No. 11-460

In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL AND SANTA MONICA BAYKEEPER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondents Natural Resources Defense Council and Santa Monica Baykeeper represent that each organization is a non-profit corporation with no shares or debt securities in the hands of the public and no parent, subsidiary, or affiliates that have issued any shares or debt securities to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

INTRODUCTION

The Los Angeles County Flood Control District is regulated by a Clean Water Act permit that prohibits the discharge of polluted stormwater from its municipal separate storm sewer system (MS4) to the Los Angeles River and San Gabriel River. The District's self-monitoring revealed persistent violations of permit limits for more than a dozen pollutants in each river. Plaintiffs Natural Resources Defense Council (NRDC) and Santa Monica Baykeeper sued to enforce the permit. The District fought to evade any liability, testifying that it could not be held accountable even if its discharges "were so polluted with oil and grease that they were on fire as they came out of the system."

The court of appeals held that the District was responsible for the documented permit violations based on undisputed evidence that the District added pollutants to each river from its storm sewer outfalls. This fact-bound liability determination hinged on the language of the District's permit – the provisions of which were previously upheld by the California state courts with jurisdiction over that determination – and on the uncontested evidence of the District's polluted discharges.

In its petition to this Court, the District does not dispute these dispositive facts. Instead, in an attempt to generate an issue meriting review, the District advances a reading of the court of appeals' decision that contradicts its plain language. The District first claims that the court of appeals wrongly concluded that man-made improvements to a river "alter" the river's status as a navigable water subject to the Clean

Water Act. But the court held otherwise: that the Los Angeles River and the San Gabriel River are navigable waters, without regard to the District's physical improvements to those waterways.

The District next claims that the court of appeals improperly found the District liable for simply transferring water "within" a single water body. Again, the court did not so hold. It ruled that the undisputed evidence established that the District added polluted stormwater from its storm sewer outfalls into the Los Angeles River and San Gabriel River.

The court's holding therefore does not conflict with any decisions of this Court. And although the Ninth Circuit's ruling is important locally, it does not establish any new rule of law or conflict with any existing rule of law. Nor will it have the national reach that the District suggests; the court's liability determination was expressly based on the terms of this polluter's permit and the factual evidence of its discharges to two rivers.

The Court should deny review.

STATEMENT OF THE CASE

I. Factual Background

Stormwater runoff is a major source of water pollution in southern California. ER 302.[1] Water that

[1] In this opposition, ER, SER, and FER refer to the Excerpts of Record, Supplemental Excerpts of Record, and Further Excerpts

flows over industrial sites, parking lots, streets, and residential areas carries untreated pollutants through storm drains and into rivers and the ocean. App. 6, 106. The harm caused by this pollution is "comparable to, if not greater than, contamination from industrial and sewage sources." *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 840 (9th Cir. 2003).

The District operates an MS4 engineered to collect, channel, and discharge this stormwater runoff to inland rivers and the ocean. App. 8; 40 C.F.R. § 122.26(b)(8) (defining MS4). The District's MS4 consists of thousands of miles of gutters, drains, pipes, and outfalls, App. 8, ER 243, and it discharges dozens of pollutants that are picked up in stormwater, including fecal bacteria and toxic metals, App. 6, 17; ER 306-08. These pollutants are conveyed to rivers and to the ocean in enormous amounts every year, measured not in pounds but in tons. ER 337, 342. These discharges cause human illness, environmental harm, and an annual economic loss to the region of tens of millions of dollars. App. 6; ER 183-84, 302, 306-10, 344-50. Toxic plumes from stormwater runoff are detected miles off the coast of Los Angeles County in the open ocean. ER 337.

II. Statutory Framework

The Clean Water Act's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The law forbids any person to discharge any pollutant

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of Record filed in the court of appeals. Ct. App. Dkt. Nos. 15, 19, & 25.

from a point source into navigable waters, unless expressly authorized. *Id*. §§ 1311(a), 1342, 1362(12). "Point source" is defined to mean any discrete conveyance, such as a pipe or channel. *Id*. § 1362(14). A person who seeks to discharge any pollutant into navigable waters must comply with the terms and limits of a National Pollutant Discharge Elimination System (NPDES) permit. *Id*. §§ 1311(a), 1342; *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). A violation of an NPDES permit is a violation of the Clean Water Act. 40 C.F.R. § 122.41(a).

