No. _____

In The Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Water Act regulates the addition of pollutants to the navigable waters of the United States, including pollutants stemming from municipal stormwater systems. 33 U.S.C. §1342(p).

The questions presented by this petition are:

1. Do "navigable waters of the United States" include only "naturally occurring" bodies of water so that construction of engineered channels or other man-made improvements to a river as part of municipal flood and storm control renders the improved portion no longer a "navigable water" under the Clean Water Act?

2. When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Natural Resources Defense Council, Inc., and Santa Monica Baykeeper, plaintiffs, appellants below, and respondents here.
- Los Angeles County Flood Control District, defendant, appellee below, and petitioner here.

In addition, the County of Los Angeles was a defendant in the underlying action and an appellee in the proceedings below, but is not a party to the petition in this Court.

There are no publicly held corporations involved in this proceeding.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – Continued

STATE STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The July 13, 2011 order and opinion of the United States Court of Appeals for the Ninth Circuit that is the subject of this petition is reported at ___ F.3d ___, 2011 WL 2712963 (9th Cir. 2011) and reproduced in the Appendix hereto ("App.") at pages 1-50. The Ninth Circuit's initial opinion was published at 636 F.3d 1235 (9th Cir. 2011) and is reproduced in the Appendix at pages 51-97.

The district court's two orders granting petitioner's motion for summary judgment with respect to the claims involved in this petition are not published and are reproduced in the Appendix at pages 98-102 and 103-32, respectively.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit initially filed an opinion in this case on March 10, 2011. (App.51.) Petitioner timely filed a petition for rehearing. On July 13, 2011, the Ninth Circuit issued an order withdrawing its prior opinion and replacing it with an opinion filed that date, and denying the petition for panel rehearing and rehearing *en banc*. (App.1-2.)

28 U.S.C. section 1254(1) confers jurisdiction on this Court to review on writ of certiorari the July 13, 2011 opinion and judgment of the Ninth Circuit.

STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondents to enforce permit requirements pursuant to provisions of the Clean Water Act (33 U.S.C. §1342(p)), which provides in pertinent part:

> (p) Municipal and industrial stormwater discharges
>
> (1) General rule
>
> Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.
>
> (2) Exceptions
>
> Paragraph (1) shall not apply with respect to the following stormwater discharges:
>
> (A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
>
> (B) A discharge associated with industrial activity.
>
> (C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) 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.

The issues raised in this petition and addressed by the Ninth Circuit concern provisions of 40 C.F.R. section 122.26 in pertinent part:

(a) Permit requirement.

* * *

(3) Large and medium municipal separate storm sewer systems. (i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems. . . .

(b) Definitions.

* * *

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management

agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

STATEMENT OF THE CASE

A. The Clean Water Act's Regulation Of Municipal Stormwater.

In 1972, Congress adopted amendments to the Federal Water Pollution Control Act (33 U.S.C. §1251, *et seq.*). After subsequent amendments in 1977, the statutes became known as the Clean Water Act ("CWA" or "the Act"). The purpose of the CWA is to "restore and maintain the chemical, physical, and

biological integrity of the Nation's waters." 33 U.S.C. §1251.

In the CWA, Congress established the National Pollution Discharge Elimination System ("NPDES") (33 U.S.C. §1342), as one of the means to achieve the CWA's goals. *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992).

33 U.S.C. section 1342(a)(1) provides that the Administrator of the Environmental Protection Agency ("EPA") may issue an NPDES permit "for the discharge of any pollutant." The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source" or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft." 33 U.S.C. §1362(12). A "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. §1362(14). The EPA Administrator may delegate NPDES permit authority to a state. 33 U.S.C. §1342(b)-(c). California has been delegated this authority. *See* Cal. Water Code §13370. In California, NPDES permits are issued by the State Water Resources Control Board or a Regional Water Quality Control Board. *Id*. at §13377.

In 1987 Congress enacted the Water Quality Act amendments, which established a new statutory scheme for the regulation of stormwater runoff. 33 U.S.C. §1342(p). The amendments set forth dates by which certain categories of stormwater dischargers

were required to obtain permits (*see Natural Resources Defense Council v. EPA*, 1966 F.2d 1292, 1296 (9th Cir. 1992)), and also enacted special provisions addressing municipal stormwater permits.

The 1987 amendments provided that permits for discharges from municipal storm sewers:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) 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 control of such pollutants.

33 U.S.C. §1342(p)(3).

These provisions of the Act are focused on municipal separate storm sewer systems – "MS4s," which are systems handling only stormwater and not sewage.[1] Recognizing that it may be impracticable, or

[1] The Ninth Circuit refers to general municipal separate storm sewer systems as "ms4s," and the municipal separate storm sewer system maintained by petitioner as the "MS4." (*See* App.8 n.2.) For sake of clarity, petitioner will instead follow common practice, and use the term "MS4" as a simple abbreviation

(Continued on following page)

undesirable to issue individual permits for MS4s operated by multiple municipalities within a large geographic area, EPA promulgated regulations allowing issuance of a permit covering multiple MS4s. *See* 40 C.F.R. §122.26(a)(3)(i)-(vi).

B. The Permit That Is The Subject Of The Underlying Litigation.

In December 2001, the California Regional Water Quality Control Board, Los Angeles Region, issued an NPDES Permit to 84 cities, the County of Los Angeles and petitioner Los Angeles County Flood Control District ("District"). (Excerpt of Record, "ER" 180-86.) The purpose of the Permit was to regulate stormwater and urban runoff discharges from each of the 86 MS4s operated by the permittees. (*Id*.)

