 2, 2010), *amended on other grounds,* 2011 WL 666875 (C.D. Cal. Jan. 27, 2011). Although the district court accepted Plaintiffs' arguments that the Permit "clearly prohibits 'discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives,'" 2010 WL 761287, at *6, and that mass-monitoring stations "are the proper monitoring locations to determine if the MS4 is contributing to exceedances [of the Water Quality Standards or water quality objectives,]" *id.,* the district court held that Plaintiffs were attempting to establish liability without presenting evidence of who was responsible for the stormwater discharge. The district court observed that although "the District is responsible for the pollutants in the MS4" at the time they pass the mass-emissions stations, "that does not necessarily determine the question of whether the water passing by these points is a 'discharge' within the meaning of the Permit and the

Clean Water Act." *Id.* at *7. Unable to decipher from the record where the MS4 ended and the Watershed Rivers begin, or whether any upstream outflows were contributing stormwater to the MS4, the district court stated that "Plaintiffs would need to present some evidence (monitoring data or an admission) that some amount of a standards-exceeding pollutant is being discharged though [sic] at least one District outlet." *Id.* at *8.

Following supplemental briefing, the district court again determined that "Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow." The district court thereupon entered summary judgment for Defendants on all four Watershed Claims.

Under Fed. R. Civ. P. 54(b), the district court entered a partial final judgment on the Watershed Claims because they were "factually and legally severable" from the other claims and "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." Plaintiffs timely appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291.

We review the district court's grant of summary judgment in a Clean Water Act enforcement action de novo. *Assoc. to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.,* 299 F.3d 1007, 1009 (9th Cir. 2002) (citing *Waste Action Project v. Dawn Mining Corp.,* 137 F.3d 1426, 1428 (9th Cir. 1998)).

DISCUSSION

Determining whether the County or the District violated the Permit's conditions, and thereby the Clean Water Act, requires us 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.

I. Whether Exceedances at Mass-Emission Stations Constitute Permit Violations

"The Clean Water Act regulates the discharge of pollutants into navigable waters, prohibiting their discharge unless certain statutory exceptions apply." *Russian River Watershed Protection Comm. v. City of Santa Rosa,* 142 F.3d 1136, 1138 (9th Cir. 1998) (citing 33 U.S.C. § 1311(a)). One such exception is for discharges by entities or individuals who hold NPDES permits. *Id.* The NPDES permitting program is the "centerpiece" of the Clean Water Act and the primary

method for enforcing the effluent and water-quality standards established by the EPA and state governments. *Am. Iron & Steel Inst. v. EPA,* 115 F.3d 979, 990 (D.C. Cir. 1997); *see also Nw. Envtl. Advocates v. City of Portland,* 56 F.3d 979, 986-90 (9th Cir. 1995) ("Citizen suits to enforce water quality standards effectuate complementary provisions of the CWA and the underlying purpose of the statute as a whole."); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.,* 570 F.3d 1210, 1225 (11th Cir. 2009) (citing *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F.2d 156,175-76 (D.C. Cir. 1982) ("There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution.")).

To decipher the meaning and enforceability of NPDES permit terms, we interpret the unambiguous language contained in the permit. *Russian River,* 142 F.3d at 1141. We review a permit's provisions and meaning as we would any contract or legal document. *See Nw. Envtl. Advocates,* 56 F.3d at 982. As described *supra,* the Permit prohibits MS4 discharges into receiving waters that exceed the Water Quality Standards established in the Basin Plan and elsewhere. Specifically, Section 2.1 provides: "[D]ischarges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Section 2.2 of the Permit reads: "Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible

for, shall not cause or contribute to a condition of nuisance."

Nevertheless, Defendants contend that exceedances observed at mass-emissions stations cannot establish liability on behalf of any individual Permittee. Their argument in this respect, as we discuss more thoroughly *infra,* relies heavily on their belief that the record is bereft of evidence connecting Defendants to the water-quality exceedances. Defendants also assert that the mass-emissions stations are "neither designed nor intended" to measure the compliance of any Permittee and, therefore, cannot form the basis for a Permit violation. Defendants also argue that municipal compliance with an NPDES stormwater permit cannot be reviewed under the same regulatory framework as a private entity or individual. In support of this contention, Defendants cite to a 1990 EPA rule:

> 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 "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.

Brief of Appellees 33 (quoting "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges," 55 Fed. Reg. 47,990, 48,037-38 (Nov. 16, 1990)).

As we detail *infra,* neither the statutory development of the Clean Water Act nor the plain language of EPA regulations supports Defendants' arguments that NPDES permit violations are less enforceable or unenforceable in the municipal-stormwater context. In fact, since the inception of the NPDES, Congress has expanded NPDES permitting to bring municipal dischargers within the Clean Water Act's coverage.

A. Regulating MS4 Operators

The NPDES permitting program originated in the 1972 amendments to the Clean Water Act. Pub. L. 92-500, § 2, 86 Stat. 88, *reprinted in* 1972 U.S.C.C.A.N. 3668 (codified as amended at 33 U.S.C. § 1342). At the time, the NPDES program was viewed "as the primary means of enforcing the Act's effluent limitations." *Natural Res. Def. Council v. Costle,* 568 F.2d 1369, 1371 (D.C. Cir. 1977); *see also Natural Res. Def. Council, Inc. v. EPA,* 966 F.2d 1292, 1295 (9th Cir. 1992) (examining statutory history of 1972 amendments to the Clean Water Act) (hereafter *NRDC v. EPA*). The permitting program is codified at Section 402 of the Clean Water Act. 33 U.S.C. § 1342. In 1973, the EPA promulgated regulations categorically

exempting "discharges from a number of classes of point sources . . . including . . . separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity." *Costle,* 568 F.2d at 1372 (citing 40 C.F.R. § 125.4 (1975)). The EPA's exemption of certain point sources, including ms4s, from Section 402's blanket requirement was invalidated by the United States Court of Appeals for the District of Columbia Circuit in *Costle*. *Id.* at 1376-77. The *Costle* court highlighted that "[t]he wording of the [CWA], legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402." *Id.* at 1377.

In the ten-year period following the *Costle* decision, the EPA did not promulgate regulations addressing discharges by ms4 operators. *See NRDC v. EPA,* 966 F.2d at 1296 (citing "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines," 56 Fed. Reg. 56,548 (1991)). In 1987, after continued nonfeasance by the EPA, Congress enacted the Water Quality Act amendments to the Clean Water Act to regulate stormwater discharges from, *inter alia,* ms4s. *See Defenders of Wildlife,* 191 F.3d at 1163 ("Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA."); *NRDC v. EPA,* 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987[.]")

(internal citations omitted); *see also* 55 Fed. Reg. 47,994 ("[P]ermits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls, and must include a requirement to effectively prohibit non-storm water discharges into the storm sewers. Furthermore, EPA in consultation with State and local officials must develop a comprehensive program to designate and regulate other storm water discharges to protect water quality.").

The principal effect of the 1987 amendments was to expand the coverage of Section 402's permitting requirements. *NRDC v. EPA,* 966 F.2d at 1296. Section 402(p) established a "phased and tiered approach" for NPDES permitting. *Nw. Envtl. Def. Ctr. v. Brown,* 617 F.3d 1176, 1193 (9th Cir. 2010) (citing 33 U.S. § 1342(p)(2)). "The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first." *NRDC v. EPA,* 966 F.2d at 1296. "Phase I" included "five categories of stormwater discharges," deemed "the most significant sources of stormwater pollution," who were required to obtain an NPDES permit for their stormwater discharge by 1990. *Brown,* 617 F.3d at 1193 (citing 33 U.S. § 1342(p)(2)). The five categories of the most serious discharge were:

> (p) Municipal and industrial stormwater discharges . . .

(2) . . .

. . .

(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.

33 U.S.C. § 1342(p)(2) (emphases added). Of the five categories of Phase I dischargers required to obtain the first permits, two are ms4 operators: municipalities with populations over 250,000, and municipalities with populations between 100,000 and 250,000. *Id.* § 1342(p)(2)(C)-(D). Indeed, as noted *supra,* the Permit at issue here was first authorized in 1990 pursuant to the 1987 amendments.

Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential "nightmare"),[6] and as regulations prior to 1987 theoretically required, Congress put the NPDES permitting requirement at the municipal level to ease the burden of administering the program. *Brown,* 617 F.3d at 1193. That assumption of municipal control is found in the Permit at issue here – Part 3.G.2 of the Permit states that "Permittees shall posses [sic] adequate legal authority to . . . [r]equire persons within their jurisdiction to comply with conditions in Permittee's ordinances, permits, contracts, model programs, or orders (i.e. hold dischargers to its MS4 accountable for their contributions of pollutants and flows.)[.]"

Defendants' position that they are subject to a less rigorous or unenforceable regulatory scheme for their stormwater discharges cannot be reconciled with the significant legislative history showing Congress's intent to bring ms4 operators under the NPDES-permitting system. Even the selectively excerpted regulatory language Defendants present to us – "Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers

[6] See 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop) ("[The regulations] can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source. . . . Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.").

. . . [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" – does not support Defendants' view. Indeed, this excerpt is but one paragraph from a longer section titled, "Site-Specific Storm Water Quality Management Programs for Municipal Systems." 55 Fed. Reg. 48,037-38. The quoted language follows a paragraph which reads:

> Section 402(p)(3)(iii) of the CWA mandates that permits for discharges from municipal separate storm sewers *shall require controls to reduce the discharge of pollutants* to the maximum extent practicable (MEP), including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Director determines appropriate for the control of such pollutants.

55 Fed. Reg. 48,038 (emphasis added). The use of such language – employing "mandates" and commands to regulate – hardly supports Defendants' notion that NPDES permits are unenforceable against municipalities for their stormwater discharges. Moreover, the paragraphs that follow the excerpt explain why developing system-wide controls to manage municipal stormwater is preferable to controlling pollution through end-of-pipe effluent technologies. *Id.* The regulations highlight that "Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner to allow site-specific permit conditions to reflect

the wide range of impacts that can be associated with these discharges." *Id.* Rather than evincing any intent to treat permitting "differently" for municipalities, the EPA merely explains why state authorities that issue permits should draft site-specific rules, as the Regional Board did here, and why *water-quality standards* may be preferable over more-difficult-to-enforce effluent limitations. Avoiding wooden permitting requirements and granting states flexibility in setting forth requirements is not equivalent to immunizing municipalities for stormwater discharges that violate the provisions of a permit.

B. Enforcement of Mass-Emissions Violations

Part and parcel with Defendants' argument that they are subject to a relaxed regulatory structure is their view that the Permit's language indicates that mass-emissions monitoring is not intended to be enforced against municipal dischargers. Defendants claim that measuring water-quality serves only an hortatory purpose – as Defendants state, "the mass emission monitoring program . . . neither measures nor was designed to measure any individual permittee's compliance with the Permit." This proposition, which if accepted would emasculate the Permit, is unsupported by either our case law or the plain language of the Permit conditions.

"The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions." *Nw. Envtl.*

Advocates, 56 F.3d at 986 (emphasis in original). We used these words, and emphasized "*all*" permit conditions, because the language of the Clean Water Act is clear in its intent to guard against all sources and superintendents of water pollution and "clearly contemplates citizen suits to enforce 'a permit or condition thereof.'" *Id.* (citing 33 U.S.C. § 1365(f)(2), (f)(6)); *see also W. Va. Highlands Conservancy, Inc. v. Huffman,* 625 F.3d 159, 167 (4th Cir. 2010) ("In other words, the statute takes the water's point of view: water is indifferent about who initially polluted it so long as pollution continues to occur.").

We have previously addressed, and rejected, municipal attempts to avoid NPDES permit enforcement. In *Northwest Environmental Advocates,* we considered a citizen-suit challenging the City of Portland's operation of a combined sewer system which periodically overflowed and discharged raw sewage into two rivers. 56 F.3d at 981-82. The plaintiffs brought suit on the basis of an NPDES permit condition which "prohibit[ed] any discharges that would violate Oregon water quality standards." *Id.* at 985. Reviewing the history of the 1972 amendments and the Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology,* 511 U.S. 700 (1994), we recognized that Congress had authorized enforcement of state water-quality standards, lest municipalities be immunized on the technicality that not all water standards can be expressed as effluent limitations. *Id.* at 988-89. The overflows from the Portland sewer system were

"caused primarily by uncontrollable events – *i.e.,* the amount of stormwater entering the system[.]" *Id.* at 989. Because the total amount of water entering and leaving the sewer system was unknown, it was impossible to articulate effluent standards which would "ensure that the gross amount of pollution discharged [would] not violate water quality standards." *Id.* Only by enforcing the water-quality standards *themselves* as the limits could the purpose of the CWA and the NPDES system be effectuated. *Id.* at 988-90. Indeed, we noted that prior to the 1972 incorporation of effluent limitations, the Clean Water Act depended entirely on enforcement *based on water-quality standards. Id.* at 986. However, troubled by the "'almost total lack of enforcement'" under the old system, Congress added the effluent limitation standards "not to supplant the old system" but to "improve enforcement." *Id.* at 986 (quoting S. Rep. No. 414, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671).

Moreover, the plain language of the Permit countenances enforcement of the water-quality standards when exceedances are detected by the various compliance mechanisms, including mass-emissions monitoring. First, the Permit incorporates and adopts the Basin Plan, which sets the water-quality standards for bacteria and contaminants for the receiving waters of Southern California, including the Watershed Rivers. The Permit then sets out a multi-part monitoring program for those standards, the goals of which explicitly include "[a]ssessing compliance with

this Order[.]" "Compliance" under the Clean Water Act primarily means adhering to the terms and conditions of an NPDES permit. *EPA v. Calif.,* 426 U.S. at 223 ("Thus, the principal means of enforcing the pollution control and abatement provisions of the Amendments is to enforce compliance with a permit."). The first monitoring program listed in the Permit is "Mass Emissions." While Defendants are correct in noting that mass-emissions monitoring has as one of its goals "estimat[ing] the mass emissions from the MS4," Defendants fail to mention that another goal, listed just below "estimating," is "[d]etermin[ing] if the MS4 is contributing to exceedances of Water Quality Standards."

Part 6.D of the Permit, titled "Duty to Comply," lays any doubts about municipal compliance to rest: "Each Permittee *must comply with all terms,* requirements, and conditions of this Order. Any violation of this order constitutes a violation of the Clean Water Act . . . *and is grounds for enforcement action,* Order termination, Order revocation and reissuance, denial of an application for reissuance; or a combination thereof[.]" This unequivocal language is unsurprising given that all NPDES permits must include monitoring provisions ensuring that permit conditions are satisfied. *See* 33 U.S.C. § 1318(a)(A) ("[T]he Administrator [of the EPA] shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological

monitoring methods), [and] (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe)[.]"); 40 C.F.R. § 122.44(i)(1) (specifying the monitoring requirements for compliance, "mass . . . for each pollutant limited in the permit," and volume of effluent discharged); *Ackels v. EPA,* 7 F.3d 862, 866 (9th Cir. 1993) ("[T]he Act grants EPA broad authority to require NPDES permitees [sic] to monitor, at such intervals as the Administrator shall prescribe, whenever it is required to carry out the objectives of the Act.").

Our prior case law emphasizes that NPDES permit enforcement is not scattershot – each permit term is simply enforced as written. *See Union Oil,* 813 F.2d at 1491 ("It is unclear whether the court intended to excuse these violations under the upset defense or under a de minimis theory. In either event, the district court erred. The Clean Water Act and the regulations promulgated under it make no provision for 'rare' violations."); *see also United States v. CPS Chem. Co.,* 779 F. Supp. 437, 442 (D. Ark. 1991) ("For enforcement purposes, a permittee's [Discharge Monitoring Reports] constitute admissions regarding the levels of effluents that the permittee has discharged."). As we explained in *Union Oil,* Congress structured the CWA to function by self-monitoring and self-reporting of violations to "'avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement.'" 813 F.2d at 1492 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64, *reprinted*

in 1972 U.S.C.C.A.N. 3668, 3730). When self-reported exceedances of an NPDES permit occur, the Clean Water Act allows citizens to bring suit to enforce the terms of the Permit.

