TO THE SUPREME COURT AND BACK AGAIN: THE LOS ANGELES COUNTY FLOOD CONTROL DISTRICT CLEAN WATER ACT MUNICIPAL STORMWATER PERMIT

By Lynne M. Cohee
cohee@tmw-law.com

Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc., 133 S. Ct. 710 (2013); *on remand to Natural Resources Defense Council, Inc. v. County of Los Angeles,* 725 F.3d 1194 (9th Cir. 2013).

In a 9-0 ruling on January 8, 2013, the United States Supreme Court reversed a Ninth Circuit Court of Appeals decision that had held the Los Angeles County Flood Control District liable for violation of Clean Water Act water quality standards for stormwater discharges. In a case in which all parties agreed on the answer to the question on which the Supreme Court granted certiorari, the Court held that the flow of water from a concrete channel or improved portion of a river into an unimproved portion of the same river does not qualify as a "discharge of a pollutant" under the Clean Water Act. The Supreme Court refused to reach an alternative issue -- raised by the environmental groups and rejected by both lower courts -- of whether exceedances of water quality standards detected at downstream "mass

emissions" monitoring stations are by themselves sufficient to establish Clean Water Act liability for upstream discharges.[1]

On August 8, 2013, the Ninth Circuit on remand took up and reversed its previous ruling on this very issue. The Court of Appeals focused on the language of the specific NPDES permit at issue and held that uncontroverted evidence of pollution exceedances at the monitoring stations established the Flood Control District's liability for permit violations as a matter of law.[2]

1. Background

The Flood Control District is a regional governmental entity comprised of 84 cities and some unincorporated areas of Los Angeles County.[3] It operates a "municipal separate storm sewer system" or MS4, a vast publicly-owned collection of storm drains, pipes, outfalls, and other infrastructure that collects urban stormwater runoff from across Los Angeles County and discharges it into the region's rivers, including the Los Angeles and San Gabriel Rivers, and ultimately into the Pacific Ocean.[4] The Los Angeles County MS4 "is a complicated web, with thousands of miles of storm drains, hundreds of miles of open channels, and hundreds of thousands of connections."[5]

Under the Clean Water Act, MS4 operators that serve a population of 100,000 people or more must obtain an NPDES permit before discharging

stormwater into navigable waters.[6] Permits for discharges from an MS4 may be issued on a system or jurisdiction-wide basis when a number of entities operate an interconnected stormwater system.[7] Under such a permit, a co-permittee "is only responsible for permit conditions relating to the discharge for which it is operator."[8]

The Flood Control District's NPDES permit was first issued in 1990 and has been renewed several times.[9] The permit prohibits "discharges from the MS4 that cause or contribute to the violation of water quality standards or water quality objectives."[10] The permit requires that the District, as "Principal Permittee", monitor stormwater runoff flowing past downstream "mass emissions" stations and submit reports identifying possible sources of any exceedances of water quality standards.[11] The stated purpose of the monitoring stations is to (1) estimate the mass emissions from the MS4, (2) assess trends in the emissions over time, and (3) determine if the MS4 is contributing to exceedances of water quality standards.[12]

The mass emissions monitoring stations are located in the Los Angeles and San Gabriel Rivers, in portions of the rivers encased in concrete channels built for flood control.[13] Although the District is the predominant discharger,

thousands of other co-permittees also discharge into the rivers at points upstream of the monitoring stations.[14] Data from the emissions stations indicates that water quality standards have repeatedly been exceeded for a number of pollutants.[15]

2. The Litigation

The District Court Rejects the Environmental Groups' CWA Citizen Suit

The Natural Resources Defense Council and Santa Monica Baykeeper filed a Clean Water Act citizen suit against the Flood Control District[16], alleging that the undisputed exceedances of the NPDES permit's water quality standards at the monitoring stations established violation of the permit as a matter of law.[17] On cross-motions for summary judgment, the U.S. District Court for the Central District of California rejected the environmental groups' argument and granted summary judgment in favor of the defendants.[18]

The District Court held 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 MSR that cause or contribute to the violation of [water quality] standards'", because under the permit and applicable regulations, a co-permittee is

responsible only for a *discharge* for which it is the operator.[19] Pointing out that numerous entities other than the District discharge into the rivers upstream of the monitoring stations, the Court concluded that the environmental groups had presented insufficient evidence to warrant a finding that the standards-exceeding pollutants detected by the monitoring stations had been discharged from the Flood Control District's own upstream outfalls.[20]