The Permit specifically recognized that "[c]ertain pollutants present in stormwater and/or urban runoff may be derived from extraneous sources that Permittees have no or limited jurisdiction over." (ER 182, Permit ¶B.2.) The Permit noted that "Federal, State, Regional or local entities within the Permittees' boundaries or in jurisdictions outside the Los Angeles County Flood Control District, and not currently named in this Order, may operate storm drain facilities and/or discharge storm water to storm drains and water courses covered by this Order." (ER 187, Permit

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for municipal separate storm sewer system and will indicate when it is referring to its own MS4.

¶D.2.) It further recognized the variability of stormwater discharges, finding that "[t]he quality of these discharges varies considerably and is affected by the hydrology, geology, land use, season, and sequence and duration of hydrologic events." (ER 182, Permit ¶B.1.)

Although the Permit was issued to 86 separate entities, under its terms, each permittee was responsible only for its own discharge: "Each Permittee is responsible only for a discharge for which it is the operator." (ER 199, Permit ¶G.4.) This is consistent with federal regulations: "*Co-permittee* means a permittee to an NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator." 40 C.F.R. §122.26(b)(1); *see also* ER 204, Permit, Part 3 D.1 (providing that the petitioner District, designated as principal permittee, "is not responsible for ensuring compliance of any individual Permittee").

The Permit also included a monitoring and reporting program. (ER 258-79.) The primary objectives of the monitoring and reporting program were: assessing compliance with the Permit; measuring and improving the effectiveness of the stormwater quality management plans; assessing the chemical, physical and biological impacts of receiving waters resulting from urban runoff; undertaking the characterization of stormwater discharges; identifying sources of pollutants; and assessing the overall health and evaluating long-term trends in receiving water quality. (ER 263.) These objectives would be accomplished through

various activities, including the monitoring of "mass-emissions" at seven mass-emissions monitoring stations. (ER 263.)

C. The Lawsuit.

On March 3, 2008, respondents Natural Resources Defense Council and Santa Monica Baykeeper filed a complaint against the County of Los Angeles, individual members of its Board of Supervisors in their official capacity, the head of the Los Angeles County Department of Public Works, and petitioner District under 33 U.S.C. section 1365(a). Respondents subsequently filed a first amended complaint asserting six claims for relief, with the first four claims alleging that discharges from the County's and petitioner District's MS4s caused or contributed to exceedances of water quality standards at the mass-emissions monitoring stations in the Santa Clara River, Los Angeles River, San Gabriel River, and Malibu Creek watersheds in violation of Part 2.1 of the Permit. (ER 453-58; *see also* 414, 426, 430-45.) The district court referred to these allegations as the "watershed claims."

D. The District Court's Decision.

Respondents moved for partial summary judgment against petitioner District with respect to exceedances of water quality standards in the Los

Angeles and San Gabriel Rivers. (App.104; ER 9.)[2] Defendants, including petitioner, also moved for summary judgment as to all watershed claims. (App.105; ER 9.)

Respondents contended that exceedances measured at the mass-emissions monitoring stations in and of themselves established a violation of the Permit that could be fairly attributable to the petitioner District's MS4. (App.117-18.) Defendants, including petitioner, contended in turn, that the mass-emissions monitoring station data could not be used to determine compliance with the Permit (a contention rejected by the district court) and there was no evidence of a "discharge" from defendants' MS4 that violated the Permit. (App.116.)

The district court initially denied both motions for summary judgment, concluding that an issue of fact existed as to whether pollutants in discharges from the District's MS4 exceeded the water quality standards set by the Permit. (App.105, 121-22.)

At the same time, the district court rejected respondents' contention that because the monitoring stations were within channelized portions of the rivers operated by District as part of its flood control system, the District was responsible for any exceedances measured there. This was because in order

[2] The parties moved for summary judgment with respect to other claims that are not relevant to this petition.

for there to be a discharge for which the petitioner District could be liable, it was necessary that water be discharged from a "point source," and this Court had expressly held in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that simply moving water between two portions of the same water body did not constitute a "discharge" from a point source under the Clean Water Act. (App.119.) The district court emphasized that there was no evidence that the Los Angeles River and San Gabriel River below the mass-emissions monitoring stations were bodies of water distinct from the MS4 above the monitoring stations, and found there was no evidence to "show where the MS4 ends and either River begins." (App.119.)

As the district court observed:

> In order for the District's actions to violate Part 2.1 of the Permit, it must be discharging pollutants from a point source. The Court has been presented with no evidence clearly establishing that the District is discharging pollutants from any given point source at or near the monitoring stations.

(App.119.)

The district court ordered the parties to file supplementary pleadings indicating whether there were any facts showing that the standards-exceeding pollutants identified at the mass-emissions monitoring stations had at any time passed through defendants' "outflows" at or near the time the exceedances

were observed in the monitoring station data. (App.122.)

On April 26, 2010, following receipt of supplementary briefing, the district court granted summary judgment to petitioner on all watershed claims. (App.98.) The court found that respondents had failed to present evidence that the standards-exceeding pollutants passed through the District's MS4 outflows at or near the time the exceedances were observed. (App.100.) Nor did respondents provide any evidence that the mass-emissions monitoring stations themselves are located at or near one of petitioner's outfalls. (*Id*.) The court again emphasized, that under the Permit, the District was only a co-permittee and that it could not be held liable for exceedances that may have been caused by discharges from outflows maintained by other co-permittees upstream from the mass-emissions monitoring stations. (App.101-02.)