In sum, the Permit's provisions plainly specify that the mass-emissions monitoring is intended to measure compliance and that "[a]ny violation of this Order" is a Clean Water Act violation. The Permit is available for public inspection to aid this purpose. Accordingly, we agree with the district court's determination that an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers.

II. Evidence of Discharge

We next turn to the factual issue on which the district court granted summary judgement in favor of Defendants – whether any evidence in the record shows Defendants discharged stormwater that caused or contributed to water-quality violations. The district court determined that a factual basis was lacking:

> Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow. Plaintiffs do represent in their supplemental briefing that their monitoring data reflects sampling conducted at or near Defendants' outflows. . . .

> However, the declarations on which Plaintiffs rely do *not* clearly indicate that the sampling in question was conducted at an outflow (as opposed to in-stream).
>
> . . .
>
> In short, Plaintiffs have failed to follow the Court's instructions and present data which could establish that "standards-exceeding pollutants . . . passed through Defendants' MS4 *outflows* at or near the time the exceedances were observed." That the pollutants must have passed through an outflow is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit.

Plaintiffs have argued throughout this litigation that the measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations by Defendants. Because these points are designated in the Permit for purposes of assessing "compliance," this argument is facially appealing. But the Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act (which means in compliance with the NPDES). *See* 33 U.S.C. § 1311(a); *see also Miccosukee Tribe,* 541 U.S. at 102. While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant. Indeed, the

Permit specifically states that "*discharges* from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives *are prohibited.*"

"[D]ischarge of pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12). Under the Clean Water Act, the MS4 is a "Point Source." *See* 33 U.S.C. § 1342(p)(2), 1362(14). "Navigable waters" is used interchangeably with "waters of the United States." *See Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526, 532 (9th Cir. 2001). Those terms mean, *inter alia,* "[a]ll 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[.]" 40 C.F.R. § 122.2. The Watershed Rivers are all navigable waters.

Thus, the primary factual dispute between the parties is whether the evidence shows any *addition* of pollutants by Defendants to the Watershed Rivers. Defendants contend that the "District does not generate any of the pollutants in the system, but only transports them from other permitted and non-permitted sources." Moreover, Defendants contend that by measuring mass-emissions downstream from where the pollutants entered the sewer system, it is not possible to pinpoint which entity, if any, is responsible for adding them to the rivers. In the words of the district court, there is no evidence that "standards-exceeding pollutants . . . passed through

Defendants' MS4 *outflows* at or near the time the exceedances were observed." Plaintiffs counter that the monitoring stations are downstream from hundreds of miles of storm drains which have generated the pollutants being detected. To Plaintiffs, it is irrelevant which of the thousands of storm drains were the source of polluted stormwater – as holders of the Permit, Defendants bear responsibility for the detected exceedances.

Resolving this dispute over whether Defendants added pollutants depends heavily on the level of generality at which the facts are viewed. At the broadest level, all sides agree with basic hydrology – upland water becomes polluted as it runs over urbanized land and begins a downhill flow, first through municipal storm drains, then into the MS4 which carries the water (and everything in it) to the Watershed Rivers, which flow into the Pacific Ocean. More narrowly, it is, as Plaintiffs concede, impossible to identify the particular storm drains that had, for instance, some fecal bacteria which contributed to a water-quality violation. Ultimately, each side fails to rebut the other's arguments. Defendants ignore their role as controllers of thousands of miles of MS4 and the stormwater it conveys[7] by demanding that

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[7] Defendants' untenable position about their responsibility for discharges is confirmed by the testimony of their Rule 30(b)(6) witness:

> *Question*: What if those flows [which exceeded water-quality standards] were so polluted with oil and grease

(Continued on following page)

Plaintiffs engage in the Sisyphean task of testing *particular* storm drains in the County for the source of each pollutant. Likewise, Plaintiffs did not enlighten the district court with sufficient evidence for certain claims and assumed it was obvious to anyone how stormwater makes its way from a parking lot in Pasadena into the MS4, through a mass-emissions station, and then to a Watershed River.

Despite shortcomings in each side's arguments, there 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 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 intra-state man-made construction – not a naturally

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that they *were on fire as they came out of the system*? Would your view be the same, that the District is not contributing to exceedances?

Answer: That the system the District maintains is not contributing to, yes.

occurring Watershed River. *See Headwaters,* 243 F.3d at 533 ("The EPA has interpreted 'waters of the United States' to include 'intrastate lakes, rivers, streams (including intermittent streams) . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce' and 'tributaries of [those] waters.'" (quoting 40 C.F.R. § 122.2(c), (e)). At least some outfalls for the MS4 were downstream from the mass-emissions stations. *See* 40 C.F.R. § 122.26(9) ("Outfall means a point source . . . at the point where a municipal separate storm sewer discharges to waters of the United States . . . ."). 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 MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Although the District argues that merely channeling pollutants created by other municipalities or industrial NPDES permittees should not create liability because the District is not an instrument of "addition" or "generation,"[8] the Clean Water Act does

[8] This issue does not usually arise in Clean Water Act litigation because it is generally assumed that ms4s "discharge" stormwater. *See, e.g., Miss. River Revival v. Adm'r, E.P.A.,* 107 F. Supp. 2d 1008, 1009 (D. Minn. 2000) ("These lawsuits involve

(Continued on following page)

not distinguish between those who add and those who convey what is added by others – the Act is indifferent to the originator of water pollution. As Judge Wilkinson of the Fourth Circuit cogently framed it: "[The Act] bans 'the discharge of any pollutant by any person' regardless of whether that 'person' was the root cause or merely *the current superintendent of the discharge.*" *Huffman,* 625 F.3d at 167 (emphasis added). "Point sources" include instruments that channel water, such as "any pipe, ditch, *channel,* tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). The EPA's regulations further specify that ms4 operators require permits for channeling: "Discharge of a pollutant . . . includes additions of pollutants into waters of the United States from: surface runoff which is collected or *channelled* by man; discharges through pipes, sewers, or other conveyances owned by a State [or] municipality." 40 C.F.R. § 122.2 (emphasis added). "[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program." 55 Fed. Reg. 47,991. Finally, the Supreme

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the discharge of storm water into the Mississippi River through the Cities' storm sewers. Thus, and this is not in dispute, the storm water discharge is subject to the NPDES permitting requirements.").

Court stated in *Miccosukee Tribe* that "the definition of 'discharge of a pollutant' contained in § 1362(12) . . . *includes* within its reach point sources that do not themselves generate pollutants." 541 U.S. at 105 (emphasis added).

Accordingly, the district court erred in stating that "Plaintiffs have not provided the Court with the necessary evidence to establish that the Los Angeles River and the San Gabriel River below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations." In light of the evidence that the Los Angeles River and San Gabriel River mass-emission stations are in concrete portions of the MS4 controlled by the District, it is beyond dispute that the District is discharging pollutants from the MS4 to the Los Angeles River and San Gabriel River in violation of the Permit. Thus, Plaintiffs are entitled to summary judgment on Claims 2 and 3.

However, we agree with the district court that, as the record is currently constituted, it is not possible to mete out responsibility for exceedances detected in the Santa Clara River and Malibu Creek (Claims 1 and 4). Like the district court, we are unable to identify the relationship between the MS4 and these mass-emissions stations. From the record, it appears that both monitoring stations are located within the rivers themselves. Plaintiffs have not endeavored to provide the Court with a map or cogent explanation of the inter-workings or connections of this complicated drainage system. We recognize that both the

Santa Clara and Malibu Creek Monitoring Stations are downstream from hundreds or thousands of storm drains and MS4 channels. It is highly likely, but on this record nothing more than assumption, that polluted stormwater exits the MS4 controlled by the District and the County, and flows downstream in these rivers past the mass-emissions stations. To establish a violation, Plaintiffs were obligated to spell out this process for the district court's consideration and to spotlight how the flow of water from an ms4 "contributed" to a water-quality exceedance detected at the Monitoring Stations. *See, e.g., Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.,* 695 F.2d 839, 846-47 (5th Cir. 1983) ("We wish to emphasize most strongly that it is foolhardy for counsel to rely on a court to find disputed issues of material fact not highlighted by counsel's paperwork; a party that has suffered the consequences of summary judgment below has a definite and specific duty to point out the thwarting facts . . . . Judges are not ferrets!"). Contrary to Plaintiffs' contention, this would not require independent sampling of the District's outfalls. Indeed, simply ruling out the other contributors of stormwater to these two rivers or following up to vague answers given by Defendants' witnesses could have satisfied Plaintiffs' evidentiary obligation. In the alternative, prior to commencing actions like this one, Plaintiffs could heed the district court's sensible observation and, for purposes of their evidentiary burden, "sample from *at least one* outflow that included a standards-exceeding pollutant[.]"

