No. 11-460

In The Supreme Court of the United States

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT,

Petitioner,

v.

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

Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The National Association of Flood And Stormwater Management Agencies ("NAFSMA") respectfully submits this brief as *amicus curiae* in support of the Petitioner, Los Angeles County Flood Control District (the "District").[1]

INTERESTS OF THE *AMICUS*

NAFSMA is a national non-profit association of municipalities, special purpose public districts and state agencies. Its members represent a broad nationwide spectrum of flood control, stormwater management, water conservation, and other water-related districts, bureaus, departments, and other instruments of local, regional and state government. NAFSMA's member agencies serve a combined population of millions of people nationwide and are responsible for the protection of lives, property and the environment from the impacts of storm and flood waters.

[1] Pursuant to Rule 37.2 of this Court, counsel of record for all parties was provided with notice at least 10 days prior to the deadline for its submission of NAFSMA's intention to file this *amicus* brief. All parties have consented to the filing of this brief and written consents are being lodged herewith. In accordance with Rule 37.6, NAFSMA represents that counsel for the *amicus* authored this brief in its entirety and that no person or entity other than the *amicus* and its representatives made any monetary contribution to the preparation or submission of this brief.

NAFSMA has an interest in this litigation because its members are directly involved in the administration of stormwater utilities and the implementation of stormwater management programs mandated by Section 402(p) of the Clean Water Act and by the state and federal regulations implementing that provision. Over the past decade, the nature and complexity of the measures required by municipal stormwater permits has increased dramatically, along with the threat of citizen suits seeking to impose liability for noncompliance with those requirements. The Ninth Circuit's decision in this case will seriously undermine the ability of NAFSMA's municipal stormwater permit holding members to demonstrate compliance with their permits, and will significantly increase the risk of wasteful litigation over the terms and conditions of those permits.

STATEMENT OF THE CASE

NAFSMA adopts the statement of the case contained in the District's Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision involves the resolution of an important question of federal law in a manner that conflicts with relevant decisions of this Court, because it found the Petitioner to be liable for the "discharge of a pollutant" that merely

passed from one portion of the same body of water to another.

Furthermore, if not reversed, the Ninth Circuit's decision would throw the entire NPDES permit program, including the municipal stormwater permit program, into disarray by virtue of the fact that the court found it was unnecessary to determine whether the pollutants in question were actually discharged through an outfall in the portion of the municipal stormwater system operated by the Petitioner.

ARGUMENT

I. THE DECISION BY THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH RELEVANT DECISIONS FROM THIS COURT

The Plaintiffs in this case alleged that the County of Los Angeles and the Los Angeles County Flood Control District are liable for violating the terms of their NPDES stormwater permit because exceedances of the applicable state water quality standards ("WQS") were measured at certain monitoring stations located in four "Watershed Rivers" within the Los Angeles region: the Los Angeles River, the San Gabriel River, the Santa Clara River and Malibu Creek. The District Court granted summary judgment to the Defendants on these claims because it found that the Plaintiffs had failed to present evidence sufficient for the court to determine whether stormwater discharged from the portion of the Municipal Separate Storm Sewer

System ("MS4") operated by the Defendants caused or contributed to the WQS exceedances detected at the monitoring stations located in each of the four rivers. Specifically, the District Court ruled that the Plaintiffs "failed to establish a basis for the court to find that standards-exceeding pollutants passed through County or District outflows upstream of the mass emissions stations at or near the time that exceedances were observed downstream." April 26, 2010 Order at 4. Explaining its decision, the District Court stated:

> That the pollutants must have passed through an outflow is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit. A co-permittee, including the county and the District, is responsible "only for a discharge for which it is the operator." Permit ¶ G.4 at 20 (emphasis added). *See also* 40 C.F.R. § 122.26(b)(1) ("Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is the operator.")

April 26, 2010 Order at 3.