E. The Ninth Circuit's Decision.

Following briefing by the parties and oral argument, on March 10, 2011, the Ninth Circuit issued its published opinion reversing the district court in part, and directing the court to enter summary judgment for respondents as against petitioner with respect to the watershed claims regarding the Los Angeles and San Gabriel Rivers. (App.51-52, 93-94, 96-97.) Writing for the court, Judge Smith agreed with the district court that, contrary to respondents' contention, the mere presence of polluted stormwater at the

mass-emissions monitoring stations did not *ipso facto* establish petitioner's liability. (App.88-89.) However, the Ninth Circuit held that the district court had erred in concluding that there had not been a "discharge" under the CWA from the petitioner's MS4 into the Los Angeles or San Gabriel Rivers. The court found that the monitoring stations were in concrete channels maintained by petitioner as part of its MS4 and hence, when water exited these channels and flowed back into the "naturally occurring" portions of the "rivers," this constituted a "discharge" from an "outfall" for purposes of imposing liability on the District for violation of the Permit. (App.91-92.) The court explained:

> [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 and San Gabriel River. Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in a section of the MS4 owned and operated by the District, when pollutants were detected, they had *not* yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted storm-water at the time it was measured or who caused or contributed to the exceedances when that water was again discharged into the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state

> *man-made* construction – not a *naturally occurring* Watershed River.

(App.91-92 (emphasis added).)

> The court continued:
>
> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

(App.92.)

The District timely filed a petition for panel rehearing and rehearing *en banc*. Petitioner noted that the Ninth Circuit's opinion adopted a theory of liability that had not been briefed by the parties, namely that the District's channelization of portions of the Los Angeles and San Gabriel Rivers where the mass-emissions monitoring stations were located, somehow transformed these portions of the rivers from being navigable waters into non-navigable discrete portions of the District's MS4 so as to allow a "discharge" from an "outfall." As the District explained, this was flatly contrary to uniform statutory and case law holding that artificial channelization of navigable waters does not alter their character

for purposes of the CWA. Indeed, as the District observed, Justice Kennedy, in his concurring opinion in *Rapanos v. United States*, 547 U.S. 715, 769 (2006), had noted that the Los Angeles River "has been encased in concrete and steel over a length of some 50 miles."

Moreover, the District noted that the court's *sua sponte* resolution of the heretofore unbriefed and uncontested issue concerning navigability was directly contrary to the EPA's specific finding in a report readily available on its website that the *entire* Los Angeles River, from its mouth to its headwaters, including the channelized portions noted in the Ninth Circuit opinion, was a "traditional navigable water" of the United States.[3]

Further, the District pointed out that by holding that channelizing portions of the navigable rivers somehow transformed their character so as to create a discharge from an outfall within the meaning of the Clean Water Act, the court had effectively overruled this Court's decision in *Miccosukee Tribe*, since the court was finding a permit violation based on transfer of water within a single navigable body of water.

The Ninth Circuit requested respondents to respond to the petition for rehearing, and respondents did so.

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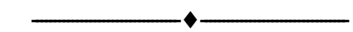
[3] http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf accessed March 30 and October 7, 2011. The District requested judicial notice of the EPA report.

On July 13, 2011, the Ninth Circuit issued its order withdrawing its prior opinion, and issuing a new opinion. (App.1-2.) The only major modification of the prior opinion was to address an argument raised by the parties in their briefing that was not addressed in the prior opinion concerning the appropriate remedy in the event violations were found. (App.37-38.) However, the court repeated, verbatim, its reasoning from the prior opinion that the District was liable for a "discharge" from an "outfall" based on the fact that the monitoring stations were within portions of the river that the District, as part of its MS4, had improved with concrete channels. (*See* App.44-45, and *compare to* App.91-92.) The court did not address any of the points raised in the petition for rehearing concerning long-standing law that a water body's status as a navigable water for purposes of the CWA was not affected by its man-made nature. It declined to address, let alone reconcile its holding with the EPA's own determination that the Los Angeles River, including the channelized portions, constituted navigable waters, and summarily denied the request for judicial notice.

Nor did it address this Court's holding in *Miccosukee Tribe* that there could not be a "discharge" within the Clean Water Act based upon merely transferring water from one portion of a single body of water into another.



REASONS WHY CERTIORARI IS WARRANTED

The Clean Water Act regulates discharge of pollutants into the navigable waters of the United States from stormwater runoff. It does so by imposing a permit scheme for medium and large municipalities to discharge stormwater into navigable waters. 33 U.S.C. §1342(p).

Here, respondents Natural Resources Defense Council and Santa Monica Baykeeper sued petitioner Los Angeles County Flood Control District, asserting that it had violated its stormwater permit by improperly discharging stormwater that exceeded water quality standards into the Los Angeles and San Gabriel Rivers. Respondents made no effort to establish that any of the District's outfalls along the banks of either river discharged stormwater containing levels of pollutants exceeding those allowed by the Permit. Instead, respondents argued that they need not show a discharge – it was enough that the monitoring stations downstream from these outfalls – monitoring stations which they admitted were in the Los Angeles and San Gabriel Rivers – indicated the presence of pollutants exceeding the Permit's standards.

Both the district court and the Ninth Circuit rejected respondents' argument, noting that numerous other entities above the monitoring stations also discharged stormwater into the rivers, and that it was necessary for plaintiffs to provide some evidence

that the pollutants at issue stemmed from a District outfall, and not from somewhere else. Indeed, the district court granted summary judgment to petitioner District on this claim, noting that plaintiffs had not provided any evidence to establish any discharge by the District.