Finally, for all four Watershed Rivers, the record is silent regarding the path stormwater takes from the unincorporated land controlled by the County to the Monitoring Stations. The district court correctly demanded evidence for the County's liability, which Plaintiffs did not proffer.

In sum, Plaintiffs were entitled to summary judgment on Claims 2 and 3 against the District for the Los Angeles River and San Gabriel River because (1) the Monitoring Stations for these two rivers are located in a portion of the MS4 owned and operated by the District, (2) these Monitoring Stations detected pollutants in excess of the amount authorized by the NPDES permit, and (3) this polluted water "discharged" into the Los Angeles River and San Gabriel River. The Plaintiffs, however, have not met their burden on summary judgment for their other claims because they did not provide the district court with evidence that the MS4 controlled by the District "discharged" pollutants that passed through the Monitoring Stations in the Santa Clara River and Malibu Creek, or that ms4s controlled by the County "discharged" pollutants that passed through the Monitoring Stations in any of the four rivers in question.

CONCLUSION

The district court's judgment for Defendant District on Claims 2 and 3 of the First Amended Complaint is REVERSED, and this matter is REMANDED to the district court for further proceedings

consistent with this opinion. The district court's grant of summary judgment for Defendant District on Claims 1 and 4, and for Defendant County on all Watershed Claims, is AFFIRMED.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Each party shall bear its own costs on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 08-1467 AHM (PLAx) Date April 26, 2010

Title NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.* v. COUNTY OF LOS ANGELES, *et al*.

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes	Not Reported	
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs:	Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS
(No Proceedings Held)

On March 2, 2010, the Court issued a ruling on the parties' cross motions for summary judgment, disposing of most of the claims. The Court reserved ruling on the "Watershed Claims." The Court found that the Plaintiffs had presented no evidence that *discharges* (meaning outflow from a point source) from the County or District portions of the MS4 were causing or contributing to pollutant exceedances at the mass emissions stations downstream. The Court ordered the parties to file simultaneous supplementary briefing on these claims. Specifically, the Court ordered that they:

> specify whether there is any basis in the record or in other facts currently in their possession establishing that the standards exceeding pollutants identified at page 4 passed through the Defendants' MS4 outflows at or near the time the exceedances were observed. In addition, both sides must disclose whether any facts in the record or already in their possession support a finding that Water Quality Standards were exceeded at the monitoring stations in Santa Clara River and Malibu Creek. Each side's response to these inquiries must not exceed five pages and must be filed by March 10, 2010. No response to the other side's filing will be permitted.

March 2, 2010 Order at 13-14. Having reviewed the parties' submissions, the Court GRANTS summary adjudication to the Defendants on the watershed claims – claims one through three and the Malibu Creek portion of claim four.

A. Motion to Strike Plaintiffs' Supporting Declarations

As a threshold matter, Defendants have moved to strike the supporting declarations that Plaintiffs have filed with their supplemental brief. The Court DENIES that motion. The declarations Plaintiffs filed do not cause Plaintiffs to have exceeded the page limit. The documents on which Plaintiffs rely are either publicly available (and have been so since

before March 2, 2010) or were identified by either Plaintiffs or Defendants during discovery.

B. The Merits

Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow. Plaintiffs do represent in their supplemental briefing that their monitoring data reflects sampling conducted at or near Defendants' outflows. *See, e.g.,* Plaintiffs' Brief at 2 ("The concentration of these pollutants in discharges measured directly from defendants' outfalls[1] exceeds corresponding water quality standards."). However, the declarations on which Plaintiffs rely do *not* clearly indicate that the sampling in question was conducted at an outflow (as opposed to in-stream). *See, e.g.,* Fernandez Decl. ¶¶ 16-20 (authenticating exhibits M-P on which Plaintiffs rely, but never specifying whether any of the monitoring stations were at an MS4 *outlet*[2]); the Burdick and Alamillo Declarations similarly do not specify that the monitoring data was collected at or

[1] Plaintiffs use the term "outfalls" synonymously with "outflows" in their supplemental brief.

[2] "Drain" is not synonymous with "outlet," since storm drain refers to the conduit that carries the water, and a measurement taken in a drain may or may not be near an outlet.

near a Defendant's *outflow* (as opposed to simply in a watercourse or drain). Indeed, at least some of the monitoring data on which Plaintiffs rely as establishing a discharge from Defendants' outflows was not collected at an outflow. *See* Fernandez Decl., Ex. K at 83-84 (describing monitoring sites 1-6 as "open" channels, a "streambed," or a "scour pond," none of which would qualify as an outflow); Plaintiffs' Brief at 2 (citing to Ex. K to support the proposition that pollutants have been "discharged [to Malibu Creek] in excess of corresponding water quality standards *directly from defendants' outfalls*" (emphasis added)).[3]

In short, Plaintiffs have failed to follow the Court's instructions and present data which could establish that "standards-exceeding pollutants . . . passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed." March 2 Order at 13 (emphasis added). That the pollutants must have passed through an outflow is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit. A co-permittee, including the County and the District, is responsible "only for a *discharge* for which it is the

[3] Ex. L to the Fernandez Decl. at 104 does suggest that the monitoring for that report was conducted at outflows. However, this reference is buried within the report – not cited in the declaration or the supplemental briefing – and for most of the exhibits, the site descriptions are not even available in the selected pages included in the filed materials.

operator." Permit ¶ G.4 at 20 (emphasis added). *See also* 40 C.F.R. § 122.26(b)(1) ("*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."). The Clean Water Act, in turn, defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "point source" is "any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, conduit, . . . [or other examples], from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Thus, the monitoring data must be from at or near a "discernible, *confined*, and discrete conveyance," *id.* (emphasis added), in order to form the basis for a finding that the County or District had discharged in violation of the Permit.

Because Plaintiffs have failed to establish a basis for the Court to find that standards-exceeding pollutants passed through County or District outflows upstream of the mass emissions stations at or near the time that exceedances were observed downstream, the Court GRANTS summary judgment to the Defendants on the watershed claims.[4]

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[4] Docket No. 113.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 08-1467 AHM (PLAx) Date March 2, 2010

Title NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.* v. COUNTY OF LOS ANGELES, *et al*.

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes	Not Reported	
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs:	Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS
(No Proceedings Held)

I. INTRODUCTION

On March 3, 2008, Plaintiffs Natural Resources Defense Council ("NRDC") and Santa Monica Baykeeper filed suit against Defendants the County of Los Angeles ("County"), the Los Angeles Flood Control District ("District"), and the individual County Supervisors and the Director of the Los Angeles County Department of Public Works in their official capacities, alleging that the County and the District violated several provisions in the National Pollutant Discharge Elimination System ("NPDES") Permit regulating municipal stormwater and urban runoff

discharges within the County of Los Angeles (the "Permit"). In its June 20, 2008 Order, the Court denied Defendants' motion to stay the case and granted in part and denied in part Defendants' motion to dismiss, finding that Plaintiffs had failed to provide adequate notice to the District but allowing Plaintiffs to refile against the District after valid notice. On September 19, 2008, Plaintiffs filed their First Amended Complaint ("FAC").

