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' SUPPLEMENTAL BRIEF

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RULE 29.6 STATEMENT

The disclosures in respondents' brief in opposition remain accurate.

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Respondents file this supplemental brief pursuant to Supreme Court Rule 15.8 to address the Brief for the United States as Amicus Curiae, filed on May 23, 2012.

DISCUSSION

The United States' brief correctly concludes that (1) the court of appeals' decision is consistent with this Court's precedent, (2) any factual misstatement in the opinion is irrelevant to petitioner's liability and is undeserving of this Court's review, and (3) the petition for a writ of certiorari does not raise any issue of national significance. The petition should therefore be denied.

I. The Court Of Appeals' Decision Is Consistent With This Court's Precedent

Respondents agree with the United States that the court of appeals did not base its decision on either of the sweeping legal conclusions attributed to the court by petitioner yet unarticulated in the opinion itself. U.S. Br. 11-12. The court neither ruled that man-made channels are outside the jurisdiction of the Clean Water Act, contrary to *Rapanos v. United States*, 547 U.S. 715 (2006), nor held that the movement of pollutants within a single water body constitutes a discharge under the Act, contrary to *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). Should the Court grant the petition for certiorari, respondents would not argue that either of these illusory rulings is correct.

Moreover, the decision could not plausibly be cited for either proposition, and there is therefore no risk

that the opinion will be misapplied by lower courts. First, the court of appeals held that both the Los Angeles River and San Gabriel River are navigable waters, App. 42, despite physical improvements to both rivers. It is far-fetched to suggest that a decision finding liability under the Clean Water Act for pollutant discharges into man-altered rivers stands for the incorrect proposition that man-altered rivers are entirely outside the scope of the Act. U.S. Br. 19.

Second, the court of appeals explicitly held that a liability determination requires proof of a discharge from a point source, App. 41-42, which the court properly defined as "'add[ing]' pollutants from the outside world to navigable water," App. 9 (citation omitted). In stating this well-established rule, the court cited the relevant discussion in *Miccosukee Tribe* that petitioner claims it overlooked, 541 U.S. at 102, to affirm that petitioner's liability depends on proof that it "discharged a pollutant." App. 41. The court further stated that "the primary factual dispute between the parties is whether the evidence shows any *addition* of pollutants by Defendants to the Watershed Rivers." App. 42 (emphasis in original). This dispute would have been irrelevant if petitioner were correct that the court determined "it was not necessary to show that petitioner's MS4 added pollutants to the rivers," in contravention of *Miccosukee Tribe*. Pet. 38-39.

The court of appeals therefore manifestly did not hold petitioner liable for the mere transfer of water within a single water body, U.S. Br. 11-12, and the decision could not be cited for that erroneous principle. Indeed, the decision has been cited to date by other courts only for the opposite and correct rule: that a finding of liability requires proof of a discharge of

pollutants into navigable waters. *Defenders of Wildlife v. Jackson*, No. 10-1915 (RWR), 2012 WL 896141, at *1 (D.D.C. Mar. 18, 2012); *Van Zanten v. City of Olympia*, No. C10-5216-JCC, 2011 WL 5299492, at *6 (W.D. Wash. Nov. 2, 2011).

II. Any Factual Misstatement Had No Bearing On Petitioner's Liability And Does Not Warrant This Court's Review

The United States concludes that, at most, the court of appeals' opinion appears to contain a factual misstatement that did not affect petitioner's liability and is not otherwise important. U.S. Br. 12. Respondents agree.

Any possible factual error relates only to the location of petitioner's outfalls with respect to the monitoring stations. U.S. Br. 18 (referencing the court's "apparent mistake as to the precise locations of the relevant monitoring stations"). The court of appeals correctly held, however, that the exact location of petitioner's outfalls is irrelevant, because the permit relies on representative compliance monitoring and not outfall monitoring to measure liability. App. 37-40, 45; *see also* 40 C.F.R. § 122.26(d)(2)(iii)(D) (compliance monitoring may be conducted at representative locations, including at "instream stations"). Petitioner does not challenge that holding in this Court. Thus, to the extent the court of appeals mischaracterized the particular location of the MS4 outfalls in relation to the monitoring stations, it made no difference to petitioner's liability. U.S. Br. 12.