On review, the Ninth Circuit agreed with both the District Court's reasoning and its decision with regard to the instream WQS exceedances observed in

the Santa Clara River and Malibu Creek. The court noted that:

> While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant. Indeed, the Permit specifically states that "discharges from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives are prohibited." "[D]ischarge of pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12). Under the Clean Water Act, the MS4 is a "Point Source." *See* 33 U.S.C. § 1342(p)(2), 1362(14). "Navigable waters" is used interchangeably with "waters of the United States." *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001). Those terms mean, inter alia, "[a]ll 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[.]" 40 C.F.R. § 122.2. ***The Watershed Rivers are all navigable waters.***

Slip Op. at 9459 (emphasis added). The Ninth Circuit agreed with the District Court that, on the record before it, it was not possible to establish responsibility for exceedances detected in the Santa Clara River and Malibu Creek, because it was unable to identify the relationship between the MS4 and the

mass-emission stations, which "are located within the rivers themselves." Slip Op. at 9463.

With regard to the exceedances detected in the Los Angeles and San Gabriel Rivers, however, the Ninth Circuit found, "as a matter of law and fact," that the rivers below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations. The basis for this finding was that the monitoring stations in those two rivers are in "concrete portions of the MS4 controlled by the District." Slip Op. at 9463. According to the Ninth Circuit,

> 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.

Slip Op. at 9461.

The Ninth Circuit's ruling is erroneous as a matter of law, and in direct conflict with relevant decisions from this Court. The court's only basis for distinguishing the location of the monitoring stations in the Los Angeles and San Gabriel Rivers from those in the Santa Clara River and Malibu Creek were that they were located in portions of those rivers that

(1) flowed through man-made, concrete channels, and (2) were owned and operated by the District. Neither of these facts can support the Ninth Circuit's erroneous legal conclusion that these locations were MS4 "point sources" rather than "navigable waters." As Justice Scalia wrote for the plurality in *Rapanos v. United States*, 547 U.S. 715, 736 (2006), the definitions contained in the Clean Water Act "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." Furthermore, although the definition of "point source" includes "ditch[es], channel[s], and conduit[s]," an open channel through which water permanently flows is ordinarily described as a "stream," not as a "channel," because of the continuous presence of water. *Id*. at 736 n. 7.

Other courts have found that whether various bodies of water are man-made makes no difference to their classification as navigable waters. *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997), *overruled on other grounds, United States v. Robinson*, 505 F.3d 1208 (11th Cir. 2007). Consequently, courts have acknowledged that ditches and canals, as well as streams and creeks, can be "waters of the United States." *Id*. The fact that portions of the rivers involved in this case are owned and operated by the District for flood control purposes is also irrelevant. As this Court has previously ruled, one cannot "denationalize" national waters by exerting private control over them. *S.D. Warren Co. v. Maine Bd. of Env.*

Protection, 547 U.S. 370, 379 n. 5 (2006) (citing *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913)).

What is more to the point, and indeed determinative in this case, is that ***all*** reaches of the Los Angeles and San Gabriel Rivers, including those in which the mass emission monitoring stations are located, are classified as "receiving waters" under the Petitioner's permit and the State of California's applicable water quality standards. Part 5 of the permit defines the "Receiving Waters" for discharges from the MS4 as "all surface water bodies in the Los Angeles Region that are identified in the Basin Plan." The "Basin Plan" refers to "the Water Quality Control Plan, Los Angeles Region, Basin Plan for the Coastal Watersheds of Los Angeles and Ventura Counties, adopted by the Regional Board on June 13, 1994 and subsequent amendments." *Id.* Reference to the list of streams identified in the Basin Plan shows that all portions of the Los Angeles and San Gabriel Rivers, from their headwaters to their estuaries, have been assigned a variety of beneficial uses by the Los Angeles Regional Water Quality Control Board – uses which in turn define the "Receiving Water Limitations" that apply to those waters.[2] *See* Basin Plan at

[2] Pursuant to CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A), each State adopts the applicable WQS for its waters, which consist of the "designated uses" of the waters involved and the "water quality criteria" based on such uses. The "Basin Plan" for the Los Angeles Region contains the WQS applicable to the rivers involved in this case.