An NPDES permit must require the discharger to conduct water quality monitoring sufficient to determine whether it is complying with its permit limits. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1). Every discharger must certify its monitoring results under threat of criminal sanction for submitting false or incomplete information, 33 U.S.C. § 1319(c)(4), and is subject to federal or citizen enforcement for any reported permit violation, *id*. §§ 1319(a)-(b), 1365(a). These provisions require every discharger to "monitor and report on its compliance with its permit." *Sierra Club v. Union Oil Co.,* 813 F.2d 1480, 1483, 1491 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988); *see also* App. 39-40.

An MS4 is a "point source" under the Clean Water Act. 33 U.S.C. §§ 1342(p), 1362(14). Therefore, the discharge of pollutants from an MS4 into waters of the United States is unlawful unless the discharge complies with the terms of a valid NPDES permit. *Id*. § 1342(a), (p).

To obtain an MS4 permit, a municipality must submit an application containing a proposed monitoring program "for representative data collection" that identifies a proposed sampling location and explains "why the location is representative." 40 C.F.R. § 122.26(d)(2)(iii)(D). This representative sampling may be conducted at "instream stations" instead of particular MS4 outfalls. *Id*. The monitoring results are used "to determine compliance and noncompliance with permit conditions." *Id*. § 122.26(d)(2)(i)(F).

Congress empowered state agencies to implement the NPDES permitting program. 33 U.S.C. § 1342(b). For Los Angeles County, California law assigns that responsibility to the Regional Water Quality Control Board for the Los Angeles Region (Regional Board). Cal. Water Code § 13200(d).

III. The District's MS4 Permit

The Regional Board issued the District's current MS4 permit in 2001. App. 12-13. The permit regulates the interconnected MS4 owned by the District, Los Angeles County, and 84 incorporated cities. App. 12. The District owns and operates more of the MS4 infrastructure than all of the other co-permittee cities combined. App. 106. Each permit holder is responsible for the discharges "for which it is the operator." 40 C.F.R. § 122.26(b)(1).

The permit prohibits discharges from the MS4 that cause or contribute to the violation of water quality standards. App. 15. Water quality standards are maximum pollutant levels set by each state to protect public health and water quality. 33 U.S.C.

§§ 1311(b)(1)(C), 1313(c)(2)(A); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). These standards limit the MS4's discharges of fecal bacteria, arsenic, cyanide, mercury, and zinc, among other pollutants. App. 14.

The permit also prescribes a self-monitoring program to determine compliance with its terms. App. 17-18; ER 263. This monitoring program was designed by the District and its co-permittees. ER 353; FER 31. Under this program, sampling is conducted at designated "mass emission stations" in major rivers, including in the Los Angeles River and San Gabriel River. App. 17-18. This sampling measures MS4 discharges at instream stations, pursuant to 40 C.F.R. § 122.26(d)(2)(iii)(D), rather than from individual outfalls. App. 18-19. The mass emission stations in the Los Angeles River and the San Gabriel River are located within the portion of the MS4 owned and operated by the District; the MS4 includes channelized portions of both rivers, in addition to the drains and outfalls that discharge into the rivers. App. 18; ER 312.

The District's monitoring reports show that its MS4 discharges violated permit limits in the Los Angeles River and San Gabriel River more than a hundred times during the period covered by the complaint. App. 19. These exceedances are not disputed and include high levels of fecal bacteria, cyanide, and zinc. App. 19, 108; ER 358-64.

After the permit was adopted in 2001, the District unsuccessfully challenged it in state court. The District admitted that its discharges did not comply with water quality standards, FER 3, 6, but argued

that the permit must be read to include a "safe harbor" that relieves it of responsibility for violating water quality standards if it had tried to comply. App. 115; *In re L.A. Cnty. Mun. Storm Water Permit Litig.*, No. BS 080548, at 7 (L.A. Super. Ct. Mar. 24, 2005) (SER 234-37). The state trial and appeals courts rejected this reading of the permit. *Cnty. of L.A. v. Cal. State Water Res. Control Bd.*, 50 Cal. Rptr. 3d 619, 622 (Cal. Ct. App. 2006).