Furthermore, any mistake of fact does not implicate the questions petitioner presented for review,

notwithstanding petitioner's effort to convert what was at most a factual misstatement into erroneous rulings of law. The court of appeals correctly held that the Los Angeles River and San Gabriel River are navigable waters. App. 42. The court also correctly held, pursuant to *Miccosukee Tribe*, that petitioner's liability must be based on proof that it discharged (or added) pollutants from its MS4 into those navigable waters. App. 9, 41-42. Neither holding depends on where the representative compliance monitoring is conducted.

Petitioner itself does not assert that the court of appeals made a mistake of fact, let alone that any mistake was relevant to the outcome below, and did not present that question to this Court in its petition for certiorari. Pet. i; Pet. Reply Br. 2-3; U.S. Br. 18 n.6. The Court should decline to consider the issue for that reason as well. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992) (the Court will not consider questions outside those presented in the petition for certiorari except "in the most exceptional cases") (citation omitted).

This Court routinely denies review to consider a purported mistake of fact. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); U.S. Br. 15. This is especially so when the lower court properly stated the governing rule of law, as it did here. Sup. Ct. R. 10; U.S. Br. 11-12, 17. There is no reason to depart from that rule in this case.

Finally, the court of appeals' ruling was both correct and equitable. Every Clean Water Act permit

"must include monitoring provisions ensuring that permit conditions are satisfied." App. 39 (citing 33 U.S.C. § 1318(a)(A)); U.S. Br. 4. As emphasized by the United States, petitioner chose the representative monitoring scheme used to assess compliance with its permit and did not challenge its adoption. U.S. Br. 6-7; C.A. FER 31. The results of that compliance monitoring showed uncontested violations of permit limits for fecal bacteria, heavy metals, and other pollutants. U.S. Br. 7; App. 19, 108. And there is no dispute that petitioner discharges these pollutants from its MS4 outfalls into both rivers, both above and below the monitoring stations, and that these outfalls include hundreds of "discernible, confined and discrete conveyance[s], including but not limited to any pipe, ditch, channel, [or] tunnel" within the plain meaning of the Clean Water Act's definition of "point source." 33 U.S.C. § 1362(14); *see also* App. 8-9, 20, 45; C.A. ER 17, 312; U.S. Br. 10. Nothing more is required for liability. App. 9-10.

In sum, to the extent the court's decision includes a factual misstatement, it did not affect petitioner's liability, is not identified in the petition, and does not merit certiorari review.

III. The Petition Does Not Raise Any Issue Of National Significance

The United States' brief properly underscores that the decision below has narrow ramifications because it is tied to the specific terms of petitioner's permit, including its distinctive monitoring scheme. U.S. Br. 12, 15. Neither petitioner nor its *amici* identify a discharger anywhere else in the country that will be

affected by the court of appeals' ruling.[1] U.S. Br. 15. In addition, petitioner's permit is currently being rewritten; the Regional Board announced in January its intent to propose a new permit with a different monitoring program in late Spring 2012.[2] This further weighs against this Court's review. U.S. Br. 15-16.

Petitioner claims that the court of appeals' decision creates confusion for federal agencies, including the Environmental Protection Agency and the Army Corps of Engineers. Pet. 20. But the United States, representing those agencies, rightly rejected this position as based on an "aberrant reading" and a "convoluted chain of reasoning." U.S. Br. 19. There is no confusion for this Court to address.

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[1] To the contrary, *amicus* the Florida Stormwater Association asserts that municipal dischargers in Florida could not be affected by this decision, because Florida state law requires different permit conditions than those at issue here. Fla. Stormwater Ass'n Br. 21.

[2] *See* Memorandum from Samuel Unger, Executive Officer, Los Angeles Regional Water Quality Control Board, to Board Members, Los Angeles Regional Water Quality Control Board, at 8, 12 (Jan. 20, 2012), *available at* http://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/la_ms4/MS4%20Memo%20012012.pdf.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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