Section 2 ("Beneficial Uses"); Table 2-1 ("Beneficial Uses of Inland Surface Waters"); Fig. 2-8 ("Major surface waters of the Los Angeles River watershed"); and Fig. 2-9 ("Major surface waters of the San Gabriel River watershed").[3]

The location of the mass emission monitoring stations at issue in this case was described in the Ninth Circuit's opinion by reference to the narrative descriptions contained in Section 2 of the "Los Angeles County 2006-07 Stormwater Monitoring Report," which is available at http://dpw.lacounty.gov/wmd/NPDES/2006-07tc.cfm. More enlightening is the map of those locations in Fig. 2-1 from the same report [reproduced in the Appendix to this brief], which can be readily compared with Figs. 2-8 and 2-9 from the Basin Plan cited above. There is no valid basis in fact or law to distinguish the mass emission monitoring stations located in the Los Angeles River (S10) and San Gabriel River (S14) from those in the Santa Clara River (S29) and Malibu Creek (S02). Because the portions of the rivers in which those stations are located are not distinct bodies of water from the downstream segments into which they flow, the Ninth Circuit's ruling in this case is in direct conflict with this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004). There, this Court held that if a

[3] All referenced sections of the Basin Plan are available at: http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/basin_plan/basin_plan_documentation.shtml.

canal and adjacent impoundment area were "simply two parts of the same water body," then the flow of water from one into the other "cannot constitute an 'addition' of pollutants." Since the Clean Water Act defines the "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), the mere fact that pollutants already within the rivers at issue in this case are allowed to flow past the monitoring stations located in those rivers cannot be held to violate the Act's prohibition against "discharges" that are not in compliance with the District's permit.

In *Miccosukee* this Court found it necessary to remand that case to the Eleventh Circuit to determine whether the canal and the impoundment were "meaningfully distinct water bodies." Here, however, the record is clear that the pollutants observed at the S10 and S14 monitoring stations are simply flowing from upstream to downstream in the same bodies of water – the Los Angeles and San Gabriel Rivers. Consequently, because there has been no "addition" of a pollutant to those waters, and no "discharge of a pollutant" that is attributable to any particular outfall from the Petitioner's MS4, this Court should grant the Petition for Certiorari and reverse the decision of the court below.

II. IF NOT REVERSED, THE NINTH CIRCUIT'S OPINION WOULD THROW THE ENTIRE MUNICIPAL STORMWATER PROGRAM, AS WELL AS THE NPDES PERMIT PROGRAM IN GENERAL, INTO CONFUSION

Since the inception of the National Pollutant Discharge Elimination System ("NPDES") nearly forty years ago, the program as administered by U.S. EPA and delegated state agencies has focused on establishing, and monitoring compliance with, water quality-based and technology-based effluent limitations for each outfall through which a permittee discharges to the receiving waters. The term "outfall" is not defined in the Clean Water Act, the relevant statutory provisions refer only to a "point source" from which pollutants are "discharged." *See* 33 U.S.C. § 1362(12), (14) and (16). However, U.S. EPA's implementing regulations in 40 C.F.R. Part 122 consistently use the term "outfall" as the point at which limits are to be imposed and compliance is to be measured. For example, 40 C.F.R. § 122.45(a) states that "All permit effluent limitations, standards and prohibitions shall be established for each outfall or discharge point of the permitted facility. . . ."

U.S. EPA's "NPDES Permit Writers' Manual," EPA-833-K-10-001 (September 2010)[4] states at 8-5 to

[4] Available at: http://cfpub.epa.gov/npdes/writermanual.cfm?program_id=45.

