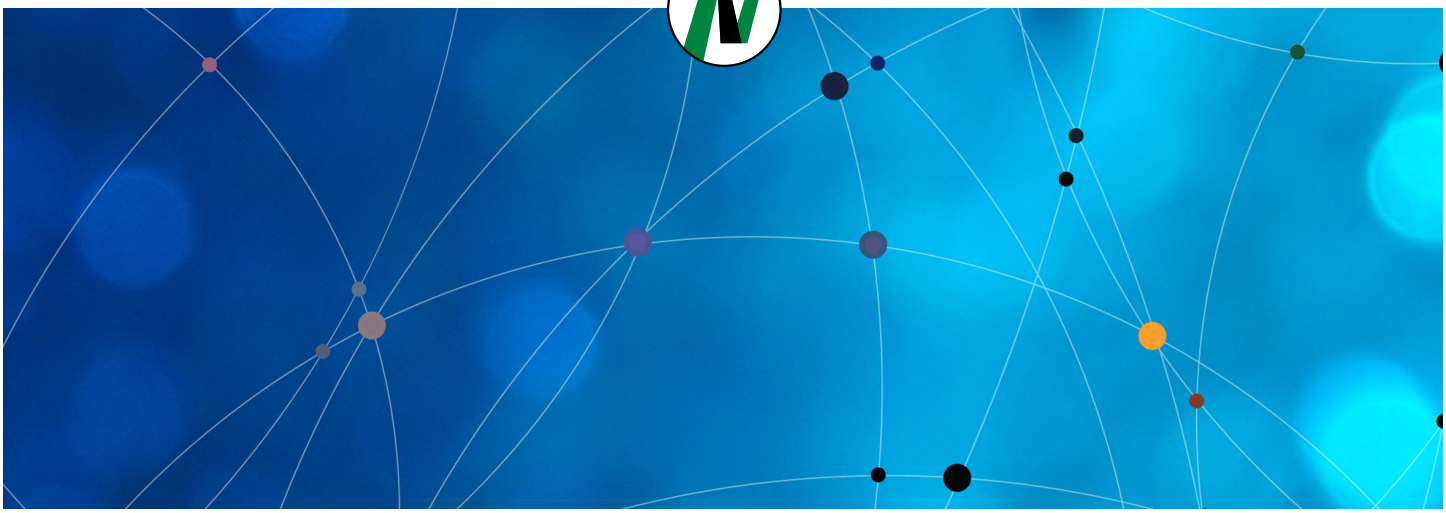

Supreme Court Reverses Ninth Circuit: Absent a "Discharge of a Pollutant" Receiving Water Exceedances are not a Violation of Clean Water Act

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On January 8, 2013, the United States Supreme Court reversed the Ninth Circuit Court of Appeals, which had found that the owner and operator of a storm drain system and permittee under a federal Clean Water Act (CWA) Section 402 National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer Discharge Permit (MS4 Discharge Permit) could be held liable for violating the MS4 Discharge Permit when receiving water monitoring demonstrated exceedances of receiving water quality standards. *Los Angeles Flood Control Dist. v. Natural Res. Def. Council, Inc*., No. 11-460, slip op. (U.S. Jan. 8, 2013). The Supreme Court reversed because the Ninth Circuit's ruling could not be squared with prior Supreme Court decisions requiring a "discharge of pollutants" to establish grounds for liability under Section 402 of the Act. *Id*. at 4 (emphasis in original). The Supreme Court reinforced that a "discharge of pollutants means any *addition* of any pollutant to navigable waters from any point source" under 33 U.S.C. § 1362(12) of the CWA.

Petitioner, the Los Angeles County Flood Control District (District), operates a municipal separate storm sewer system (MS4) that collects, transports, and discharges storm water and surface runoff. *See* 40 C.F.R. § 122.26(b)(8). The CWA and its implementing regulations require MS4 operators to obtain a NPDES permit before discharging such water into navigable waters. The District originally obtained its NPDES permit for its MS4 in 1990. The District's MS4 Discharge Permit has been renewed several times since 1990, most recently on November 8, 2012, effective December 28, 2012.

Respondents Natural Resources Defense Council, Inc. (NRDC) and Santa Monica Baykeeper filed a citizen suit against the District, among others, under section 505 of the CWA, 33 U.S.C. § 1365, alleging, *inter alia*,

that water-quality measurements from monitoring stations located within the Los Angeles and San Gabriel Rivers demonstrated that the District was violating the terms of its MS4 Discharge Permit, and, particularly, the "receiving waters limitations" of that permit.

Lower Court Proceedings
The trial court granted summary judgment to the District on NRDC's and Baykeeper's claims. It concluded that, although it was undisputed that data from the monitoring stations indicated that receiving water quality standards had repeatedly been exceeded for a number of pollutants, the record was insufficient to find that the District's MS4 was responsible for the discharges of the standards-exceeding pollutants detected by the downstream monitoring stations. The court noted that there were numerous entities that discharged into the rivers upstream of these monitoring stations.

The Ninth Circuit reversed. The court noted that the monitoring stations at issue were located in "concrete channels" within the Los Angeles and San Gabriel Rivers, which had been constructed for flood control purposes. It held that a discharge of pollutants occurred under the CWA when the polluted water detected at the monitoring stations "flowed out of the concrete channels" and entered unimproved portions of the downstream waterways that lacked the same concrete linings. The Ninth Circuit found that the District could be held liable for the discharges that occurred when water exited these concrete channels because the District exercises control over the concrete-lined portions of the river in which the monitoring stations were located.

Supreme Court Decision
The Supreme Court granted certiorari solely on the question of whether the flow of water out of a concrete channel within a river qualifies as a "discharge of a pollutant" under the CWA. In an opinion delivered by Justice Ginsburg, the Court held that such flows do not constitute the discharge of a pollutant under the CWA.

The Court based its decision on its earlier decision in *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004) (*Miccosukee*). There, the Court 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. Id. at 109-112. The Court based this holding on the text of the CWA, which defines a "discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any point source." Where no pollutants are "added" to a water body, but instead water is merely transferred between different portions of that water body, no "discharge of a pollutant" can occur. The Court, citing an earlier opinion from the Second Circuit, noted that "if 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 to the pot." *Id.* at 109-110.

Following the rationale of its earlier decision in *Miccosukee*, the Court held 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 therefore reversed the Ninth Circuit, as urged by more than 15 amicus briefs filed in the case, including an amicus brief by the Untied States.

The Supreme Court's decision provides important protections for all MS4 permittees, as well as others subject to the terms and conditions of MS4 permits, by reassuring dischargers and other regulated parties that some discharge or addition of pollutants is required to establish grounds for CWA liability. The decision also in dicates that regulators issuing federal CWA Section 402 NPDES permits for discharges of storm water (including U.S. EPA and, in California, the State Water Resources Control Board and the Regional

Water Quality Control Boards), should clarify the language of their storm water permits to eliminate any implication that violations of receiving water limitations are sufficient to establish violations of the NPDES Permit and the CWA. In California, the Supreme Court's decision could not be more timely because the State Water Resources Control Board is currently engaged in a regulatory process to consider and provide policy direction regarding proper receiving water limitations language that will be required to be included in all California storm water permits.