The FAC alleges six causes of action under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq.,* for: (1) causing and contributing to exceedances of water quality standards in the Santa Clara River watershed; (2) causing and contributing to exceedances of water quality standards in the Los Angeles River watershed; (3) causing and contributing to exceedances of water quality standards in the San Gabriel River watershed; (4) causing and contributing to exceedances of water quality standards and Total Maximum Daily Load ("TMDL") violations in the Malibu Creek watershed and at Surfrider Beach; (5) illegally discharging waste into the oceanic Area of Special Biological Significance ("ASBS") between Mugu Lagoon in Ventura County and Latigo Point in Los Angeles County; and (6) failing to submit adequate Receiving Water Limitations ("RWL") Compliance Reports.

On September 8, 2009, Plaintiffs moved for partial summary judgment as to liability as to claims two and three (as to the District); as to the Surfrider Beach violations in claim four; and as to all of claims five and six. On September 14, 2009, Defendants filed

their motion for summary judgment as to all counts. Plaintiffs have also filed a Motion for Leave to File Surreply in Opposition to Defendants' Motion for Summary Judgment, which the Court DENIES.[1] The Court held a hearing on the summary judgment motions on February 8, 2010. For the following reasons, the Court GRANTS IN PART AND DENIES IN PART Plaintiffs' motion.[2] The Court also GRANTS IN PART AND DENIES TN PART Defendants' motion.[3]

Specifically, the Court DENIES summary judgment for both parties as to the watershed claims (claims one, two, three, and the Malibu Creek portion of claim four). The Court GRANTS summary judgment for the Plaintiffs on claim five and on the Surfrider Beach portion of claim four.[4] The Court

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[1] Docket No. 173.

[2] Docket No. 87.

[3] Docket No. 113.

[4] The parties have notified the Court that Judge Yaffe of the Superior Court for the County of Los Angeles has stayed the operation of Los Angeles Regional Water Quality Control Board Order No. R4-2006-0074 (the "Regional Board Order"). Defendants' Notice of Los Angeles Superior Court Order, Ex. 1. This Regional Board Order amended the Permit to establish the TMDL limits at Surfrider Beach. Plaintiffs' Response to Defendants' Notice of Los Angeles Superior Court Order at 1. With this Regional Board Order stayed, the TMDL limits at Surfrider Beach at issue in claim four are not currently operational. The state court stay does not affect the Court's analysis as to liability on claim four. However, the state court proceeding may affect the remedies stage of this case. In addition, should Judge Yaffe invalidate the Regional Board Order, Defendants may move to vacate the judgment on this claim.

GRANTS summary judgment for the Defendants on all portions of claim six except for the adequacy of the 2008 Compliance Reports' treatment of Surfrider Beach. The Court DENIES summary judgment for both parties as to the adequacy of the 2008 Compliance Reports' treatment of Surfrider Beach.

II. SUMMARY OF UNDISPUTED FACTS

The municipal separate storm sewer system ("MS4") in the Los Angeles County basin carries urban runoff from local storm drains to inland rivers and eventually to ocean waters. Plaintiffs' SUF ¶ 3. No treatment plant cleans the runoff before it enters the so-called receiving waters of the region, so the runoff can contain a number of untreated pollutants it acquires as it flows over streets, parking lots, commercial sites, and residential areas. Plaintiffs' SUF ¶ 2. The MS4 is a complicated web, with thousands of miles of storm drains, hundreds of miles of open channels, and hundreds of thousands of connections. Plaintiffs' SUF ¶¶ 4-5. The MS4 includes storm drains operated by – and runoff coming from – 84 incorporated cities, in addition to that from the County and District. Defendants' SUF ¶ 8. The District owns, operates, and maintains approximately 500 miles of open channel and 2,800 miles of storm drains, which is more of the MS4 than all 84 co-permittee cities combined. Plaintiffs' SUF ¶¶ 20-21. The County owns and operates additional storm drains, separate from the District, that connect to the MS4. *Id.* at ¶ 22. The

County has no central record of these storm drains and does not know their complete extent. *Id.*

The Regional Water Quality Control Board ("Regional Board"), an entity of the State of California, issued collectively to the County, the District, and these 84 cities a National Pollutant Discharge Elimination System ("NPDES") Permit required under the Clean Water Act. This Permit allows the Permittees to discharge stormwater runoff from the MS4, contingent on meeting a number of conditions. Defendants' SUF ¶ 7-9. Most notably, Part 2.1 of the Permit provides that "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Defendants' SUF ¶ 12. The Permit incorporates water quality standards from the Los Angeles Region Basin Plain for the Coastal Watersheds of Los Angeles and Ventura Counties ("Basin Plan") and the California Ocean Plan ("Ocean Plan"). *See* Cal. Water Code §§ 13170.2 & 13240.

The Permit sets forth a monitoring program, which includes a requirement for the Principal Permittee (the District) to monitor the runoff flowing past seven specific mass emissions stations. Plaintiffs' SUF ¶¶ 23-24; Defendants' SUF ¶ 10. These mass emissions stations include the Malibu Creek, Los Angeles River, San Gabriel River, and Santa Clara River monitoring stations at issue in this case. The Los Angeles River and San Gabriel River mass emissions monitoring stations are located within the portion of the MS4 owned and operated by the Flood

Control District. Plaintiffs' SUF ¶ 24. Monitoring data from the Los Angeles River and San Gabriel River mass emissions stations indicate that water quality standards have repeatedly been exceeded for a number of pollutants, including aluminum, copper, cyanide, fecal coliform bacteria, and zinc (the "standards-exceeding pollutants").[5] Plaintiffs' SUF ¶¶ 33-37.

The Permit's monitoring program also includes a requirement that water quality samples be taken five times per week at Surfrider Beach, a beach within the Santa Monica Bay. Plaintiffs' SUF ¶ 25. This monitoring shows that the water at Surfrider Beach has exceeded bacterial limits (including limits on total coliform, fecal coliform, and enterococcus) on dozens of occasions during summer dry weather seasons. Plaintiffs' SUF ¶¶ 25-28. The Regional Board has issued Notices of Violation to the County and the District (and the 84 cities that discharge to the MS4) indicating that discharges from the MS4 are causing or contributing to bacterial exceedances at Surfrider Beach. Colangelo Decl. Exs. G & H.

The California Ocean Plan prohibits the discharge of waste into the Malibu Area of Special Biological Significance ("ASBS"), which covers the 4-mile coastline from Latigo Point in Malibu to Laguna Point in Ventura. Plaintiffs' SUF ¶¶ 17, 42. Plaintiffs

[5] Neither party has provided the Court with monitoring data from the other mass emissions monitoring stations.

assert that this prohibition has been incorporated into the Permit. The District and the County own and operate drains (at least 13 District drains and 8 County drains) that discharge to the Malibu ASBS. Plaintiffs' SUF 45. County sampling of 11 of these drains in 2004 indicated that every single wet-weather event (rainstorm) sampled had discharges exceeding bacteria limits. Plaintiffs' SUF ¶ 46. Sampling data collected by Santa Monica Baykeeper covering at least 2004-2006 show numerous instances of discharge from these drains exceeding applicable water quality standards. Plaintiffs' SUF ¶ 47.

The Permit also requires Permittees to submit to the Regional Board annual Receiving Water Limitations ("RWL") Compliance Reports describing the Permittee's plan to remedy violations of the permit "[u]pon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard." Defendants' SUF ¶¶ 13-14. Defendants did not submit any Compliance Reports in 2003, 2004, or 2005. Plaintiffs' SUF ¶ 53. Defendants submitted Compliance Reports in 2006, 2007, and 2008, but the parties disagree as to whether these Reports satisfied the requirements under the Permit. Plaintiffs' SUF ¶¶ 54-62.

III. LEGAL STANDARD FOR A MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.,* 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's

case. *See Celotex,* 477 U.S. at 325. Thus, "[s]ummary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.'" *Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 805-06 (1999) (citing *Celotex,* 477 U.S. at 322).

When the moving party meets its burden, the "opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e). Summary judgment will be entered against the opposing party if that party does not present such specific facts. *Id.* Only admissible evidence may be considered in deciding a motion for summary judgment. *Id.*; *Beyene v. Coleman Sec. Servs., Inc.,* 854 F.2d 1179, 1181 (9th Cir. 1988).