The permit's validity is therefore settled. The District is barred from raising a collateral attack on its permit in a federal enforcement proceeding. 33 U.S.C. § 1369(b)(2); *Gen. Motors Corp. v. EPA*, 168 F.3d 1377, 1381-83 (D.C. Cir. 1999); *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 77-78 (3d Cir. 1990).

IV. Procedural History

NRDC and Santa Monica Baykeeper filed this lawsuit to eliminate ongoing permit violations. The complaint alleged that the District's and Los Angeles County's polluted discharges contributed to violations of water quality standards in four rivers: the Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek. ER 453-57.

The district court agreed that MS4 discharges repeatedly violated permit limits, as demonstrated by the compliance monitoring results. App. 108, 117. The court further held that the District was responsible for the pollution measured at the monitoring stations in two of the watersheds – for the Los Angeles River and San Gabriel River – because the District owned and operated the MS4 at those monitoring locations. App.

118. But the court held that plaintiffs failed to identify the location of each defendant's particular "outflows" that discharged into each river, and thus failed to establish liability as a factual matter.[2] App. 101-02. The district court entered final judgment on these claims under Federal Rule of Civil Procedure 54(b), to permit NRDC and Santa Monica Baykeeper to appeal.

The court of appeals reversed in part. The court noted that the Clean Water Act prohibits the (a) discharge (b) of a pollutant (c) from a point source (d) to navigable waters (e) in excess of permit limits. App. 10. Four of these five elements are uncontested: Polluted stormwater is a "pollutant," the District's MS4 is a "point source," App. 9, all four watershed rivers are "navigable waters," App. 42, and the District's monitoring showed violations of permit limits, App. 19. Thus, the court noted that the only relevant disputed question was a factual one: whether plaintiffs presented evidence of each defendant's discharge of pollutants into each river. App. 42.

The court concluded that plaintiffs presented adequate evidence of discharges by the District into the Los Angeles River and San Gabriel River, App. 5, 44-46, because "polluted stormwater is discharged into the two rivers" through the District's outfalls. App. 5. The record showed that "[a]t least some outfalls for the MS4 were downstream from the mass-emissions stations," and thus "there is no dispute" that the District's MS4 "adds storm-water" to the Los Angeles and San Gabriel Rivers. App. 45. The court rejected the district court's requirement that plaintiffs identify

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[2] The term "outflow" does not appear in the Clean Water Act.

which of the District's particular outfalls discharged polluted stormwater into each river, concluding that "the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations." App. 45.

The court of appeals agreed with the district court that the proffered evidence failed to establish the District's liability for discharges into the other two rivers, the Santa Clara River and Malibu Creek, or the County's liability for discharges into any of the four rivers. App. 47, 49. Plaintiffs therefore prevailed against one of the two defendants in the case, with respect to two of the four rivers at issue.

The District petitioned for rehearing or rehearing *en banc*, arguing, among other things, that the permit includes a "safe harbor" provision that shields the District from liability for good faith violations. The panel voted unanimously to deny the petition for rehearing. App. 2. The court issued an amended opinion expressly rejecting the District's "safe harbor" argument, holding that "no such 'safe harbor' is present in this Permit," and noting that the California state courts and the district court below had all reached that same result. App. 37-38 & n.7. The court also denied the District's petition for rehearing *en banc*, with no judge of the court requesting a vote on whether to rehear the case *en banc*. App. 2.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied because this case does not satisfy the Court's criteria for certiorari review.

The District first claims that the court of appeals held that man-made improvements to a river alter that river's status as a navigable water, contrary to *Rapanos v. United States*, 547 U.S. 715 (2006). However, the court of appeals properly found that both the Los Angeles River and the San Gabriel River are navigable waters for their entire reach, consistent with *Rapanos*. App. 42. Every other court that has considered the question has agreed that an improved river can be a navigable water.