Astonishingly, the Ninth Circuit nonetheless reversed, relying on a newly-minted theory of liability, one not argued or relied upon by the parties. Even though respondents admitted that the monitoring stations were located in the Los Angeles and San Gabriel Rivers, the Ninth Circuit held that since the monitoring stations were in channelized portions of the rivers the District maintained for flood control, water flowing out of those channels into "naturally occurring" portions of the rivers downstream constituted a "discharge" from an "outfall" for purposes of finding a permit violation by the District. In sum, the Ninth Circuit held that the rivers lost their character as navigable waters when they were channelized for flood control, and were then transformed back into navigable waters when flowing into "naturally occurring" portions of the rivers.

The Ninth Circuit's unprecedented – and unsupportable – construction of the Clean Water Act is directly contrary to the decisions of this Court and uniformly accepted statutory interpretations defining navigable waters of the United States under the Clean Water Act, or a "discharge" within the meaning of the Act. As a result, it has caused confusion and threatens ongoing disruption with respect to one of

the most fundamental services that public entities provide – stormwater and flood control. It also creates confusion as to the jurisdiction of federal agencies, the EPA and U.S. Army Corps of Engineers, to regulate water bodies as navigable waters. Thus, certiorari is warranted for the following reasons.

1. Review is necessary because the Ninth Circuit's holding that only "naturally occurring" waters may be navigable waters of the United States, and that man-made improvements somehow transforms that status under the Clean Water Act, is directly contrary to the statutory scheme of the Act, the decisions of this Court, as well as other federal courts.

Nothing in the provisions of the Clean Water Act nor accompanying regulations suggests that the status of a body of water as a "navigable water" depends upon whether it is man-made or "naturally occurring." 33 U.S.C. §1362(7); 40 C.F.R. §122.2. In fact, the phrase "naturally occurring" was invented by the Ninth Circuit out of whole cloth and is nowhere referenced in the regulatory scheme.

In *Rapanos v. United States*, 547 U.S. 715 (2006), a sharply divided Court differed on a precise definition of what constituted a navigable water of the United States, but neither of the tests urged by the plurality and concurring opinions turned upon whether a body of water was artificially altered or "naturally occurring." Both opinions expressly recognized that man-made bodies of water could constitute navigable waters. In his concurring opinion in

Rapanos, Justice Kennedy specifically identified the Los Angeles River as fitting the statutory definition, observing that, "it periodically releases water volumes so powerful and destructive that it has been incased in concrete and steel over a length of some 50 miles." 547 U.S. at 769. Not surprisingly, the circuit courts, including the Ninth Circuit itself, have previously recognized that man-made channels may be waters of the United States under the Act. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) [irrigation channels]; *United States v. Eidson*, 108 F.3d 1336, 1342-43 (11th Cir. 1997), *overruled on other grounds*, *United States v. Robison*, 505 F.3d 1208, 1215 (11th Cir. 2007) [man-made storm drainage ditch].

The confusion wrought by the Ninth Circuit's decision is not limited to claims involving the Clean Water Act and municipal stormwater systems. The very premise of the Ninth Circuit's opinion – that the status of a water body as a navigable water may vary depending upon man-made alterations – has an impact across the board on claims under the Clean Water Act since discharge into the navigable waters is a *sine qua non* of federal regulation under the Act. Indeed, the EPA and Army Corps of Engineers derive their authority under the Act from the status of water bodies as navigable waters. The Ninth Circuit's opinion casts doubt on the basic regulatory authority of these agencies.

2. Review is necessary because the Ninth Circuit's decision imposes liability under the Clean

Water Act for a "discharge" of pollutants within a single body of water, in direct contravention of this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). In *Miccosukee Tribe*, the Court emphasized that simply transferring water from one portion of a single body of water into another portion cannot constitute the "addition" of pollutants for purposes of the Clean Water Act. *Id*. at 107. Nonetheless, here, the Ninth Circuit has adopted precisely the opposite view, concluding that water flowing from one channelized portion of a river into another portion of the same river constitutes a discharge from a point source and outfall within the meaning of the Clean Water Act. The Ninth Circuit's decision is irreconcilable with *Miccosukee Tribe*.

3. Review is essential in order to provide clear guidance to the EPA, state permitting agencies and regulated municipalities concerning application of the Clean Water Act to improved portions of navigable waters of the United States that serve as flood control systems, and incidentally, municipal separate storm sewer systems. Although petitioner believes that under existing case and statutory authority resolution of the issue should be clear, as the Ninth Circuit's opinion underscores, there is confusion about what transpires when a municipality undertakes improvements within the course of navigable waters of the United States.

The confusion created by the Ninth Circuit's decision imposes a particularly onerous burden on

petitioner Los Angeles County Flood Control District, an entity that, as the Ninth Circuit acknowledges, covers a vast area. It is responsible for safeguarding from flooding and stormwater damage billions of dollars worth of property and the lives of citizens in the most populous county in the United States. It does so by maintaining a flood control system including large portions of the Los Angeles and San Gabriel Rivers – rivers that, by necessity, have been subject to man-made alteration throughout much of their length. Decisions involving expenditure of tens of millions of taxpayer dollars and impacting the lives and property of millions of citizens should not and cannot be based on speculation about the potential legal ramifications of engaging in basic flood control.

Moreover, virtually every major metropolitan area in the country borders a navigable water of the United States and many are subject to the MS4 permitting requirements. Municipalities across the country have modified traditional waters through channelization. By its nature, flood and stormwater control requires advance planning and a massive commitment of public funds and resources. It is vital that local entities be able to assess sooner, rather than later, potential obligations stemming from efforts to alter adjoining rivers, lakes or streams as part of basic flood and stormwater control.

In the nearly 25 years since incorporation of the stormwater permitting requirements in the Clean Water Act, this Court has never addressed the scope of these requirements. As the Ninth Circuit's decision

here underscores, it is essential that the Court now do so.

