No. 13-901

In The Supreme Court of the United States

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT, ET AL.,

Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

CHUCK THOMPSON
General Counsel and
Executive Director
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
7910 Woodmont Ave.,
Suite 1440
Bethesda, MD 20814
Tel. (202) 466-5424
cthompson@imla.org

RODERICK WALSTON
Counsel of Record
SHAWN HAGERTY
J.G. ANDRE MONETTE
REBECCA ANDREWS
BEST BEST & KRIEGER LLP
655 West Broadway, Suite 1500
San Diego, CA 92101
Tel. (619) 525-1300
Fax (619) 233-6118
roderick.walston@bbklaw.com

Counsel of Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the International Municipal Lawyers Association ("IMLA"), is a non-profit, professional organization of over 2,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the development of municipal law through education and advocacy, which includes providing federal and state courts with the collective viewpoint of local governments from across the United States.

IMLA's member agencies own and operate municipal separate storm sewer systems ("MS4s") that are permitted under the Federal Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program. As MS4 operators, IMLA's member agencies are faced with the ongoing challenge of controlling what amounts to "nonpoint

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party authored this brief in whole or in part, and neither such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All counsel of record have consented to the filing of this brief. Those consents are being lodged with this Court concurrently with this brief.

source" pollution through a point source regulatory system.

If it stands, the Ninth Circuit's decision to assign liability to the Los Angeles County Flood Control District ("District")[2] without evidence of discharge will become law throughout the Ninth Circuit, and persuasive authority in the rest of the Country. As explained more fully below, the Ninth Circuit's decision upends the existing regulatory scheme established by the Clean Water Act ("Act" or "Clean Water Act"), and holds MS4 dischargers such as the District liable for the general condition of Waters of the United States, without any evidence that any discharge violated the Act or that the discharger otherwise violated a permit condition.

As operators of large and small MS4s subject to the Clean Water Act's NPDES requirements, IMLA's member agencies have a substantial interest in this Court's review and potential reversal of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

On remand from this Court, the Ninth Circuit Court of Appeals reversed its decision in *Natural*

[2] The Los Angeles County Flood Control District is a division of Los Angeles County. For the purposes of this brief both are referred to as "District."

Resources Defense Council, Inc. v. County of Los Angeles, 673 F.3d 880 (9th Cir. 2011) (hereinafter, "*NRDC I*"), and held that the District violated its NPDES permit because data collected at monitoring stations in the Los Angeles and San Gabriel Rivers demonstrated those water bodies did not meet applicable Water Quality Standards. No evidence linked discharges from the District's MS4 to any exceedance of Water Quality Standards. *NRDC v. County of Los Angeles*, 725 F.3d 1194, 1200, 1209-10 (9th Cir. 2013) (hereinafter, "*NRDC II*"). The Ninth Circuit's decision was based on the mistaken premise that the monitoring stations were intended to determine whether the District was in compliance with its NPDES permit. *Id*. at p. 1206. Because the monitoring data showed pollutant levels in rivers exceeded those allowed under the District's NPDES permit, the Ninth Circuit concluded that the District had violated its permit. *Id*. at p. 1207.

In so holding, the Ninth Circuit imposed liability on the District *without any evidence* that the District's MS4 discharges added any pollutants to the Waters of the United States at the time the exceedances were measured. This *Amicus* brief makes the following arguments in support of the District's petition for review of the Ninth Circuit's decision:

1. By imposing liability without evidence of an unlawful discharge, the Ninth Circuit's decision conflicts with the plain language of the Clean Water Act and regulations implementing the Act's NPDES Program.

The Clean Water Act prohibits the "discharge" of pollutants from a "point source" into the "waters of the United States" without a permit. 33 U.S.C. §§ 1311(a), 1342, 1362(7), (12); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (hereinafter, "*Miccosukee*"). A permit issued in accordance with the Clean Water Act establishes two primary types of conditions: (1) discharge prohibitions; and (2) in the case of MS4s, management practices to "reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. §§ 1342(p)(3)(B)(ii), (iii).

A discharge is lawful as long as it complies with permit conditions regulating the discharge. 33 U.S.C. §§ 1311(a), 1342(k). The Clean Water Act does not impose liability for the general condition of Waters of the United States without direct evidence of violation of a discharge prohibition or required management practice. *See Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1142 (10th Cir. 2005) (hereinafter, "*Sierra Club*") (in order to prove a violation of the Act, a plaintiff must demonstrate that each element of a permit violation occurred); *see also U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 215 F.Supp.2d 239, 246 (D. Me. 2002) (hereinafter, "*Atlantic Salmon*") (same).