"[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Hunt v. Cromartie,* 526 U.S. 541, 552 (1999) (quoting *Anderson,* 477 U.S. at 255). But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Anderson,* 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (citation omitted).

Simply because the facts are undisputed does not make summary judgment appropriate. Instead, where divergent ultimate inferences may reasonably be drawn from the undisputed facts, summary judgment is improper. *Braxton-Secret v. A.H. Robins Co.,* 769 F.2d 528, 531 (9th Cir. 1985).

IV. ANALYSIS

A. Threshold Issues: Standing and Notice

1. Plaintiffs have standing to sue.

Plaintiffs NRDC and Santa Monica Baykeeper have demonstrated that they have associational standing in this suit.

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977).

In order for Plaintiffs' members to have standing to sue on their own, they would have to show: (1) they have "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant;

and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Services,* 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). Plaintiffs' members use and enjoy the water bodies involved in this case for recreational and professional reasons, and their reasonable concern about exposure to pollutants has caused them to curtail their use of the Los Angeles River, San Gabriel River, Surfrider Beach, and the Malibu ASBS. Plaintiffs' SUF ¶¶ 68-70. The impairment of aesthetic, recreational, and professional interests is an injury in fact. *Laidlaw,* 504 U.S. at 184-85. Moreover, the Plaintiffs' members' injuries are caused in part by Defendants' MS4 discharges, and reducing those discharges would help to redress their injuries. Plaintiffs' SUF ¶ 71.

In addition, the lawsuit is germane to each Plaintiff's organizational purpose, as they are environmental organizations, and Santa Monica Baykeeper has a specific focus on protecting Santa Monica Bay. Plaintiffs' SUF ¶ 72. If, as here, associational plaintiffs do not seek individualized relief for their members that would require individualized proof, the participation of individual members is not required. *Hunt,* 432 U.S. at 343-44. Thus, Plaintiffs have standing to sue.

2. Plaintiffs have provided sufficient notice.

Defendants ask the Court to reconsider its decision in its June 20, 2008 Order in light of a recent

Ninth Circuit case addressing the notice requirement in CWA citizen suits and find that the Court has no jurisdiction to hear the claims against any defendant. *See Center for Biological Diversity v. Marina Point Development Co.,* 566 F.3d 794 (9th Cir. 2009); Motion at 10. *Marina Point Development* did not alter the standard for CWA notice in this Circuit; it merely reiterated the need for the notice to, at a minimum, tell a potential defendant "precisely what it allegedly did wrong, and when." *Id.* at 801.[6] Plaintiffs' notice to the Defendants here does precisely that. It lists with detailed specificity the exact portions of the permits and statutes allegedly violated and the exact date, location, and nature of each alleged violation. Colangelo Decl., Ex. RR at 570-83. The Court finds this notice adequate for the case to proceed against Defendants and will not reconsider the ruling in its June 20, 2008 Order.

B. Neither Plaintiffs Nor Defendants Are Entitled to Summary Judgment on the Watershed Claims Because Genuine Issues of Material Fact Remain.

The "Watershed Claims" encompass those claims that involve the rivers and creeks into which the MS4 flows (claims one through three and the Malibu Creek

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[6] The court cited, discussed, and did not reject, much less overrule, the case that this Court cited in its June 20, 2008 Order, *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy,* 305 F.3d 943, 953 (9th Cir. 2002).

portion of claim four). With respect to these claims, Defendants do not dispute Plaintiffs' monitoring data.[7] Defendants argue, however, that because the monitoring stations are located downstream of where their own storm drains connect with the larger MS4, the discharges for which they are responsible will be commingled with those of other MS4 users. Defendants argue, therefore, that they cannot be found to be "causing or contributing" to the permit exceedances.[8]

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[7] Plaintiffs move for summary judgment only on the claims involving the Los Angeles River and San Gabriel River watersheds, and so the Court has been presented with data of permit exceedances only in these locations.

[8] As a preliminary matter, Defendants argue that in order for a permittee to be in violation of the permit, either the permittee or the Regional Board must have made a determination that the permittee is causing or contributing to exceedances of water quality standards, and the permittee must also fail to participate in good faith in the iterative process to remedy the exceedances. Opp'n at 17-19. A state court has already ruled on these arguments in Defendants' challenge to the validity of the Permit and found that, based on the regulatory history underlying the creation of the Permit, there is no safe harbor for a Permittee who complies with the iterative process. *In re Los Angeles County Municipal Storm Water Permit Litigation,* No. BS 080548, at 6-7 (Los Angeles Super. Ct. Mar. 24, 2005) (Colangelo Decl., Ex. D at 166-67). This Court agrees with that analysis. At the hearing, Defendants directed the Court's attention to a January 22, 2001 letter from the then-chair of the Regional Board, Francine Diamond, which the Superior Court cited in its opinion. *See* Gest Decl. Ex. D at 8-9. The Diamond letter suggests that as long as a Permittee is engaged in a good faith effort in the iterative process to remedy exceedances, it is in compliance with the Permit. However, as an informal mailing to Permittees, this letter does not have the force of law, and the

(Continued on following page)

The Permit clearly prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." Permit, Burhenn Decl. Ex. 1, Part 2.1 at 23. The Permit designates the mass emissions monitoring stations as the locations where monitoring shall take place to "[d]etermine if the MS4 is contributing to exceedances of Water Quality Standards . . . ." *Id.* at T-6. Because the permit specifies that these stations are the proper monitoring locations to determine if the MS4 is contributing to exceedances, Defendants' argument that these locations cannot be the basis for determining whether there were exceedances fails.

Defendants also assert that because the monitoring stations are located downstream of where their own storm drains join these water bodies, the monitoring data cannot possibly pinpoint that their discharges – as opposed to those of the other entities using the MS4 – caused the exceedances.[9] However, in order for the Permit to be violated, it is not necessary

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Court need not defer to it, especially when it runs counter to the language of the Permit.

[9] At the hearing, Defendants cited to numerous portions of the Permit and witness depositions and declarations that demonstrate that there were other sources of the pollutants at issue here. This is undoubtedly true, but irrelevant to liability under the Permit. "[D]ischarges from the MS4 that cause *or contribute* to the violation of Water Quality Standard . . . are prohibited." Permit Part 2.1 at 23. The MS4 or a particular Permittee need not be the sole source of the pollutant to be in violation of the Permit.

to pinpoint the source of pollutants. The Permittees, collectively, are violating the permit if "discharges from the MS4" are "caus[ing] or contribut[ing] to the violation of Water Quality Standards or water quality objectives." Permit Part 2.1 at 23; *see also In re Los Angeles County Municipal Storm Water Permit Litigation,* No. BS 080548, at 6 (Los Angeles Super. Ct. Mar. 24, 2005) (Colangelo Decl., Ex. D at 166) (explaining that subparts 2.1 and 2.2 of the Permit set forth the "basic receiving water requirements for Los Angeles area waters" and acknowledging that a permittee could be in "violation" of these requirements).

According to the Permit, monitoring at the mass emissions stations shall be used to determine if the MS4 is causing or contributing to exceedances. Permit at T-6. Here, Plaintiffs have alleged that water quality standards were exceeded at the monitoring stations on each of the four rivers (Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek) on multiple occasions. FAC ¶¶ 79-229. Defendants have offered no facts to dispute these allegations. Moreover, Defendants have even acknowledged that their MS4 is conveying the specified pollutants to the water bodies in question. *See* Colangelo Decl., Ex. N at 291-93, 295, 298. Thus, Defendants are not entitled to judgment as a matter of law that they are in compliance with the Permit.

With respect to the Los Angeles River and San Gabriel River, Plaintiffs have moved for partial summary judgment as to liability for the District. Plaintiffs offer data showing the exceedances at the

monitoring stations for these bodies of water. Plaintiff's SUF ¶¶ 33-37. In addition, Plaintiffs argue that because the mass emissions monitoring stations for these bodies of water are located in the portion of the MS4 owned and operated by the District, the District is responsible for the pollutants in the MS4 at this point. *See* Plaintiffs' SUF ¶ 24. The Court agrees with this proposition. As a Permittee, the District is "required to comply with the requirements of this Order applicable to discharges within its boundaries . . . ." Permit Part 3.E at 26; *see also* Part 3.D.8 at 25 (explaining that as Principal Permittee, the District must comply with the requirements of general Permittees, as well). However, that does not necessarily determine the question of whether the water passing by these points is a "discharge" within the meaning of the Permit and the Clean Water Act.