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING THAT MAN-MADE IMPROVEMENTS TO A NAVIGABLE WATER OF THE UNITED STATES SUCH AS CHANNELIZATION AS PART OF FLOOD CONTROL OR A MUNICIPAL SEPARATE STORM SEWER SYSTEM ALTERS ITS STATUS, IS INCONSISTENT WITH THE PROVISIONS OF THE CLEAN WATER ACT, THIS COURT'S DECISION IN *RAPANOS V. UNITED STATES* AND THE DECISIONS OF OTHER CIRCUITS.

The Clean Water Act regulates the addition of pollutants into the waters of the United States. With respect to stormwater from municipal systems, the Act provides for the issuance of permits to municipalities on an individual or collective basis concerning discharge from municipal separate storm sewer systems – MS4s. 33 U.S.C. §1342(p)(3); 40 C.F.R. §122.26.

The Ninth Circuit held that respondents had established that petitioner had discharged pollutants in excess of standards set forth in the Permit, because exceedances were shown by mass-emissions monitoring stations in portions of the Los Angeles and San Gabriel Rivers that were maintained by petitioner as part of its MS4. The court did not find that respondents had shown that outfalls of petitioner's MS4 into

the rivers upstream of the monitoring stations discharged pollutants exceeding Permit standards into the Los Angeles and San Gabriel Rivers. (App.41-44.) Rather, the court concluded that improvements within the rivers could constitute point sources for purposes of a discharge through an outfall:

> Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in the section of the MS4 owned and operated by the District, when pollutants were detected, they had not yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intrastate *man-made* construction – not a *naturally occurring* Watershed River.

(App.44 (emphasis added).)

The court continued:

> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways.

(App.45.)

Respondents admitted in the district court that the monitoring stations in question were located *in* the Los Angeles and San Gabriel Rivers, respectively.[4] Given Respondents' admission that the monitoring stations were located in the rivers, the Ninth Circuit's conclusion that these portions of the rivers were somehow not navigable waters for purposes of the Clean Water Act was premised solely on its view that because those portions flow through "man-made" construction – not a "naturally occurring Watershed River" – they somehow lost their status as waters of the United States.

The Ninth Circuit's reasoning does not withstand scrutiny. Nothing in the applicable regulatory scheme suggests that a navigable water loses its character as such once man-made improvements are made. Moreover, both this Court, and the lower federal courts, have recognized that man-made alterations to a body

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[4] In their Statement Of Genuine Issues Of Material Fact In Dispute filed in opposition to defendants' motion for summary judgment, plaintiffs admitted that both monitoring stations were in the rivers. Defendants' first "uncontroverted" fact stated: "Plaintiffs allege that rainfall and urban runoff that becomes collected in the flood control system contain pollutants that are in excess of 'water quality standards' adopted by the Regional Board. The plaintiffs base their allegations on samples taken at 'mass emission stations' *located in the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek, and on samples taken at Surfrider Beach*." (District Court Dkt. 140 at 2, Fact No. 1 (emphasis added).) Plaintiffs' response was as follows: "First sentence: Disputed. . . . Second sentence: Undisputed." (*Id*.)

of water do not change its character for purposes of determining whether it is a navigable water under the Clean Water Act.

A. The Ninth Circuit's Conclusion That Man-Made Alterations To A Navigable Water May Change Its Character For Purposes Of The Clean Water Act Is Unsupported By The Act Itself And Relevant Regulations.

The Clean Water Act regulates the addition of pollutants to "navigable waters" which is defined by 33 U.S.C. section 1362(7), as meaning "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). The Act's implementing regulations in turn, define "waters of the United States" to mean:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (b) All interstate waters, including interstate "wetlands";
>
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, west meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) which are

> or could be used by interstate or foreign travelers for recreational or other purposes; (2) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
>
> (f) The territorial sea; and
>
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (a) through (f) of this definition.

40 C.F.R. §122.2.

Although the Ninth Circuit cited this regulation to support its conclusion that the man-made nature of the portions of the channels located in the Los Angeles and San Gabriel Rivers somehow altered the rivers' status as navigable waters so there could be a discharge from the District's MS4 within the meaning of the Clean Water Act, the language of the regulation belies that construction. Nowhere in 40 C.F.R. section 122.2 is it stated that a navigable water must be free of man-made improvements. Indeed, nowhere is there any reference to a "naturally occurring" body of water. (*Compare* 40 C.F.R. §122.2 *to* App.44.)

The Ninth Circuit cites no case holding or even suggesting that the status of a body of water as a navigable water changes depending upon whether it has been subject to man-made improvements. While the court cited *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001), nothing in that decision supports the strained proposition urged by the Ninth Circuit. In fact, in *Headwaters*, the Ninth Circuit found that man-made irrigation canals were "waters of the United States." 243 F.3d at 533.

Nor does the fact that the rivers were channelized for flood control purposes somehow alter their status as navigable waters. The Ninth Circuit suggests that because an MS4 *can* be a "point source," channelizing a portion of a river therefore transforms that portion of the river from a navigable water into a point source. (App.42.) This is apparently the basis for the Court's conclusion that "[a]s a matter of law and fact, the MS4 is distinct from the two navigable rivers. . . ." (App.44.)

The Ninth Circuit's analysis does not withstand scrutiny. To be sure, as the district court recognized, as both a factual and legal matter it may be difficult to discern where the rivers leave off and where petitioner's MS4 begins. In fact the EPA itself recognized that it might be difficult to draw a clear line between an MS4 and the navigable waters of the United

States.[5] Yet, review of regulations governing MS4s, particularly in light of the statutory and regulatory definitions of waters of the United States, utterly refutes the Ninth Circuit's suggestion that man-made improvements to navigable waters transform their status so as to allow a discharge under the Act.

