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The Supreme Court Reverses the 9th Circuit and Reaffirms Its Earlier Interpretation of 'Discharge' Under the Clean Water Act

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On January 8, 2013, the U.S. Supreme Court held unanimously in L.A. County Flood Control District v. NRDC *that the flow of polluted stormwater from an improved portion of a navigable waterway into an unimproved portion of the same waterway is not a discharge of pollutants under the federal Clean Water Act. The Court's decision reaffirms its 2004 holding in* South Florida Management District v. Miccosukee Tribe of Indians[1] *and overturns a Ninth Circuit ruling that could have significantly altered the permitting and enforcement scheme for stormwater and flood control, particularly for engineered structures conveying water within a single water body. The Court declined NRDC's call for it to address broader questions relating to liability for stormwater pollution under Clean Water Act permit terms and focused only on the narrow discharge issue on which it granted review.*

Background and History of Stormwater Regulation

The Los Angeles County Flood Control District ("District") operates a complex and sprawling municipal separate storm sewer system ("MS4") designed to collect stormwater and control flooding over a 4,500 square mile area within the County. Stormwater flows over paved and developed urban landscapes, often collecting pollutants – including suspended metals, algae-promoting nutrients, pesticides and other toxic contaminants – along its path before entering the MS4 system and ultimately being discharged, untreated, into receiving waters. MS4 stormwater discharges are regulated by EPA under Clean Water Act ("CWA") Section 402(p).[2]

[1] 541 U.S. 95 (2004).
[2] 33 U.S.C. § 1342(p).

Traditionally, stormwater discharges are regulated differently than other discharges under National Pollutant Discharge Elimination System ("NPDES") permitting. In 1972, Congress enacted the Federal Water Pollution Control Amendments, whose stated goal was the elimination of the discharge of pollutants into navigable waters by 1985. The Act, now known as the Clean Water Act, established the NPDES permit program as the primary means of meeting this goal and cleaning up the nation's waters. Notwithstanding the general prohibition against the discharge of pollutants into navigable waters, the Act also authorized EPA to utilize the NPDES permitting program to sanction the discharge of pollutants into these waters, subject to the conditions set forth in the discharger's permit. EPA immediately set about establishing the NPDES program, initially concentrating its attention on industrial point source pollution consistent with the priority assignment by Congress. In doing so, EPA, by regulation, exempted certain categories of point source pollution from the NPDES program in 1973, including uncontrolled and uncontaminated discharges of stormwater runoff. This exemption was challenged by the Natural Resources Defense Council and, in 1977, the U.S. Court of Appeals for the District of Columbia set it aside.[3]

In the wake of this adverse decision, EPA revisited the regulation of municipal stormwater runoff in 1979, 1980 and 1984, and EPA's perceived failure to successfully address the problem of stormwater pollution via point sources caused Congress to enact the Water Quality Act of 1987, which established a new regime for regulating stormwater runoff. Pursuant to this new authority, EPA approached the regulation of stormwater runoff in separate phases. The Phase I rules were promulgated in 1990 and addressed the issue of the discharge of stormwater runoff by MS4s and from larger industrial facilities and activities. These rules were also challenged by NRDC but the bulk of the new rules were affirmed by the Ninth Circuit in *NRDC v. EPA*.[4]

It is important to note that the 1987 amendments to the CWA established new controls for MS4s; under this authority, municipal stormwater discharge permits issued by EPA or a delegated state "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."[5] To achieve the "maximum extent practicable" standard, MS4s may utilize Best Management Practices, instead of having to meet the technology-based requirements of CWA Section 301.[6] That is, MS4 permits allow regulators to treat pollutants that enter the stormwater system through system-wide management practices rather than end-of-the-pipe pollution controls.

The *L.A. County Flood Control District* case and the Supreme Court's Decision

At issue in this case were channelized sections of the Los Angeles and San Gabriel Rivers, lined with concrete for flood control purposes and operated by the District as part of its MS4. The District, together with Los Angeles County and 84 cities within the County, holds a joint NPDES permit for its MS4. The permit prohibits "discharges from the MS4 that cause or contribute to a 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 established a monitoring and reporting program which includes compliance monitoring at "mass emissions stations" downstream of the system's discharge points where water samples are analyzed for pollutant constituents.

[3] *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

[4] 966 F.2d 1292 (9th Cir. 1992).

[5] 33 U.S.C. § 1342(p)(3)(B).

[6] 33 U.S.C. § 1342(p)(3)(B)(iii) ("Municipal discharge. Permits for discharges from municipal storm sewers … shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices …"); *see also The ABA Clean Water Act Handbook* ("Through section 403(p)(3)(B), Congress modified the substantive requirements that must be met by municipal stormwater discharges. Such discharges need not meet the technology-based requirements of section 301 of the CWA (either BAT/BCT controls or secondary treatment). Instead, municipal separate storm sewers simply must require controls to reduce the discharge of stormwater to the maximum extent practicable.").

In 2008, the NRDC and Santa Monica Baykeeper (the "environmental groups") alleged that the District was in violation of its NPDES permit due to discharges of pollutants from its MS4 that contributed to the violation of water quality standards in the rivers. The environmental groups, citing water quality data collected from the mass emissions monitoring stations located in the channelized portions of the rivers, argued that (1) existing permits incorporate water quality standards for both rivers, (2) the mass emissions stations had recorded exceedances of those limits and (3) these in-river exceedances constituted non-compliance with the permit, therefore constituting a violation of the CWA and rendering the District liable.