Second, citing *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), the District argues that it cannot be liable under the Clean Water Act if its activities consist entirely of transferring water within the same water body. However, the court of appeals found that the District violated its permit because of evidence of the District's discharges from a point source (the District's MS4 outfalls) into separate navigable waters (the Los Angeles River and San Gabriel River). The court did not find the District liable based on the transfer of water within a single water body, and thus the court correctly applied *Miccosukee Tribe*.

The fact-bound holding below turned on the evidence of the District's discharges into two rivers and the specific monitoring program included in the District's permit. Because the court's holding was specific to the language of the District's permit and the

evidence of each defendant's particular discharges, the decision will not have the national impact that the District and its *amici* predict.

I. The Court of Appeals' Decision Is Consistent with This Court's Precedent

A. The Decision Below Does Not Implicate *Rapanos*

In *Rapanos*, the Supreme Court considered in what circumstances wetlands could constitute "navigable waters" under the Clean Water Act. 547 U.S. at 719, 729. A four-Justice plurality concluded that the term navigable waters is limited to "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id*. at 739 (alteration in original; citation omitted). Justice Kennedy concurred in the judgment but concluded that wetlands are covered under the Clean Water Act if they have a "significant nexus" to navigable waters, meaning that "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters." *Id*. at 779-80.

The District argues that review is warranted here because the court of appeals purportedly held that only "naturally occurring" waters may be navigable waters. Pet. 20. This asserted holding, the District claims, conflicts with statements in Justice Kennedy's opinion in *Rapanos* and creates confusion concerning federal jurisdiction over similar water bodies. Pet. 20-21. The District's argument might be persuasive if it were true.

But the court of appeals held no such thing. To the contrary, the court explicitly held that the Los Angeles River and San Gabriel River are navigable waters, App. 42, even though much of each river has been converted into a concrete channel. Nothing in the court's liability determination depends on whether the rivers have been altered by man-made improvements.

Attempting to manufacture a conflict with *Rapanos*, the District declares that the court of appeals "somehow" held that improvements to a waterway "alter" or "transform" its status as a navigable water. *E.g.*, Pet. 15, 16, 20. But the District never cites the Ninth Circuit's decision when it refers, eight separate times, to what the court "somehow" held. Pet. 15, 16, 20, 26, 28, 29, 42. And the court nowhere concluded that improvements to a waterway alter or transform its status. To the contrary, the court stated that the Los Angeles River and the San Gabriel River are both navigable waters. App. 42. That statement is fully consistent with Justice Kennedy's suggestion in *Rapanos*, quoted several times by the District, that the Los Angeles River is a navigable water. Pet. 16, 21, 33.

Nor did the court of appeals hold, as the District asserts, that the movement of water from a concrete channel to "'naturally occurring' portions of the rivers" constituted a discharge. Pet. 14, 19, 43. Rather, the court alluded to naturally occurring watershed rivers to distinguish the rivers from the District's MS4 outfalls and the rest of the constructed MS4 infrastructure – the storm drains and thousands of miles of underground sewer pipes that ultimately discharge to the rivers. App. 8, 44, 46. This was relevant to show that the District adds stormwater to

both rivers from its MS4, App. 44-45, a factual point that the District does not dispute. The court of appeals never referred to "naturally occurring portions of the rivers," a term contrived by the District and then repeated throughout its petition. Pet. 14, 19, 43.

The District assigns great significance to the passing phrase "naturally occurring." Tellingly, however, the District's petition for rehearing or rehearing *en banc* made no mention of this supposedly pivotal term; nor did it argue that the court of appeals' decision is inconsistent with *Rapanos*. Ct. App. Dkt. No. 34-1. If the court of appeals had relied on a "newly-minted" theory of liability, that water flowing from a channel into "naturally occurring" portions of the rivers constituted a discharge, Pet. 19, contravening Supreme Court precedent in the process, presumably the District would have mentioned it in its petition for rehearing or rehearing *en banc*. Instead, for purposes of seeking certiorari review, the District concocted this purported holding to generate a dispute about the scope of the Clean Water Act that does not exist.