40 C.F.R. section 122.26(b)(8), defines a municipal separate storm sewer system as a public owned "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)," "designed or used for collection or conveying stormwater," that "*discharges to waters of the United States*." *Id*. (emphasis added).

Without a doubt, channelization of the Los Angeles and San Gabriel Rivers was certainly the creation of a system "designed or used for collecting or conveying

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[5] As the EPA noted in the preamble to the proposed MS4 regulations:

> In addition to identifying outfalls from municipal storm sewer systems for the development of a management program to reduce pollutants in stormwater discharges, it is also important to identify the location of such outfalls to clarify where the storm sewer system ends and where waters of the United States begin. In many situations, waters of the United States that receive discharges from municipal storm sewers can be mistakenly considered to be part of the storm sewer system. Permit applicants should refer to the regulatory definition of waters of the United States at 40 C.F.R. § 122.2 for appropriate guidance.

53 Fed. Reg. 49453.

stormwater." 40 C.F.R. §122.26(b)(8)(ii). The channels, however, do not "discharge to waters of the United States." 40 C.F.R. §122.26(b)(8)(i). 40 C.F.R. section 122.26(b)(9), makes this clear when it defines "outfall" to mean:

> a point source as defined by 40 C.F.R. 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and *does not include* open conveyances connecting two municipal separate storm sewers, or pipes, tunnels *or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey the waters of the United States.*

40 C.F.R. §122.26(b)(9) (emphasis added).

In short, while petitioner may operate channelized portions of the Los Angeles and San Gabriel Rivers for flood control, as the applicable regulations indicate, this does not mean that the status of the rivers as navigable waters of the United States changed. To the contrary, the regulations make it clear that simply channeling navigable waters for flood control is not a "discharge" through an "outfall" – the rivers retain their status as navigable waters as they flow through the channels.

Moreover, as noted, the EPA has stated that the distinctions between MS4s and navigable waters should be drawn using its regulatory definitions of the term. 53 Fed. Reg. 49453. As previously discussed, that definition nowhere states or even

suggests that such waters must be "naturally occurring," free from man-made improvement. 40 C.F.R. §122.2.

No authority supports the Ninth Circuit's conclusion that man-made improvements, such as a concrete channel, alter the character of a navigable water of the United States so as to remove it from the statutory definition for purposes of the Clean Water Act.

B. The Ninth Circuit's Decision Is Inconsistent With *Rapanos v. United States*, And The Decisions Of Other Federal Courts.

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Court addressed the issue of whether particular wetlands constituted "waters of the United States" under the Clean Water Act.

The Court sharply divided on the construction of the phrase "waters of the United States." The plurality concluded that the phrase included only "relatively permanent, standing or continuous flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id*. at 739. The plurality further found that the phrase "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*.

Justice Kennedy concurred in the judgment, but rejected the plurality's rationale. Instead, he concluded that jurisdiction extends to wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id*. at 759. Justice Kennedy found that wetlands would "possess the requisite nexus" if "either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780.

Critically, both the plurality and Justice Kennedy recognized that man-made bodies of water could constitute "waters of the United States" under the Act. As the plurality observed, "a permanently flooded man-made ditch used for navigation is normally described, not as a 'ditch,' but as a 'canal.'" 547 U.S. at 736 n.7.

In his concurring opinion, Justice Kennedy invoked the Los Angeles River as emblematic of a "water of the United States" and highlighted the fact that it was subject to man-made improvements for virtually all of its length:

> The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. [Citation.] Yet it periodically releases water volumes so powerful and destructive

> that it has been encased in concrete and steel over a length of some 50 miles.

Id. at 769.[6]

The Court's recognition that "navigable waters of the United States" necessarily included man-made or improved water bodies is not surprising. This Court has found that improved waterbodies are "navigable waters," in defining Congress' regulatory authority under the Commerce Clause. *Kaiser Aetna v. United States*, 444 U.S. 170, 172-73 (1979) [private pond, dredged and opened to navigable waters, is a navigable water]. *See also, United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-08 (1940) [error to determine navigability based on natural conditions only; a waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids are required before commercial navigation may be undertaken].

Moreover, the regulations implementing the Rivers and Harbors Act, 33 U.S.C. §401 *et seq.*, provide that artificial channels, even those that are a "major portion" of a river, can constitute a navigable water of the United States. 33 C.F.R §329.8(a)(1)-(2). The regulations also provide that a water body which was "navigable in its natural or improved state . . . retains its character as 'navigable in law' even though

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[6] One author has described the Los Angeles River as "51 miles of concrete." B. Gumprecht, *The Los Angeles River: Its Life, Death, and Possible Rebirth* at 51 (1999).

it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions." 33 C.F.R. §329.9(a).

The lower federal courts have similarly recognized that navigable waters are not limited to unaltered "naturally occurring" bodies of water. In *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), *overruled on other grounds*, *United States v. Robison*, 505 F.3d 1208, 1215 (11th Cir. 2007), the court held that a drainage ditch into which the defendant had discharged industrial wastewater was a "navigable water" of the United States within the meaning of the CWA. 108 F.3d at 1339. The court rejected the contention that because the drainage ditch was man-made, it could not constitute a water of the United States for purposes of the Act:

> There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes. The fact that bodies of water are "man-made makes no difference. . . . That the defendants used them to convey the pollutants without a permit is the matter of importance."

108 F.3d at 1342.

Similarly, in *United States v. Vierstra*, ___ F. Supp. 2d ___, 2011 WL 1064526 (D.Idaho 2011), the court held that a man-made canal constituted a water of the United States because it met both the plurality

standard of *Rapanos* as well as the "significant nexus" requirement of Justice Kennedy's concurring opinion. 2011 WL1064526 at *3-*6.