The Ninth Circuit Reverses the District Court and Holds the Flood Control District Liable for CWA Permit Violations

On appeal, the Ninth Circuit Court of Appeals reversed the District Court in relevant part and ruled in favor of the environmental groups with regard to the Los Angeles and San Gabriel rivers. The Ninth Circuit rejected what it labeled the environmental groups' "*ipso facto*" argument that exceedances of water quality standards alone establish a Clean Water Act violation, agreeing instead with the District Court that "while it may be undisputed that [water quality] exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant."[21]

However, the Court went on to hold that the Flood Control District had violated the Clean Water Act because a "discharge" of pollutants from a point source occurred when stormwater containing pollutants flowed "out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways."[22] The Court held that because the monitoring stations "are located in concrete portions of the MS4 controlled by the [Flood Control] District, it is beyond dispute that the District is discharging pollutants from the MS4" into the rivers in violation of the permit.[23]

The Supreme Court Reverses the Ninth Circuit and Clarifies the CWA Definition of Discharge

On petition by the Flood Control District, the Supreme Court granted certiorari solely on the question of whether a "discharge" occurs when polluted water flows out of a concrete channel into a lower portion of the same river.[24] In a five-page decision, a unanimous court reversed the Ninth Circuit, holding that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a discharge of pollutants under the Clean Water Act.[25]

The Court relied on its previous holding in *South Florida Water Management District v. Miccosukee Tribe of Indians* that the transfer of polluted water between "two parts of the same water body" is not a discharge of pollutants.[26] In *Miccosukee,* a Florida water management district pumped polluted water from a canal, through a pump station, and into a nearby reservoir.[27] The Court held that such a water transfer would count as a discharge of a pollutant only if the canal and reservoir were "meaningfully distinct water bodies."[28]

As the Court explained in *Miccosukee* and reaffirmed in *L.A. County,* the Clean Water Act defines "discharge of pollutant" to mean "any addition of any pollutant", and no pollutants are "added" to a water body when water is merely transferred between different portions of the same water body.[29] In her opinion written on behalf of the Court[30], Justice Ruth Bader Ginsburg noted that *all* parties to the appeal – including the United States[31] as *amicus curiae* – agreed that water flowing out of a concrete channel within a river does not constitute a "discharge of pollutant", and thus that the answer to the question upon which the Court had granted certiorari was "no."[32]

The environmental groups nevertheless urged the Court to uphold the Ninth Circuit ruling, arguing – as they had unsuccessfully before the District and Ninth Circuit courts -- that exceedances of water quality standards detected at instream monitoring stations were in and of themselves sufficient to establish liability for permit violations.[33] Justice Ginsburg declined to consider the environmental groups' argument, noting that it had failed below, and was "not embraced within or even touched by the narrow question" on which the Court granted certiorari.[34]

The Supreme Court Sends the Case Back to the Ninth Circuit

Much of the parties' Supreme Court briefs and virtually all of the questioning at oral argument concerned whether the case, if reversed, should be remanded to the Ninth Circuit. [35] Although all parties agreed that the Ninth Circuit's reasoning was erroneous, the Flood Control District asserted that the Ninth Circuit had made an error of *law,* and thus that its decision should be reversed and judgment entered in favor of the Flood Control District. The United States and the environmental groups, however, took the position that the Court of Appeals more likely misunderstood the *facts.* They asserted that if the Court chose not to uphold the Ninth Circuit decision, it should vacate that decision and remand to the Ninth Circuit, suggesting that if

the case were vacated and remanded with a "corrected understanding of the universe of law and facts" the Ninth Circuit might potentially rule in favor of the environmental groups.[36] Without explanation, the Supreme Court reversed and remanded the case to the Ninth Circuit.[37]

On Remand the Ninth Circuit Adopts the Argument it Previously Rejected and Once Again Finds the Flood Control District Liable

The second time around the Ninth Circuit -- adopting the very argument that it had previously rejected -- agreed with the environmental groups that the mass emissions monitoring data alone established the Flood Control District's liability for NPDES permit violations as a matter of law.[38] The Court acknowledged that the environmental groups had returned from the Supreme Court with the same argument that they had "consistently advanced throughout this litigation", that the District and Ninth Circuit courts had previously rejected the argument, and that the Supreme Court had explicitly declined to address it.[39] The Court nevertheless held that it was free to reconsider the merits of the environmental groups' argument because no mandate had issued, rejecting the Flood Control District's position that the Court's prior decision was final and constituted the law of the case.[40]