The District also claims that the court of appeals' decision is inconsistent with the Eleventh Circuit's holding in *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997). Pet. 21, 35. However, that court agreed that whether a water body is a navigable water does not turn on whether it is man-made or otherwise physically altered. *Eidson*, 108 F.3d at 1342. Nor is there any intra-circuit conflict, as the District asserts (Pet. 36); the two Ninth Circuit cases cited by the District – *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 532 (9th Cir. 2001), and *United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007) – reach the same result as the decision below. In any

event, certiorari is unwarranted to review a claimed intra-circuit conflict, especially because the court of appeals, without dissent, denied the District's petition for rehearing *en banc* on this question. *See Taylor v. United States*, 493 U.S. 906 (1989) (denying petition for writ of certiorari to consider intra-circuit split).

Finally, the District argues that this Court's review is necessary to provide clear guidance about Clean Water Act applicability to improved portions of navigable waters because of "confusion about what transpires when a municipality undertakes improvements within the course of navigable waters." Pet. 22. The District does not cite any cases indicating any confusion among the lower courts on this subject. Because the court of appeals' decision does not question the jurisdictional status of improved waters, it will not generate the "confusion" the District claims to fear.

B. The Decision Below Comports with *Miccosukee Tribe*

Petitioner also contends that the decision below conflicts with *Miccosukee Tribe*. Pet. 38. The District is wrong for three reasons.

First, *Miccosukee Tribe* governs what activities require an NPDES permit, an issue that is not in dispute here. In *Miccosukee Tribe*, the Supreme Court considered whether pumping water from a canal into a wetland constituted a "discharge" that required an NPDES permit. 541 U.S. at 102-03. The Court held that transferring pollutants within a single water body would not require a permit and remanded for a determination of whether the two water bodies

involved – the canal and wetland – were physically distinct or were in fact the same body of water. *Id.* at 110-12. The Court concluded that if the waters at issue "are two hydrologically indistinguishable parts of a single water body," no permit is required. *Id*. at 109, 112.

The District's MS4, unlike the water pumping station in *Miccosukee Tribe*, is defined by Congress as a point source that must be regulated by a permit. 33 U.S.C. § 1342(p); *see also* 40 C.F.R. § 122.26(b)(8) (defining MS4); App. 9. The Clean Water Act was amended in 1987 explicitly to require that MS4 discharges be regulated by the statute's NPDES permitting program. App. 29. The District's discharge of stormwater from its MS4 into the two rivers is therefore subject to a binding NPDES permit. *See* 73 Fed. Reg. 33697, 33702 n.7 (June 13, 2008) (affirming that the water transfer exception discussed in *Miccosukee Tribe* does not apply to MS4s); *Catskill Mountains Chapter of Trout Unlimited, Inc., v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (holding that the diversion of polluted water from a reservoir, through a tunnel, and into a creek constitutes a discharge of pollutants from a point source to navigable waters); *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs.,* 278 F. Supp. 2d 654, 679 (E.D.N.C. 2003) ("[b]ecause Defendants' ditches serve to channel and collect stormwater and other pollutants that are subsequently discharged into waters of the United States, these ditches are point sources" properly regulated by a permit).

Federal regulations further undercut the District's view. The term "discharge of a pollutant" is defined to include "surface runoff which is collected or

channelled" by man. 40 C.F.R. § 122.2; *see also Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied*, 513 U.S. 873 (1994). In *Mokelumne River*, the defendants "channelled" water and drainage into a river by diverting runoff, just like the District's MS4 does here, and thus it was "conclusively establish[ed] that defendants 'discharge a pollutant'" into the river. 13 F.3d at 308. The court below correctly held that MS4 operators "require permits for channeling" stormwater. App. 46 (citing 40 C.F.R. § 122.2).