8-6 that "[e]ffluent monitoring locations should provide a representative sample of the effluent being discharged into the receiving water. . . . Most importantly, the point where a final effluent limitation applies and the point where monitoring is required must be the same. A logical effluent monitoring point is just before discharge to the receiving water." EPA's general NPDES permit regulations do not contain a separate definition of "outfall," but its common meaning has long been well-understood by permitting authorities and the regulated community. For example, U.S. EPA's "NPDES Compliance Inspection Manual," EPA 305-X-04-001 (July 2004)[5] defines "Outfall" at 18-10 as a "Point source where an effluent is discharged into receiving waters." For purposes the MS4 program, however, EPA has promulgated a very specific definition of "Outfall." Pursuant to 40 C.F.R. § 122.26(b) ("Definitions"):

> (9) *Outfall* means 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 waters of the United States***. (Emphasis added.)

[5] Available at: http://epa.gov/oecaerth/resources/publications/monitoring/cwa/inspections/npdesinspect/npdesmanual.html.

In holding that the pollutants detected at the monitoring stations in the Los Angeles and San Gabriel Rivers "had not yet exited the point source into navigable waters," the Ninth Circuit quotes only the first part of this definition, and omits the qualifying language highlighted above. Only by doing so was it able to reach the erroneous conclusion that a "discharge from a point source" occurred when polluted stormwater flowed "out of the concrete channels" and into the downstream portion of the Los Angeles and San Gabriel Rivers. Slip Op. at 9461. Having found the channelized portions of the rivers to be "point sources" rather than navigable waters, the court was then able to suggest that "the precise location of each outfall is ultimately irrelevant." *Id*.

If not reversed, the Ninth Circuit's holding that the river itself is both the point source and the outfall, so that WQS exceedances measured within the river are sufficient to impose liability on MS4 permittees without regard to the proximity of any actual outfalls from their systems, would wreak havoc in the administration of the MS4 permit program nationwide. In fact, it would throw a monkey wrench into the long-established approach to NPDES permitting and enforcement in general, which relies upon setting limits and measuring compliance for all permittees at the point of discharge from their outfalls into the receiving waters. The District Court decision reversed by the Ninth Circuit in this case properly emphasized the need to show that some amount of standards-exceeding pollutant is being discharged through at

least one District "outlet" or "outflow" or "outfall" into the receiving stream. *See* March 2, 2010 Order at 12-13; April 26, 2010 Order at 3.

The fundamental unfairness of the Ninth Circuit's decision is underscored by the fact that, in addition to the County and the District, there are 31 other municipalities directly or indirectly discharging stormwater to the Los Angeles River (identified as co-permittees in Appendix A of the permit), and the Fact Sheet for the permit reveals that there are another 1,327 direct or indirect dischargers covered by industrial stormwater permits, and 147 dischargers covered by construction stormwater permits. Fact Sheet/Staff Report at 12.[6] Similarly, on the San Gabriel River, in addition to the 29 municipal co-permittees, there are 549 industrial and 175 construction stormwater permittees. The Ninth Circuit would hold the District liable for the pollutants discharged by all of these permittees, regardless of whether they were transmitted through a portion of the MS4 operated by the District (i.e., its own pipes and outfalls, as opposed to the rivers themselves). Neither the permit in this case, nor the Clean Water Act and its state and federal implementing regulations can tolerate such a result.

[6] Available at: http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/los_angeles_ms4/staffreportfactsheetfinal.pdf.

CONCLUSION

The Ninth Circuit's decision in this case decides an important federal question in a way that conflicts with relevant decisions of this Court. For each of the foregoing reasons, NAFSMA respectfully requests that the District's Petition for Certiorari be granted and that the decision of the Ninth Circuit, which has serious negative consequences for municipal storm-water permittees throughout the country, be reversed.

