

April 12, 2011

Municipalities Are Responsible For Discharges Of Stormwater Regardless Of The Ultimate Source Of Pollution

[*Natural Resources Defense Council v. Los Angeles County, United States Court of Appeals for the Ninth Circuit, Case No. 10-56017 \(March 10, 2011\)*](#)

By [Elizabeth Anderson](#)

The Ninth Circuit Court of Appeals held that environmental groups were entitled to summary judgment after presenting evidence that the Los Angeles County Flood Control District ("District") had illegally discharged polluted stormwater into the Los Angeles River and San Gabriel River in violation of the federal Clean Water Act. The District has argued that the evidence did not show it was the source of the pollutants, only that it conveyed polluted stormwater. The Ninth Circuit rejected this argument and decided summary judgment was appropriate because monitoring stations located in a section of the municipal separate storm sewer system ("MS4") owned and operated by the District detected pollutants in excess of the limits set forth in the District's National Pollutant Discharge Elimination System permit ("Permit") and, after the polluted stormwater passes through these monitoring stations, it was discharged into the two rivers, causing or contributing to exceedances of water quality standards.

The District's MS4 moves stormwater runoff from across Los Angeles County ("County") to various watercourses including the four watercourses at issue in this case—the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek—and ultimately to the Pacific Ocean. The District operates the MS4 pursuant to the Permit, which prohibits discharges from the MS4 that cause or contribute to the violation of the water quality criteria contained in the Water Quality Control Plan for the Los Angeles Region and other state and federal approved surface water quality plans. The Permit also requires the District to monitor pollutant levels at various mass-emissions monitoring stations.

Between 2002 and 2008, the monitoring stations for the rivers at issue in this case identified hundreds of instances of pollutant discharge levels that exceeded the Permit's water quality standards. The Natural Resources Defense Council and Santa Monica Baykeepers ("Plaintiffs") sued the District and the County ("Defendants") in the Central District of California alleging that they had violated the Permit's conditions, and thereby the federal Clean Water Act. The District

admitted that it conveys polluted stormwater via the MS4, but contended that "its infrastructure alone does not generate or discharge pollutants." Rather, according to the District, the MS4 conveys the discharges of the numerous "up-sewer" municipalities and, moreover, thousands of other parties are discharging pollutants into the watercourses. The district court agreed, holding that Plaintiffs "failed to present evidence that the standards-exceeding pollutants passed through the [MS4] *outflows* at or near the time the exceedances were observed."

On appeal, the Ninth Circuit considered "whether an exceedance at a mass-emissions 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."

With respect to the first question, the appellate court concluded that an exceedance at a mass-emissions monitoring station is a Permit violation. The provisions of the Permit plainly specify that mass-emissions monitoring is intended to measure compliance with the Permit. Furthermore, Congress intended to put the burden of the NPDES requirements at the municipal level, so, contrary to Defendants' position, municipalities are not subject to a less rigorous or unenforceable regulatory scheme for their stormwater discharges.

With respect to the second question, Plaintiffs argued that the measured exceedances at the mass-emissions monitoring stations established that the District had violated the Permit because, as holders of the Permit, Defendants are responsible for the violations regardless of the ultimate source of the polluted stormwater. Defendants countered that the District does not generate any of the pollutants in the system but rather merely transports them. Additionally, the Defendants asserted that by measuring mass-emissions downstream from where the pollutants entered the sewer system, it is not possible to identify which entity is responsible for adding the pollutants to the watercourses.

The Ninth Circuit held that "the Clean Water Act does not distinguish between those who add and those who convey what is added by others—the [Clean Water] Act is indifferent to the originator of water pollution." Therefore, the court decided that there was sufficient evidence in the record showing that the District had added polluted stormwater from the MS4 to the Los Angeles River and San Gabriel River. Because the mass-emissions monitoring stations for the Los Angeles River and the San Gabriel River are located in channelized portions of the MS4 controlled by the District, when pollutants were detected, they had not yet exited the MS4 into navigable waters. Therefore, the Ninth Circuit concluded, there is no question that the District controlled the polluted stormwater at the time it was measured and that the District caused or contributed to the exceedances.

On the other hand, the appellate court determined that Plaintiffs failed to proffer sufficient evidence that the District had discharged polluted stormwater into the Santa Clara River or Malibu Creek or that the County had discharged polluted stormwater into any of the four watercourses at issue in this case. To establish a violation, Plaintiffs were obligated to identify how the flow of water from an MS4 contributed to a water quality exceedance detected at a mass-emissions monitoring station.

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