Second, the *Miccosukee Tribe* exception applies only to activities occurring solely within a single water body or between two portions of the same water body. 541 U.S. at 112; *see also W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) (holding that the exception discussed in *Miccosukee Tribe* "only applies when pollutants are transferred from one navigable water to another"). The District's MS4 is not a "water body" identical to the rivers. It is a constructed physical infrastructure that includes catch basins, gutters, drains, pipes, and outfalls, in addition to channelized portions of some natural watercourses. App. 8; ER 243, 312. The court of appeals held that it is "undisputed" that the District's MS4 "collects and channels stormwater runoff from across the County." App. 8. Collecting polluted stormwater from parking lots, streets, and industrial sites, and then discharging it through gutters and drains into local rivers is not a transfer of water within a single water body. *See Huffman*, 625 F.3d at 167. The District cannot and does not argue that its MS4 – composed of gutters, storm sewers, and underground pipes – is in any way "hydrologically indistinguishable"

from the two rivers, as would be required for *Miccosukee Tribe* to apply. 541 U.S. at 109, 112.

The District states that the regulatory definition of "outfall" excludes "conveyances which connect segments of the same stream." Pet. 31 (citing 40 C.F.R. § 122.26(b)(9)). But the District never claims that its MS4 simply "connect[s] segments of the same stream." Nor could it. The District's MS4 includes external pipes and outfalls – thousands of them – that are separate from the rivers at issue in this case and that discharge polluted stormwater into those rivers. App. 8; ER 312.[3]

The court of appeals thus found that the District was liable for permit violations based on evidence of its discharges *from* the MS4 *to* the two rivers. App. 5, 45. The District misrepresents the court's decision when it claims that the court held "it was not necessary to show that petitioner's MS4 added pollutants to the rivers." Pet. 38-39. To the contrary, the court reviewed the evidence and concluded that it was undisputed that the District added pollutants to the rivers from its outfalls. App. 5 ("Specifically, Plaintiffs provided evidence that . . . polluted stormwater *is discharged* into the two rivers" by the District) (emphasis added); App. 44 ("[T]here is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River

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[3] The *amicus* brief filed by the Florida Stormwater Association admits what the District avoids mentioning: that the District's stormwater discharges are "transmitted through ditches, culverts, and other devices . . . *into* the receiving body of water," FSA Br. at 7 (emphasis added), effectively acknowledging that the District's *Miccosukee Tribe* argument is wrong.

and San Gabriel River."); App. 45 ("[T]here is no dispute" that the District's MS4 "*adds* storm-water *to* the Los Angeles and San Gabriel Rivers") (emphasis added). The holding in both courts below turned on the sufficiency of the factual evidence proffered. The court of appeals reversed the district court on "the factual issue on which the district court granted summary judgment . . . – whether any evidence in the record shows Defendants discharged stormwater that caused or contributed to water-quality violations." App. 40.

The court of appeals properly stated the rule of law that the District asserts should apply here. The court held that there must be proof of a discharge from an outfall into a navigable water to establish the District's liability. App. 42. Even assuming incorrectly that the court erred in finding that the factual evidence demonstrated such a discharge from the District's outfalls into two of the four rivers, App. 44-45, review should not be granted to consider the asserted misapplication of a properly stated rule of law. Supreme Court Rule 10.

Third, the District in reality is not challenging the court's liability determination but the compliance monitoring contained in its permit. Under the permit, the District's MS4 discharges are properly sampled not at one of the District's thousands of individual outfalls but at representative, instream locations that were proposed by the District itself in its permit application. App. 18, 37-40; ER 353. As the Regional Board explained, "the Permit incorporates the type of monitoring scheme that the permittees expressly requested in their permit application. That scheme determines compliance not at any city's individual

outfalls, but in-stream at 'mass emissions stations' . . . ." FER 31.

This monitoring scheme in the District's permit is both lawful and logical. 40 C.F.R. §§ 122.48(b), 122.41(j)(1), 122.26(d)(2)(iii)(D); 55 Fed. Reg. 47990, 48046 (Nov. 16, 1990). Federal regulations allow compliance monitoring to be conducted at a "representative" location that is not exactly at the point of discharge. 40 C.F.R. §§ 122.48(b), 122.41(j)(1). This can include "outfalls," "field screening points," or "instream stations." *Id*. § 122.26(d)(2)(iii)(D). The District's argument here – that monitoring conducted instream cannot be used to establish its liability – runs counter to the applicable Clean Water Act regulations, and the court of appeals correctly held that the District's assertion "if accepted would emasculate the [p]ermit." App. 34. The permit's validity is settled, and the District cannot attack it now. 33 U.S.C. § 1369(b)(2); *Gen. Motors Corp.*, 168 F.3d at 1381-83.

