

## Supreme Court Reaffirms CWA Discharge Ruling

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On January 8, 2013, the U.S. Supreme Court unanimously upheld its 2004 ruling that the movement of polluted water between separate sections of the same waterbody does not constitute a “discharge” of pollutants requiring a permit under the Clean Water Act (“CWA”). In *Los Angeles County Flood Control District v. NRDC*, No. 11-460 (Jan. 8, 2013), the Justices addressed only the discharge issue on which they had granted review, declining to consider broader questions relating to the interpretation of CWA permit terms and the validity of the Environmental Protection Agency’s (“EPA”) contentious “water transfer rule.” Accordingly, while permittees may take comfort in the Court’s reiteration of existing law, they also must be mindful that decisions on these other important issues likely lie just over the horizon.

### Background

Section 402(p) of the CWA authorizes EPA to regulate stormwater discharges from municipal separate storm sewer systems (“MS4s”). 33 U.S.C. § 1342(p). MS4s collect stormwater and carry it away from homes, businesses, and roads through a complex infrastructure network that includes gutters, storm drains, sewers, and more, ultimately discharging the stormwater to receiving waters. Such stormwater discharges often pose water quality concerns because, as water flows over surfaces, it may pick up pollutants, pathogens, and toxins that ultimately enter the receiving waters. As a result, Section 402(p) requires MS4s serving populations of 100,000 or more to obtain National Pollutant Discharge Elimination System (“NPDES”) permits before discharging stormwater to waters of the United States. But unlike with other NPDES permits, MS4 permits may be issued to allow regulators to treat what enters the system through stormwater management rather than end-of-the-pipe pollution controls and on a system-wide basis, enabling local governments to jointly apply for a single permit covering interconnected systems discharging into the same waters.

The Los Angeles County Flood Control District (the “District”), along with Los Angeles County and 84 cities, holds such a joint permit – a system-wide MS4 permit (the “Permit”) that covers stormwater discharges from a vast urban area of Southern California, including thousands of miles of storm drains and hundreds of miles of open channels. The Permit prohibits “discharges from the MS4 that cause or contribute to violation of Water Quality Standards or water quality objectives,” but states that “each co-permittee is responsible only for discharge for which it is the operator.” The Permit contemplates compliance through implementation of control measures and a monitoring and reporting program, which establishes locations for compliance monitoring at “mass emissions stations” downstream of the system’s discharge points. Those stations collect water samples that are analyzed for pollutant constituents in the stormwater flowing out of the MS4 into receiving waters such as the Los Angeles and San Gabriel Rivers. The data collected at those stations repeatedly showed exceedances of numerous pollutants. But the stations were located in somewhat of a unique area – downstream of where the District’s and others’ storm drains discharge into the rivers, in channelized sections of the rivers that are within the MS4.

In 2008, the Natural Resources Defense Council and Santa Monica Baykeeper (together the “environmental groups”) sued the District under the CWA’s citizen suit provision alleging that the District

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and Los Angeles County were violating their MS4 permit by causing or contributing to exceedances of water quality standards in the Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek (collectively, the “watershed claims”). The District countered that it was not liable because it simply oversees sections of the rivers for flood control purposes, and pollutants that pass through the MS4 originate from upstream municipalities located in the areas that drain into the rivers.

The U.S. District Court for the Central District of California granted summary judgment for the District on all four watershed claims. The district court explained that data from the mass emissions stations could be used for determining whether the entire MS4 system is in compliance with its Permit, but it could not be used to determine whether the District, as one co-permittee out of many, was responsible for “discharges from the MS4 that cause or contribute to the violation” of standards in the Permit.

On appeal, the Ninth Circuit agreed that an exceedance detected by the District’s mass-emissions monitoring is a Permit violation for which contributing dischargers are liable. But the appellate court also found that the monitoring data were sufficient to establish that the District was liable for Permit exceedances because it believed the data showed that the District had discharged stormwater that caused or contributed to the Permit violations. The Court explained that the monitoring stations for the Los Angeles and San Gabriel Rivers are located in the District’s MS4, that the monitoring stations had detected pollutants in excess of the amounts authorized by the Permit, and that the polluted stormwater was discharged from the MS4 into the rivers. Thus, the Ninth Circuit concluded that the District had discharged pollutants in violation of the Permit and Section 402 of the CWA.