The Ninth Circuit then focused on the specific language of "*this particular"* permit.[41] The Court pointed to permit provisions requiring the mass emissions stations monitoring and reporting program, noting that the permit states that one of the primary objectives of the program is to assess compliance with the permit. The Court rejected the Flood Control District's assertion that the monitoring program was intended to assess the MS4 collection system as a whole rather than to measure an individual permittee's compliance with the permit.[42]

Although acknowledging that the permit also provides that "[e]ach permittee is responsible only for a discharge for which it is the operator", the Court held that the only reasonable reading of the "putatively conflicting provisions" of the permit was that the provision limiting a permittee's responsibility to its own individual discharge "applies to the appropriate *remedy* for Permit violations, not to *liability* for those violations."[43] The Court thus concluded that the Flood Control District was *liable* for permit violations as a matter of law, and reversed and remanded to the District Court to determine "the appropriate *remedy*" for the Flood Control District's violations.[44]

The Ninth Circuit's decision is notable for what it does not do. The decisions of the District Court, the Ninth Circuit on its initial review of the case, and the Supreme Court all turned on an analysis of the Clean Water Act's definitions of a "discharge" and "point source."[45] The remand decision, however, contains virtually no discussion of the appropriate definition of a "discharge" or "point source" under the CWA. To the contrary, the Court states that "[t]he question before us is not whether the Clean Water Act mandates any particular result."[46] Nor does the Ninth Circuit refer to the fact that the permit's provision that a co-permittee can be held responsible only for "a discharge for which it is the operator" has its origins in the EPA regulation defining a "co-permittee."[47]

3. The Saga Continues

Shortly before the Supreme Court oral argument a renewed permit was approved for the Flood Control District's MS4 requiring water quality monitoring at individual upstream outfall points.[48] Counsel for the Flood Control District explained at oral argument that the new permit's upstream monitoring will allow the Regional Board to pinpoint the source of water quality-exceeding pollutants.[49] Thus, determining which co-permittees are responsible for discharging pollutants will not be an issue in the future, and

on remand the District Court will only address remedies for past permit violations.[50]

As to those past violations, the case may be heading back to the Supreme Court. On September 26, 2013, the Ninth Circuit rejected the Flood Control District's petition for rehearing and/or rehearing en banc.[51] The District recently moved for a 90-day stay of the issuance of the mandate pending the filing of a petition for writ of certiorari.[52]

4824-1443-9446, v. 1

---

[1] *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.,* 133 S. Ct. 710 (2013).
[2] *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles,* 725 F.3d 1194 (9th Cir. 2013).
[3] *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles,* 673 F.3d 880, 884 (9th Cir. 2011).
[4] 133 S. Ct. at 712.
[5] *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles,* No. 08 Civ. 1467 (AHM), 2010 WL 761237 at 2 (C.D.Cal. Mar. 2, 2010), *amended on other grounds,* 2011 WL 666875 (C.D.Cal. Jan. 27, 2011).
[6] 133 S. Ct. at 712. *See* 33 U.S.C. §§ 1311(a), 1342(p)(2)(C), and (D); 40 CFR §§ 122.26(a)(3), (b)(4), (b)(7).
[7] 33 U.S.C. § 1342(p)(3)(B)(i).
[8] 40 C.F.R. § 122.26(b)(1).
[9] 133 S. Ct. at 712; 673 F.2d at 886. The permit is issued by the California State Water Resources Control Board for the Los Angeles Region. *See* 673 F.2d at 886.
[10] 673 F.2d at 887.
[11] *Id.* at 888-89. Applicants for MS4 permits are required to propose a monitoring program for representative data collection. 40 C.F.R. § 122.26(d)(2)(iii)(D).
[12] *Id.* at 888.
[13] 133 S. Ct. at 712
[14] 673 F.3d at 889-90.
[15] 133 S. Ct. at 712.
[16] The environmental groups brought suit against both the Flood Control District and Los Angeles County. Only the Flood Control District pursued review before the U.S. Supreme Court.
[17] 673 F.2d at 890.
[18] 2010 WL 761237 at 8.
[19] *Id.* (emphasis in original); *See* 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.").
[20] 2010 WL 761237 at 8; 133 S. Ct. at 712.
[21] 673 F.3d at 898 ("[T]he 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.")
[22] *Id.* at 899-901.
[23] *Id.* at 900-01.
[24] 133 S. Ct. at 712-13.
[25] *Id.* at 713.