Also, as noted, the Ninth Circuit itself in *Headwaters v. Talent Irrigation*, 243 F.3d 526, held that an irrigation canal fell within the definition of water of the United States. Similarly, in *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), applying *Rapanos*, the court held that a man-made creek constituted a water of the United States for purposes of the Act. 496 F.3d at 988-91.

It is impossible to square the Ninth Circuit's conclusion that channelizing the Los Angeles and San Gabriel Rivers altered their status as waters of the United States, with the applicable statutory and regulatory authority, the decision of this Court in *Rapanos*, and prior appellate decisions. The Ninth Circuit's departure from what had been previously believed to be established statutory and case authority mandates review by this Court.

C. The Ninth Circuit's Unprecedented Alteration Of The Definition Of What Constitutes A "Navigable Water Of The United States" Has Impact Beyond Regulation Of Stormwater.

The Ninth Circuit's decision here has a direct impact on the manner in which local entities maintain MS4s for purposes of regulation under the Clean Water Act. Nonetheless, because the Act itself addresses the

addition of pollutants to the navigable waters of the United States from all sources, the impact of the Ninth Circuit's opinion goes far beyond regulation of stormwater.

For example, *Headwaters*, *Moses*, *Eidson* and *Vierstra* were all non-stormwater cases but would likely come out differently if the Ninth Circuit's newly invented standard were applied. Moreover, the very authority of the EPA and the Army Corps of Engineers under the Act itself is derived from the status of water bodies as navigable waters.

The EPA has the authority to adopt new and modified water quality standards in "the navigable waters involved" if water quality standards submitted by a state are not consistent with applicable requirements of the Act or the Administrator determines that a revised or new standard is necessary to meet the Act's requirements. 33 U.S.C. §1313(c)(4). Further, both the EPA and states with delegated authority can adopt "total maximum daily loads" (TMDLs) for navigable waters where effluent limitations are not stringent enough to implement water quality standards for such waters. 33 U.S.C. §1313(d).

Likewise, under the Act, the Army Corps of Engineers issues permits for the discharge of dredged or fill material into "navigable waters." 33 U.S.C. §1344(a).

If improvements to a traditional navigable river render the improved sections no longer the original

navigable water, EPA authority to adopt new water quality standards and TMDL programs for those sections, and the Corps' authority to require permits for discharges of dredged and fill material into the improved channels, is called into question.

The Ninth Circuit's patently erroneous decision creates a ripple effect, sowing confusion the entire breadth of the Clean Water Act. It is essential that this Court grant review to bring clarity to a standard that must be applied by local and federal agencies on a daily basis.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING THAT PETITIONER MAY BE LIABLE FOR DISCHARGES RESULTING FROM WATERS OF THE LOS ANGELES AND SAN GABRIEL RIVERS PASSING THROUGH ITS CHANNELS WITHIN THE RIVERS, IS CONTRARY TO *SOUTH FLORIDA WATER MANAGEMENT DISTRICT V. MICCOSUKEE TRIBE OF INDIANS* WHICH FORECLOSES CLAIMS PREMISED UPON MERE TRANSFERS OF WATER WITHIN A SINGLE BODY OF WATER.

In holding that petitioner was liable for permit violations based upon waters of the Los Angeles and San Gabriel Rivers passing through the concrete channels in the rivers, the Ninth Circuit cited this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The Ninth Circuit noted that it was not

necessary to show that petitioner's MS4 added pollutants to the rivers, but rather, it was sufficient that petitioner's concrete channels within the rivers transported water containing pollutants that were then discharged from the channels into lower portions of the rivers. (App.46-47.)

Yet, while the Ninth Circuit correctly cited *Miccosukee Tribe* for the proposition that a "discharge of a pollutant" as defined by 33 U.S.C. section 1362(12), includes point sources that do not themselves generate pollutants, the Court flatly ignored the basic premise of *Miccosukee Tribe* – that a mere transfer of water between two points of a single body of water cannot constitute the "addition of pollutants" to a navigable water of the United States.

In *Miccosukee Tribe*, the issue before the Court was whether the flow of water from a canal into a reservoir a short distance away required a discharge permit under the NPDES. 541 U.S. at 98-99. The lower courts had held that a permit was required, concluding that the two bodies of water were distinct. *Id*. at 96.

Among the issues before this Court was whether a "point source" needed to be the original source of a pollutant in order to require a permit for discharging pollutants into waters of the United States. *Id*. at 105. The Court rejected the contention, concluding that "discharge of a pollutant" under 33 U.S.C. section 1362(12), "includes within its reach point sources that do not themselves generate pollutants." *Id*.

However, the Court agreed with the parties, that if the canal and reservoir were in fact not distinct bodies of water "but instead are two hydrologically indistinguishable parts of a single water body," no permit would be required. *Id*. at 109-10. As the Court explained:

> The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants. As the Second Circuit put it in [*Catskill Mountains Chapter of*] *Trout Unlimited, Inc.* [*v. New York,*] 273 F.3d 481, 492 (2d Cir. 2001), "'[i]f 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 else to the pot.'"

Id. at 95, 109-10.

Because the record did not contain enough information for the Court to determine whether the canal and reservoir were a single body of water, or distinct bodies of water, the Court remanded for further proceedings. 541 U.S. at 112.

In *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), the Court reaffirmed that "[t]he question in *Miccosukee* was whether a pump between a canal and an impoundment produced a 'discharge of a pollutant' within the meaning of §402 [citation] and the Court accepted the shared view of the parties that if two identified volumes of water are 'simply two parts of the same

water body, pumping water from one into the other cannot constitute an "addition" of pollutants'. . . ." 547 U.S. at 381.