The Ninth Circuit's decision to hold the District in violation of its NPDES permit because monitoring results indicated that the Los Angeles and San Gabriel Rivers did not meet Water Quality Standards violates the basic requirement that there must be

evidence of either a discharge from a point source or failure to implement a management practice by the permit holder in order to assign liability for violation of an NPDES permit.

2. The Ninth Circuit's decision eviscerates the requirement that dischargers are only responsible for discharges of pollutants from point sources that they own or operate, and has far reaching implications for the regulatory system established by the Clean Water Act.

The Ninth Circuit's radical expansion of the NPDES program to create liability for the condition of the Waters of the United States without evidence of discharge will undermine the regulatory scheme that has been in place since the Clean Water Act was passed in 1972 by replacing the state and Federal governments as the entities responsible for the overall condition of the Waters of the United States and forcing that responsibility onto dischargers. The Ninth Circuit's Decision will likewise create uncertainty over the status of all permitted discharges in a watershed because it forces dischargers to allocate responsibility for the condition of the watershed amongst themselves under a scheme of joint and several liability.

The threat of enforcement based on the general condition of a Water of the United States will force MS4 operators and other NPDES permittees to expend resources fighting over responsibility without any evidence of actual liability rather than directing those resources toward implementing pollution

control measures and improving water quality as envisioned by the Clean Water Act.

ARGUMENT

I. The Ninth Circuit's Decision Violates The Plain Text Of The Clean Water Act And Regulations Implementing The NPDES Program.

The Ninth Circuit held that because the District's NPDES permit provides that one of the objectives of its monitoring program is assessing compliance with the District's permit, exceedances detected at the mass-emission monitoring stations must be construed as permit violations. *NRDC II, supra,* 725 F.3d at 1207.

The Ninth Circuit thus created a scheme of liability for all permittees, including the District, which assigns liability without proof that a permittee's discharges in fact caused or contributed to the water quality exceedances measured in the monitoring stations. *Ibid*. This holding is directly contrary to the plain language of the Clean Water Act and the regulations implementing the NPDES program. To prevent future misapplication of the Act, it is essential that this Court grant review.

A. The Ninth Circuit's Decision Conflicts With The Plain Language Of The Clean Water Act.

The Ninth Circuit's decision omits a critical fact necessary for assigning liability under the Clean Water Act – evidence of a discharge from the point source in violation of a permit condition.

Section 301(a) of the Clean Water Act prohibits the unauthorized discharge of a pollutant. 33 U.S.C. § 1311(a). The discharge of a pollutant occurs when there is an "addition" of pollutants to "the waters of the United States" from a "point source." 33 U.S.C. §§ 1362(7), (12); *Miccosukee, supra,* 541 U.S. at 102.

Under the NPDES program, the EPA and authorized states may issue a permit for the "discharge of any pollutant." 33 U.S.C. § 1342(a). A discharge or addition of pollutants is lawful if it is authorized by an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(k). NPDES permits require discharges to comply with "effluent limitations" and require "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods." 33 U.S.C. §§ 1311(e), 1342(a)(1), (p)(3)(B)(ii), (iii); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1126-29 (9th Cir. 2002). In this manner, Section 301 prohibits an unauthorized discharge of a pollutant, and Section 402 authorizes such a discharge as long as it is in compliance with an NPDES permit.

Permit requirements are thus either: 1) discharge limitations or 2) management practices and control techniques designed to reduce pollutant levels in discharges exiting the MS4. The latter category includes monitoring and reporting requirements. 33 U.S.C. § 1318.

To establish a violation of an NPDES permit, there must be evidence that the discharger either discharged a pollutant in exceedance of a discharge limitation, or failed to implement some management practice or monitoring or reporting requirement. Both Sections 309 and 505 of the Clean Water Act provide that liability under the Clean Water Act is to be assessed for either discharging pollutants in violation of the Act, or failing to implement required management practices. 33 U.S.C. §§ 1319, 1365.

Section 309 provides civil liability for violations of sections 301 (no discharge without a permit), 302 (discharge effluent limitations), 306 (standards of performance for new sources), 307 (pretreatment discharge limitations), 308 (inspections, monitoring and record keeping), 318 (discharge limitations for aquaculture), 405 (discharge of sewage sludge), or any NPDES permit condition or limitation implementing any of the above listed sections. 33 U.S.C. § 1319. Section 505 covers the same list. 33 U.S.C. § 1365(f).

Thus, while there are multiple ways to violate the Clean Water Act, the common denominator is that in order to incur liability, a discharger must either

discharge a pollutant from a point source without an NPDES permit, 33 U.S.C. §§ 1311(a), 1342, or violate a discharge prohibition, or a management practice required by the Act and incorporated into an NPDES permit, 33 U.S.C. §§ 1319, 1342(k), 1365. In all cases, there must be evidence that a point source violated a permit condition in order for the point source discharger to be held liable.