A federal district court granted summary judgment to the District, reasoning that the record failed to connect the standards-exceeding pollutants in the rivers to the District's MS4. The district court explained that data from the mass emissions stations, located downstream of outfalls for both the District and other cities subject to the permit, reflected an aggregation of pollution in the river, not simply the District's contribution, and could not be used to determine whether the District was responsible for violations of standards in the permit. The district court concluded, "[t]here is no evidence showing that *discharges* from the District portions of the MS4 are contributing to the exceedances at the [Stations]."

The Ninth Circuit reversed on appeal, holding that the District was liable for in-river exceedances detected by the District's mass emissions monitoring. Significantly, the court held that a "discharge" occurred when the water flowed out of the mid-river concrete channels and back into a naturally occurring part of the river. The Ninth Circuit asserted that the CWA "does not distinguish between those who add and those who convey what is added by others."

The District petitioned the Supreme Court to review the Ninth Circuit's ruling in light of the Court's 2004 *Miccosukee Tribe* decision, which held that if two areas of water are part of the same water body, moving water from one into the other does not constitute a discharge. The Supreme Court granted *certiorari* to consider the narrow question: whether, under the CWA, a "discharge of pollutants" occurs when polluted water flows from one portion of a navigable water of the United States, through an engineered improvement, and then into a lower portion of the same water body. Significantly, both in briefs and at oral arguments, all parties and the United States, participating in an amicus role, agreed that the answer to the question on review was "no." The environmental groups, however, advocated that the High Court should consider whether the Ninth Circuit properly held that the District was liable for exceedances of water quality standards in a channel of the river over which it exercised control.

The Supreme Court reversed the Ninth Circuit and remanded for further proceedings. The Court reiterated its *Miccosukee Tribe* holding that a transfer of polluted water between two parts of the same water body is not a discharge of pollutants under the CWA. To constitute a "discharge of pollutants," the Court explained, an "addition" of a pollutant into navigable waters from a "point source" must occur: i.e., the transfer of water must be "meaningfully distinct." The Court refused to address the environmental groups' alternative ground for affirmance. Notably, Justice Alito concurred in the judgment but did not join in the Court's reasoning and wrote no concurring opinion to explain his position.

Implications of the Court's Decision

The Supreme Court's reversal of the Ninth Circuit in *L.A. County Flood Control District* avoids upheaval to current consensus regarding the CWA's application to engineered sections of a single navigable water body. The Court's narrow focus regarding what constitutes a discharge, and its affirmance of its holding in *Miccosukee* on this point, makes clear both that (1) ascertaining whether a regulated discharge exists is the critical threshold question important to every permitting or enforcement action under the CWA and (2) the Court intends to hold EPA and regulatory agencies to the text of the Act.

On its face, the opinion reduces uncertainty regarding the legal ramifications of engaging in basic flood control – efforts that typically involve expenditure of tens of millions of taxpayer dollars and which impact

the lives and property of millions of citizens. The addition of a flood channel in a river, for example, will not trigger CWA NPDES permit regulation because this addition does not create a new discharge of a pollutant into the river.[7]

An affirmance by the Supreme Court of the Ninth Circuit's decision regarding the District's liability would have significantly impacted local governments across California and the U.S. that control stormwater and urban runoff through the MS4 permitting program. If an improved part of a navigable waterway were deemed a point source by virtue of being part of an MS4, it would impose a significant regulatory burden on municipalities, which have limited control over the kind and volume of pollutants managed under their permits. Indeed, in an amicus brief supporting petitioners, it was noted that were the District held liable for in-river exceedances going forward per the Ninth Circuit holding, L.A. County would require an additional 200 urban runoff recycling facilities to process a "dry day flow" at a rough cost of $2.4 billion dollars.

Leaving for another day the issue of MS4 liability for MS4-caused exceedances, on which the environmental groups sought a ruling, the Supreme Court's decision maintains the status quo. The decision shields municipalities and related permitted entities from the substantial compliance, technical, and enforcement costs that undoubtedly would have accrued as a result of the Ninth Circuit's liability finding. Further, the Court's interpretation of "discharge" provides clarity for the entire regulated community, as this term is a trigger for regulation under the rest of the CWA NPDES permitting program.[8]

Notably, this decision could influence the lower courts' review of EPA's "water transfer" rule.[9] This rule, which has been hotly contested, exempts the transfer of water between two separate water bodies from NPDES permitting unless the water being transferred is subjected to "intervening industrial, municipal or commercial use" or has pollutants introduced by the water transfer activity itself. It could be argued that, the EPA rule, particularly when considered with its exceptions, is consistent with the Supreme Court's continued focus on the requirement that a pollutant must be added in order to constitute a "discharge," first in *Miccosukee* and now in *L.A. County Flood Control District*.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors.

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[7] Such a project could require a CWA Section 404 permit for the construction of the facility.

[8] "Discharge" is also a regulatory trigger under CWA Section 404, which regulates the discharge of dredged or fill material into waters of the United States.

[9] *See, e.g.*, *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012) (declining to rule on pending "water transfer" rule cases).