Indeed, Defendants argue that the water sampled at these monitoring stations does not constitute a discharge from the MS4, but merely reflects water passing by the stations. Defendants insist that no liability can attach to the District because it is merely allowing water to move within the same waterbody and, thus, no discharge occurs at the monitoring stations. The Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "point source" is "any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, conduit, . . . [or other examples], from which pollutants are or may be discharged." 33 U.S.C.

§ 1362(14). A point source can include objects "that do not themselves generate pollutants." *South Florida Water Management District v. Miccosukee Tribe of Indians,* 541 U.S. 95, 105 (2004). In *Miccosukee,* the Supreme Court held that if two portions of a water body are part of the same water body, moving "water from one into the other cannot constitute an 'addition' of pollutants" so as to constitute a discharge under the Act. *Id.* at 109.[10] Plaintiffs have not provided the Court with the necessary evidence to establish that the Los Angeles River and the San Gabriel River below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations. In other words, the record before the Court does not show where the MS4 ends and either River begins. 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.

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[10] At the hearing, Plaintiffs took issue with the Court's citation to *Miccosukee* since that case addressed whether a permit could be issued under the Clean Water Act, and a permit already regulates the MS4 here. However, the Court is not relying on *Miccosukee* to invalidate the Permit, but rather to clarify the meaning of the terms "discharge" and "point source" under the Clean Water Act, in order to help understand how those terms in the Permit should be interpreted.

Plaintiffs pointed out during their oral argument that the District releases runoff through outlets that are *upstream* of the mass emissions stations on the San Gabriel and Los Angeles Rivers. Ex. UU to Second Colangelo Decl. at 283:4-17 (Pestrella D. Tr.). Outflow from these upstream outlets would be considered discharges under the Permit and the Clean Water Act. However, there is no data showing that any of these upstream discharges by the District are causing or contributing to the violations of the Water Quality Standards.

At the hearing, Plaintiffs also argued that exceedances at the mass emissions stations establish a violation of the Permit as a matter of law. They cited to 40 C.F.R. § 122.26(d)(ii)(3)(D), which requires a stormwater permit application to include

> A proposed 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.

Plaintiffs assert that this regulation means that MS4 sampling need not be conducted at a point of discharge, but instead may be conducted at a "representative" location elsewhere, and that such a representative location may be used to determine the MS4' s compliance with the Permit. *See* Permit at T-6 (stating that the monitoring from the mass emissions stations

shall be used to "determine if the MS4 is contributing to exceedances of Water Quality Standards").

Where Plaintiff's argument runs into trouble, however, is the fact that although 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, that data is not sufficient to enable the Court to determine that the District 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." Permit ¶ G.4 at 20 (emphasis added). *See also* 40 C.F.R. § 122.26(b)(1) ("*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."). There is no evidence showing that *discharges* from the District portions of the MS4 are contributing to the exceedances at the mass emissions stations. Plaintiffs would need to present some evidence (monitoring data or an admission) that some amount of a standards-exceeding pollutant is being discharged through at least one District outlet.[11] They have not done so. Consequently, the Court cannot

[11] "In support of their position, Plaintiffs invoke the specter of being forced to sample every single outflow in Los Angeles County, which would be impossible. This ruling would not require that result. It would require sampling from at least one outflow that included a standards-exceeding pollutant, in order to show that a discharge from a particular permittee is contributing to an exceedance downstream.

grant summary judgment for the Plaintiffs on any of the watershed claims.

In their Motion for Summary Judgment, Defendants do not assert that, as a factual matter, the runoff they are discharging from their MS4 outlets is devoid of the observed pollutants. They instead make the legal arguments that the Court has already rejected above – that the flow from their MS4 outlets does not constitute discharge, that the monitoring data cannot be used to establish Permit noncompliance, that the presence of other sources of the pollutants absolves them of responsibility, and that the Permit provides a "safe harbor" for Permittees that participate in the iterative process. If the Court had an evidentiary basis to find that the standards-exceeding pollutants did not pass through the Defendants' MS4 outflows at or near the time the exceedances were observed, then Defendants could be entitled to summary judgment on these claims. However, neither side has introduced evidence of whether the standards-exceeding pollutants passed through the Defendants' outflows.

The Court therefore ORDERS each side to specify whether there is any basis in the record or in other facts currently in their possession establishing that the standards-exceeding pollutants identified at page 4 passed through the Defendants' MS4 outflows at or near the time the exceedances were observed. In addition, both sides must disclose whether any facts in the record or already in their possession support a finding that Water Quality Standards were exceeded

at the monitoring stations in Santa Clara River and Malibu Creek. Each side's response to these inquiries must not exceed five pages and must be filed by March 10, 2010. No response to the other side's filing will be permitted.

C. Plaintiffs Are Entitled to Summary Judgment on the Surfrider Beach Claim.

The Permit prohibits discharges from the MS4 that cause or contribute to violations of bacterial limits during the dry summer months at beaches in the Santa Monica Bay, including at a designated monitoring location at Surfrider Beach. Permit at 17, 22 (Part 1.B), 24 n.4, 24 (Part 2.5), & Att. U-2. Defendants do not dispute that exceedances of bacterial limits at Surfrider Beach have occurred dozens of times in the summer months since 2006. Defendants also do not dispute that the Regional Board has expressly identified MS4 discharges as one of the sources of fecal bacteria at the beach, in Notices of Violations that it issued to the County and the Flood District in March 2008. Plaintiffs' SUF ¶¶ 26-28, 31-32.

Defendants make two arguments that they are not liable for the exceedances at Surfrider Beach. First, they argue that because there are many other potential sources of bacteria at Surfrider Beach, the exceedances cannot be attributed to them. However, the existence of other potential sources is irrelevant to determining whether there has been a violation

under the Permit. With respect to Surfrider Beach, the Permit specifies that all permittees are "jointly responsible for compliance" with the requirements prohibiting discharges that cause or contribute to bacterial exceedances. Permit at 22 n.3. Thus, Defendants are liable for the exceedances so long as they contributed to them.

Defendants next argue that there is no evidence that they contribute to the exceedances at Surfrider Beach, in part because none of their storm drains discharge directly to Surfrider Beach. Nowhere does the Permit require that a permitee [sic] discharge directly to a monitoring site to "cause or contribute" to exceedances in violation of the Permit. *See* Permit at 17, 22 (Part 1.B), 24 n.4, 24 (Part 2.5), & Att. U-2. Indeed, the shoreline monitoring at Surfrider Beach itself is dispositive evidence of Permit violations. Permit at 16-17 (¶ 36). The Permit specifies that if bacterial limits are exceeded at a compliance monitoring site, the Regional Board will issue an appropriate investigative order. Only if the Regional Board thereafter determines that a permittee is not responsible for the exceedances will the permittee be absolved of responsibility. Permit at 17-18 (¶¶ 37-38). Here, the Regional Board has issued Notices of Violation to the County and the District (and the other entities that discharge to the MS4) indicating that the discharges from the MS4 are causing or contributing to bacterial exceedances at Surfrider Beach. Colangelo Decl. Exs. G & H. As Defendants conceded at oral argument, the Regional Board has not yet made a finding that

discharges from the MS4 are not contributing to the documented bacterial violations at Surfrider Beach. *See* Plaintiff's SUF ¶ 29. Thus, until the Regional Board decides otherwise, the Defendants are jointly responsible (along with the other permitees [sic]) for the bacterial exceedances at Surfrider Beach. Consequently, summary judgment as to liability for the Plaintiffs on this claim is warranted.