The fact that the District's discharges are monitored "instream" at mass emission stations does not mean that the District is simply moving water "within" a stream, as the District claims. The court's reliance on the permit's instream monitoring to measure compliance is consistent with the Clean Water Act and the language of the permit and does not implicate *Miccosukee Tribe*.

The consequence of the District's argument would be that the protections of the Clean Water Act could never apply to its discharges into these rivers. The District would be operating an entirely unregulated MS4, because the District's collection and discharge of polluted stormwater from parking lots, streets, and

industrial sites into rivers would be considered simply a "transfer" of water within the same water body. As the District admitted below, under its theory, it could never be liable for violating the permit, even if its discharges "were so polluted with oil and grease that they were on fire as they came out of the system." App. 43-44 n.8. The court of appeals correctly rejected this position as "untenable." App. 43 n.8.

II. The District's Petition Does Not Raise Any Issue of National Significance

The remaining issues raised by the Petitioner and *amici* do not rise to the level of national importance that warrants this Court's review.

The District alludes vaguely to impacts on "flood control planning" based on "uncertainty" about its "potential obligations," Pet. 44-45, but fails to say what those impacts are or how it could suffer any uncertainty. As explained above, all MS4s, including municipal flood control districts, have been defined as point sources subject to Clean Water Act regulation since Congress amended the statute in 1987. App. 29. The District's obligations are clear: Discharges from its MS4 into navigable waters must comply with the limits in the NPDES permit. App. 9-10; *see also Huffman*, 625 F.3d at 166 ("Both those who generate pollution and those who superintend ongoing discharges must obtain NPDES permits.").

Moreover, contrary to the District's suggestion, Pet. 43-44, the same solutions that would ameliorate permit violations would make the region *less* susceptible to flooding, not more, by promoting natural filtration of stormwater that would lessen the

discharges from the District's MS4. The Regional Board, when it adopted the permit, found that the benefits of permit implementation would include reduced flood damage, fewer illnesses from swimming in contaminated water, enhanced commercial fishing, improved aesthetic value, and better drinking water quality. ER 309-10. Flood control planning will therefore be strengthened, not compromised, by the District's permit compliance.

The District also insists that it is unlike a typical industrial discharger because its MS4 performs a public function in collecting and discharging stormwater. Pet. 43-44. The courts have unanimously held that a discharger's "intentions" are irrelevant; "the statute takes the water's point of view." *Huffman*, 625 F.3d at 167; *see also Mokelumne River*, 13 F.3d at 308. The Clean Water Act bans unpermitted discharges by "any person," 33 U.S.C. § 1311(a), and defines "person" to include states and municipalities in addition to private parties, *id*. § 1362(5). This ban is "sweeping in scope." *Huffman*, 625 F.3d at 162.

Finally, *amicus* the National Association of Flood and Stormwater Management Agencies (NAFSMA) claims that the ruling below "would throw a monkey wrench into the long-established approach to NPDES permitting and enforcement in general," which purportedly relies upon "measuring compliance for all permittees at the point of discharge from their outfalls into the receiving waters." NAFSMA Br. at 13. But NAFSMA ignores the federal regulation allowing MS4 compliance monitoring to be conducted at "instream stations" instead of at the point of discharge, 40 C.F.R. § 122.26(d)(2)(iii)(D), and the language of the District's permit, which requires compliance monitoring to be

conducted at the mass emission stations. App. 37, 40; ER 263. Other dischargers and regulatory agencies are free to agree on a different compliance monitoring scheme for their storm sewer systems if they choose, including monitoring from representative outfalls. 40 C.F.R. § 122.26(d)(2)(iii)(D), (d)(2)(i)(F). The court of appeals' decision interpreted only the District's permit and would not apply to a different discharger's permit with different monitoring provisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

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