Moreover, as previously noted, the federal regulations, consistent with this Court's view in *Miccosukee Tribe*, make it clear that an "outfall" or a "point source" with respect to an MS4 "does not include open conveyances connecting to municipal separate storm sewers, or pipes, tunnels or other conveyances *which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States*." 40 C.F.R. §122.26(9) (emphasis added).

Notwithstanding the Court's clear statement in *Miccosukee Tribe*, the Ninth Circuit's opinion does not even address the issue of whether the flow of Los Angeles and San Gabriel River waters through concrete channels and into allegedly "naturally occurring" waters can be squared with *Miccosukee Tribe*'s clear holding that there can be no discharge for purposes of permit requirements under those circumstances. The Ninth Circuit's silence with respect to this issue is inexplicable, given that petitioner pointed out this inconsistency with *Miccosukee Tribe* in its petition for rehearing.

The Ninth Circuit's decision calls into question the basic holding of *Miccosukee Tribe* by finding that man-made channels or other improvements within a river that is a navigable water may constitute a "point source" requiring an NPDES permit,

even though the channel merely conveys water from one portion of the river to another. The result is again confusion both with respect to how local entities may operate MS4s and, more generally, how parties are to assess permit requirements where, at the end of the day, the point source merely conveys water within a single water of the United States. For this reason, too, review is warranted.

III. REVIEW IS WARRANTED TO PROVIDE CLEAR GUIDELINES ON FUNDAMENTAL PROVISIONS OF THE CLEAN WATER ACT AND SPECIFIC PROVISIONS CONCERNING REGULATION OF STORMWATER.

The Ninth Circuit's decision here has thrown confusion into what had been previously settled principles concerning application of the Clean Water Act. The Ninth Circuit's suggestion that only "naturally occurring" bodies of water may be navigable waters of the United States and that man-made alterations somehow transform the status of a body of water, is contrary to the decisions of both this Court and other circuit courts, and indeed contrary to prior Ninth Circuit authority.

Similarly, the Ninth Circuit's conclusion that water flowing from the Los Angeles and San Gabriel Rivers through man-made channels comprising part of petitioner's MS4 can nonetheless constitute a discharge from a point source when such waters exit into

"naturally occurring" portion of the rivers, flies in the face of this Court's decision in *Miccosukee Tribe*.

As this Court recognized in intervening in both *Rapanos* and *Miccosukee Tribe*, what constitutes a navigable water of the United States or the discharge of a pollutant within the meaning of the Clean Water Act are fundamental inquiries that require clear standards as public entities struggle to apply them on a daily basis. These are ongoing, important questions that necessarily mandate resolution.

In addition, the Ninth Circuit's departure from principles articulated by this Court is compounded by a lack of clarity with respect to the provisions of the Clean Water Act as they relate to municipal separate storm sewer systems. This Court has never addressed application of the Clean Water Act to MS4s. While petitioner submits that the resolution of the issues presented in this case should be controlled by the Court's previous constructions of the Act, as the Ninth Circuit's decision reflects, there is clearly confusion in this area. As noted, the EPA itself, in proposing the initial regulations governing MS4s, observed that there might be difficulties in determining where an MS4 ends and navigable waters of the United States begin. *See*, *supra*, text accompanying note 5.

Municipalities across the United States that operate MS4s are subject to NPDES permitting requirements. Control of flood and stormwater is among the most vital functions performed by public entities to

safeguard the lives and property of their citizens. Few functions have a greater potential impact on the overall welfare of a community and demand expenditure of a proportionally large amount of public funds.

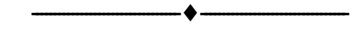
The standards governing MS4s affect every major city in the United States with a separate storm system. Yet, even if the Ninth Circuit's decision were confined to the Los Angeles area, its impact would be enormous. As the decision acknowledges, the area served by the Flood Control District is vast, encompassing 84 cities and various unincorporated areas within the County of Los Angeles. (App.6-7.) For basic public safety, the District, along with other governmental entities, has engaged in substantial modification of the Los Angeles and San Gabriel Rivers.[7]

By necessity, the District must expend substantial time and money in planning and undertaking improvements to the flood control system and its operations – decisions that require an understanding of all potential obligations. Quite simply, a failure to address the uncertainty created by the Ninth Circuit's

[7] Prior to these extensive man-made alterations, the Los Angeles River routinely overflowed its banks, resulting in devastating floods and loss of life at regular intervals – in 1884, 1886, 1889, 1914, and 1938. B. Gumprecht, *The Los Angeles River: Its Life, Death, and Possible Rebirth* at 158-60, 162-64, 167-68, 215-16. Climate and geology create the river's unique potential for devastating flooding. Occasional catastrophic rainfall and close proximity to steep mountains combine to create particularly fast flowing water – up to 45 miles per hour during storms. *Id*. at 224, 299. It is known, for good reason, as a "fifty-one mile storm drain." *Id.* at 173.

opinion will have a direct impact on the expenditure of tens of millions of dollars and decisions concerning the welfare of millions of citizens within the County of Los Angeles.

Finally, given the paucity of case law interpreting the Clean Water Act provisions concerning MS4s, the Ninth Circuit's decision will have an unduly negative impact on municipalities across the country. This is not an issue that can await further litigation in the appellate courts – flood control planning must and does occur on a daily and immediate basis. It is vital that municipalities know sooner rather than later what their potential exposure may be in undertaking their basic duties of flood and stormwater control. It is essential that this Court grant review.



CONCLUSION

For the foregoing reasons, petitioner submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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