D. Plaintiffs Are Entitled to Summary Judgment on Their Claim of Illegal Discharge into the ASBS.

Defendants make two arguments for why they should not be held liable for discharging waste into the protected coastal Malibu ASBS. First, they assert that the prohibition on waste discharge has not properly been incorporated into the Permit and so Plaintiffs cannot enforce it under the citizen suit provision of the Clean Water Act. Next, they argue that even if the prohibition is considered part of the Permit, Defendants cannot be held liable for its violation because they are awaiting the outcome of their application for an exemption from the prohibition from the State Water Resources Control Board ("State Board").

1. Incorporation of the ASBS discharge prohibition into the Permit

Contrary to Defendants' arguments, the prohibition on discharging waste into the ASBS is incorporated into the Permit. The Permit prohibits

"discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." Permit at 23. The Permit defines "water quality standard" to include "water quality criteria contained in . . . the California Ocean Plan. . . ." Permit at 70. The California Ocean Plan ("Ocean Plan"), in turn, prohibits the discharge of waste (defined as "a discharger's total discharge, of whatever origin") into any ASBS. Colangelo Decl. Ex. C at 150, 154.

Defendants argue that this prohibition of discharge of waste is not a "water quality standard" because it is located in Part III of the Ocean Plan – the program of implementation – rather than in Part I or Part II – the beneficial uses and water quality criteria sections. However, the State Board found, in a precedential order issued before the current Permit was adopted, that the "Ocean Plan discharge is a water quality standard" that is enforceable in an NPDES Permit. *In re California Department of Transporation* [sic], Order WQ 2001-08 at 8-9 (Apr. 26, 2001) (Colangelo Decl. Ex. I at 243-44). Because this was a precedential order, the Regional Board was bound to follow it when issuing the Permit, and therefore, the prohibition on waste discharge in an ASBS is a water quality standard for purposes of the Permit. *See* State Board Order WR 96-01 at 17 n.11 (Jan. 18, 1996) (designating all water quality decisions and orders as precedential decisions) (Second Colangelo Decl. Ex. XX at 45); Cal. Gov. Code

§ 11425.60 (authorizing precedential decisions by state agencies).

Moreover, this decision by the State Board, that the Ocean Plan's prohibition on the discharge of waste is a water quality standard, is supported by the Clean Water Act's regulations. The regulations specify, "Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses." 40 C.F.R. § 131.3(i). Water quality criteria are, in turn, defined as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). The prohibition on the discharge of waste into an ASBS is a classic example of the type of narrative statement that would qualify as a water quality criterion under this definition. *See, e.g., PUD No. 1 of Jefferson County v. Washington Dept. of Ecology,* 511 U.S. 700, 715 (1994) ("'[C]riteria' are often expressed in broad, narrative terms, such as 'there shall be no discharge of toxic pollutants in toxic amounts.'" (citation omitted)).

Based on this analysis, the Ocean Plan's prohibition on discharge into an ASBS is a water quality standard that is covered by the Permit's prohibition on "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." Permit at 23.

2. Defendants' exemption application

Defendants also argue that they need not comply with the prohibition on discharging waste in the ASBS because they have applied for an exception from that prohibition with the State Board and their application is still pending. Opp'n at 23-24. This Court has already ruled on this issue in its June 20, 2008 Order on Defendants' motion to dismiss. In that Order, the Court found that the "State Water Resources Control Board has explicitly stated that the provisions of the 'Ocean plan' remain fully enforceable while it reviews the administrative applications on which Defendants rely." Order at 2. Defendants' attempt to relitigate this issue is improper.

Moreover, the cases which Defendants rely upon are inapposite, as they involve situations where no permit had yet been issued to regulate the defendant's discharge, not a situation like this one, where a valid permit limits the defendants' discharge, but an application for an exception is pending. *See Hughey v. JMS Development Corp.,* 78 F.3d 1523 (11th Cir. 1996); *Mississippi River Revival v. City of Minneapolis,* 319 F.3d 1013 (8th Cir. 2003). The Defendants will not be permitted to avoid responsibility for their conduct currently regulated under the Permit, simply because a discretionary exception application is still pending with the State Board.

E. Defendants Are Entitled to Summary Judgment as to Part of the Compliance Reports Claim.

Defendants assert that they are not required to submit Receiving Water Limitations ("RWL") Compliance Reports under the Permit until and unless the Permittee or the Regional Board determines that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard. The Court agrees. The Permit clearly states, "Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee shall promptly notify and thereafter submit a [RWL Compliance Report] to the Regional Board . . . ." Permit Part 2.3.a, at 23. In order for a Permittee to be required to submit RWL Reports, either the Permittee or the Regional Board must determine that discharges from the MS4 are causing or contributing to exceedances of a Water Quality Standard.

At oral argument, Plaintiffs directed the Court's attention to another provision of the Permit, which states (with respect to the Principal Permittee – the District), "When *data indicate* that discharges are causing or contributing to exceedances of applicable Water Quality Standards . . . a RWL Compliance Report . . . shall be submitted with the subsequent Unified Annual Report." Permit ¶ I.C.6 at T-4 (emphasis added). Plaintiffs would have the Court read this language to find that anytime the monitoring

data at the mass emissions stations exceeds water quality limits, an RWL Report is automatically required. However, as the Court found in Part IV.B of this Order, discussing the Watershed claims, data showing exceedances at the mass emissions stations does not necessarily show that *discharges* from the MS4 are causing or contributing to those exceedances, because the Court has been presented with no evidence establishing that standards-exceeding pollutants are passing through an outflow of either Defendant. Thus, even though Plaintiffs have presented evidence of exceedances at the monitoring stations since 2003, Fernandez Decl., Exs. A-G, this monitoring data did not automatically invoke the RWL requirements. Because neither the Regional Board nor the Defendants has formally determined that the MS4 is causing or contributing to exceedances of water quality standards in the four watersheds, Defendants are not required to submit RWL reports with respect to these water bodies. Thus, the Court grants summary judgment to Defendants with respect to the claim of inadequate Compliance Reports for the rivers and creeks.

In contrast, the Regional Board has made a determination, and notified Defendants through formal Notices of Violation, that the MS4 is causing or contributing to exceedances of bacterial limits at Santa Monica Bay beaches, including Surfrider Beach. Colangelo Decl., Exs. G & H. These Notices of Violation were sent to Defendants on March 4, 2008, so

they were required to submit RWL Compliance Reports addressing the violations at Surfrider Beach beginning on this date. Defendants have each submitted one RWL Compliance Report since receiving a Notice of Violation – their 2008 Compliance Reports. Colangelo Decl. Exs. NN & 00. These Reports do address the bacterial exceedances in Santa Monica Bay, but there is a genuine issue of material fact as to whether their discussion of the proposed changes to the monitoring program is adequate to meet the requirements of the Permit. SGI ¶ 62. Thus, the Court cannot grant either Defendants or Plaintiffs summary judgment as to the adequacy of the 2008 Compliance Reports.

V. CONCLUSION

For the foregoing reasons, the Court DENIES summary adjudication for the Plaintiffs as to the Watershed Claims (claims one, two, three, and the Malibu Creek portion of claim four). The Court reserves its ruling on the Defendants' Motion for Summary Judgment on the Watershed Claims pending the receipt of the briefing requested in Part IV.B of this Order. The Court GRANTS summary adjudication for the Plaintiffs on claim five and on the Surfrider Beach portion of claim four. The Court GRANTS summary adjudication for the Defendants on all portions of claim six except for the adequacy of the 2008 Compliance Reports' treatment of Surfrider

Beach. The Court DENIES summary adjudication for both parties as to the adequacy of the 2008 Compliance Reports' treatment of Surfrider Beach.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL and SANTA MONICA BAYKEEPER,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; et al.,

Defendants-Appellees.

No. 10-56017

D.C. No. 2:08-cv-01467-AHM-PLA
Central District of California, Los Angeles

ORDER

(Filed Sep. 26, 2013)

Before: PREGERSON and M. SMITH, Circuit Judges, and HOLLAND, Senior District Judge.*

The panel has unanimously voted to deny the petition for rehearing. Judges Pregerson and M. Smith have voted to deny the petition for rehearing en banc, and Judge Holland so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court called for a vote on it. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc are DENIED.

* The Honorable H. Russel Holland, Senior District Judge for the U.S. District Court for the District of Alaska, sitting by designation.