The District petitioned the U.S. Supreme Court to review the Ninth Circuit’s ruling in light of the High Court’s 2004 holding in *South Florida Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The Court agreed to consider that narrow question: Under the CWA, does a “discharge of pollutants” occur when polluted water flows from one portion of a river that is a 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 Court held oral argument on December 4, 2012. The arguments took a somewhat surprising turn when all parties, and the United States (which was participating in an *amicus* role), agreed on the primary issue under review – that the flow of polluted stormwater from channelized portions of the rivers into un-channelized portions does not constitute a “discharge of pollutants” under the CWA. The environmental groups instead urged the Court to go beyond that discrete question and to consider whether the Ninth Circuit had correctly found the District liable as an MS4 co-permittee for the water quality exceedances detected in the portions of the system over which it exercised control. (A detailed summary of the oral argument is available [here](#).)

### The Supreme Court’s Opinion

Little more than two months after holding oral argument, the Supreme Court issued a terse, 5-page unanimous decision reversing the Ninth Circuit’s ruling and finding for the District. The Court had little

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difficulty justifying its decision. After noting that the parties agreed that no discharge occurs when stormwater flows between separate areas of a single river, the Court reiterated its 2004 decision in *Miccossukee Tribe of Indians*. There, the Court had held that the transfer of polluted water between “two parts of the same water body” does not constitute a discharge of pollutants under the CWA. Rather, the Court explained, a “discharge of pollutants” requires an “addition” of a pollutant into navigable waters from a “point source.” And there can be no “addition” when water merely is relocated to different places within the same body. Instead, the water must be transferred from one “meaningfully distinct” waterbody to another. In light of that clear holding in *Miccossukee* and the fact that the challenged flows took place within the same rivers, the Court agreed with the District and quickly concluded that “the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA.”

The Court expressly declined to address the other issues pressed by the parties during oral argument, most importantly whether the District’s Permit could be used to establish liability for CWA violations where the Permit requires water quality monitoring and that monitoring detected exceedances within waters controlled by the District. The Justices simply noted that the argument had “failed below” and that it was unrelated to the issue they agreed to review. Accordingly, the Court reversed the judgment of the Ninth Circuit and remanded for further proceedings.

### Conclusions and Implications

More significant than what the Supreme Court addressed in *Los Angeles County Flood Control District* is what it did not. By declining to consider whether NPDES permit terms requiring water quality monitoring and compliance with established water quality standards are sufficient to establish liability where monitoring data detects exceedances, the Court left the door open for future lawsuits against MS4 co-permittees. That is particularly problematic in light of many permit writers’ tendency to incorporate water quality standards wholesale into NPDES permits, as well as the growing trend of requiring permittees, such as the District, to monitor their actual discharges into receiving waters. These factors likely will create fertile ground for increased citizen enforcement of CWA permits where plaintiffs obtain data on both the quality of a permittee’s discharge and the condition of the receiving waters.

On the other hand, the Court’s willingness to take up the “unitary waters” issue – just seven years after first considering it in *Miccossukee* – also may set the stage for the Justices to consider EPA’s contentious “water transfer” rule in the near future. EPA issued the rule in 2008 to clarify that no NPDES permit is required to transfer water between two separate waterbodies unless the water is subject to “intervening industrial, municipal, or commercial use.” (A detailed summary of the water transfer rule is available here). The Court did not examine the rule, despite the urging of *amicus* groups. But the Justices’ unanimous reaffirmation of the principle that a regulable “discharge” requires an actual “addition” of pollutants *might* translate into support for the water transfer rule, which relies on the same principle, when ongoing environmental group challenges to the rule ultimately reach the Court.

For more information, please contact Parker Moore, pmoore@bdlaw.com, 202-789-6028, Richard Davis,

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rdavis@bdlaw.com, 202-789-6025, Karen Hansen, khansen@bdlaw.com, 512-391-8040, or Sara Vink, svink@bdlaw.com, 202-789-6044.