Respectfully submitted,

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Appendix

Los Angeles County 2006-07 Stormwater Monitoring Report, Fig. 2-1

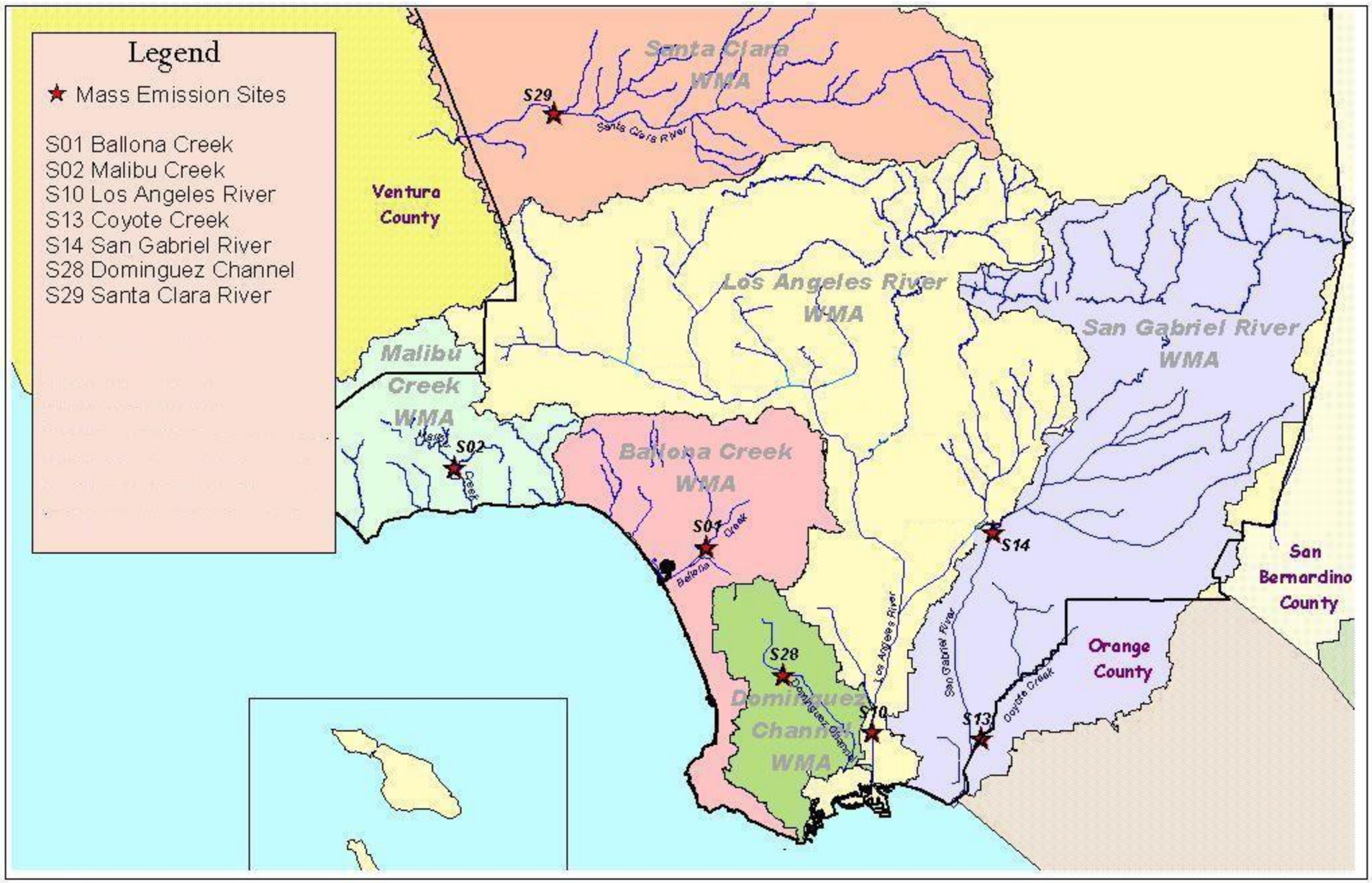

Figure 2-1
Mass Emission Sampling Sites

N W E S

3 0 3 6 9 Miles