[26] *South Fla. Water Management Dist. v. Miccosukee Tribe,* 541 U.S. 95, 124 S. Ct. 1537 (2004).
[27] 541 U.S. at 100.
[28] *Id.* at 112.
[29] 133 S. Ct. at 713; 541 U.S. at 109-112 (*quoting Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York,* 273 F.3d 481, 492 (C.A. 2 2001) ("[I]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.").
[30] All justices joined in Justice Ginsburg's opinion with the exception of Justice Scalia, who concurred in the judgment but did not write a separate opinion.
[31] Upon invitation by the Supreme Court, the Solicitor General filed a brief opposing the Flood Control District's petition for a writ of certiorari, on the grounds that the Ninth Circuit's ruling turned on the specific terms of the District's MS4 permit and the evidence of a potential violation of the permit put forth by the environmental groups. Br. for the U.S. as Amicus Curiae. Following the Supreme Court's acceptance of the appeal, the Solicitor General filed an amicus brief "supporting neither party", and was granted leave by the Court to participate in oral argument. *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc*, 132 S. Ct. 1133 (2012); *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc*, 133 S. Ct. 638 (2012).
[32] 133 S. Ct. at 712-13.
[33] *Id.* at 713.
[34] *Id.* at 713-14. The Court continued, "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.* The environmental groups had opposed the Flood Control District's petition for certiorari, and did not cross petition from the Ninth Circuit's decision rejecting the *ipso facto* argument.
[35] The oral argument transcripts are available on the Supreme Court website at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-460.pdf. The parties' Supreme Court briefs on the merits can be found at http://www.americanbar.org/publications/preview_home/11-460.html.
[36] Justice Ginsburg chose not to resolve this dispute, instead noting that "[w]hatever the source of the Court of Appeals' error, all parties agree that the court's analysis was erroneous." 133 S. Ct. at 713 n.1.
[37] 133 S. Ct. at 714. The opinion did not contain the words "remanded for further proceedings" but simply stated: "the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded." *Id.*
[38] *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles,* 725 F.3d 1194 (9th Cir. 2013).
[39] *Id.* at 1202-03.
[40] *Id.* at 1203-04.
[41] *Id.* at 1204-05 (emphasis in original).
[42] *Id.*
[43] *Id.* at 1206 (emphasis in original). The Court also referenced language in an amicus brief filed in a related case by the Los Angeles Regional Water Quality Control Board, the entity issuing the permit. *Id.* at 1208. The Court characterized the Regional Board as disagreeing "with any construction of the permit that would require individualized proof of a permittees' [sic] discharges in order to establish liability." *Id.*
[44] *Id.* at 1210 (emphasis in original). Permittees in violation of an NPDES permit are subject to mandatory civil penalties and may be subject to attorney's fees and potential injunctive relief. 33 U.S.C. §§ 1319(d), 1365(a); *NRDC v. Southwest Marine, Inc.,* 236 F.3d 985, 1001 (9th Cir. 2000).
[45] *See e.g.,* 2010 WL 761237 at 7-8; 673 F.3d at 898-901; 133 S. Ct. at 712-14.
[46] 725 F.3d at 1205 n.16. The approach taken by the Ninth Circuit on remand is exactly the same as that taken by the Solicitor General's office in its Supreme Court brief: "On remand, the court of appeals' liability determination will depend on the court's interpretation of the MS4 permit. . . [the] question is one of permit construction as to which the CWA does not mandate any particular result." Br. for the U.S. as Amicus Curiae Supporting Neither Party at 25-26.
[47] *Id.* at 1206. *See* 40 C.F.R. §122.26(b)(1).
[48] 133 S. Ct. at 714 n.2.
[49] *See* the oral argument transcripts at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-460.pdf.
[50] Although the Supreme Court considered the permit renewal important enough to make note of it in its opinion, the only mention of the renewed permit in the remand opinion is a one sentence footnote stating that

the Regional Board issued a new NPDES permit on November 8, 2012. 133 S. Ct. at 714 n.2; 725 F.3d at 1198 n.7. The Ninth Circuit decision contains no discussion about the terms of the renewed permit or the fact that it specifically addresses the problem of identifying which upstream entities are discharging polluted stormwater.

[51] *Natural Res. Def. Council, Inc. v. Cnty. Of Los Angeles,* No. 10-56017, Order dated September 27, 2013.

[52] *Natural Res. Def. Council, Inc. v. Cnty. Of Los Angeles,* No. 10-56017, Motion of Defendants-Appellees County of Los Angeles and Los Angeles County Flood Control District for Stay of Issuance of Mandate, dated October 2, 2013.