This is accepted as law across the Circuit Courts. *See, e.g., Arkansas Poultry Federation v. EPA*, 852 F.2d 324, 328 (8th Cir. 1988) ("liability could not be imposed on industrial users without proof of causation"); *National Ass'n of Metal Finishers v. EPA*, 719 F.2d 624, 640-41 (3d Cir. 1983) (same); *United States v. Moses*, 496 F.3d 984, 988-93 (9th Cir. 2009) (assessing the sufficiency of the evidence supporting a criminal conviction under the Act); *United States v. Cooper*, 482 F.3d 658, 664-69 (4th Cir. 2007) (same); *Sierra Club, supra,* 421 F.3d at 1146-50 (assessing the sufficiency of the evidence supporting the Act's requirement of "a connection or link between discharged pollutants and their addition to navigable waters" when determining liability); *see also Higbee v. Starr*, 598 F.Supp. 323, 331 (W.D. Ark. 1984) (requiring evidence of a "causal connection" between activities and the presence of pollutants in water).

In contrast, the Ninth Circuit has held that the District violated the Clean Water Act without any evidence that the District discharged pollutants without an NPDES permit, or violated a discharge limitation or management practice requirement in its

NPDES permit. The Ninth Circuit relies on monitoring data which measured the cumulative pollutant loading from hundreds of discharges to the Los Angeles and San Gabriel Rivers to hold that the District violated its NPDES permit. *NRDC II, supra,* 725 F.3d at 1206-07 ("the data collected at the monitoring stations was intended to determine whether the permittees were in compliance with the permit.").

There is no evidence linking discharges from the District's MS4 to measured exceedances in the Los Angeles and San Gabriel Rivers; however, the Ninth Circuit filled the evidentiary gap by substituting data collected from the cumulative discharges of at least 1,877 upstream dischargers for the evidence of an unpermitted discharge from the District's MS4. *Compare NRDC I, supra,* 673 F.3d at 899 ("In the words of the district court, there is no evidence that 'standards-exceeding pollutants . . . passed through Defendants' MS4 *outflows* at or near the time the exceedances were observed.'") (emphasis in original) *with NRDC II, supra,* 725 F.3d at 1206-07 ("the data collected at the monitoring stations is intended to determine whether Permittees are in compliance with the Permit.").

As explained above, the Clean Water Act does not impose liability for the general condition of Waters of the United States without direct evidence of a violation of a discharge prohibition or required management practice. *See Sierra Club, supra,* 421 F.3d at 1142 (in order to prove a violation of the Act, a plaintiff must demonstrate that each element of a permit

occurred); *Atlantic Salmon, supra*, 215 F.Supp.2d at 246 (same). Moreover, in the instant case, the Ninth Circuit's reliance on explicit permit language is misplaced. The permit requirement that the District is alleged to have violated 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." *NRDC I, supra,* 673 F.3d at 898.

Without any evidence of an unlawful discharge from the District's MS4 at the time the monitoring stations in the Los Angeles and San Gabriel Rivers measured pollutant exceedances, there is no basis under the Clean Water Act to hold the District in violation of its NPDES permit.

B. The Ninth Circuit's Decision Violates The Plain Text Of The Clean Water Act's Implementing Regulations.

The Ninth Circuit's analysis additionally misconstrues applicable federal regulations. First, the Decision incorrectly interprets monitoring requirements at 40 C.F.R. § 122.26(d)(2)(i)(F) as requiring permit applicants to conduct monitoring sufficient to determine compliance with permit conditions. *NRDC II, supra*, 725 F.3d at 1207.

The monitoring requirements at 40 C.F.R. § 122.26(d)(2)(i)(F) do not require an MS4 discharger to conduct monitoring to determine compliance with its NPDES permit. Instead, this regulation requires

an applicant, when applying for coverage under an NPDES permit, to demonstrate that it has *legal authority* to conduct inspections, surveillance and monitoring necessary to determine compliance with permit conditions. Federal regulations therefore only require the legal authority to develop and implement a monitoring program. Federal regulations do not make the data from that monitoring program an *ipso facto* violation unless the data demonstrates that a discharge has occurred in violation of the Clean Water Act or that a management practice was not implemented, as discussed above. Monitoring data about the cumulative pollutant loading, without evidence that a particular co-permittee's operations cause or contribute to a violation, cannot form the basis for liability under the Act. 33 U.S.C. §§ 1311(a), 1342(k), (p); 40 C.F.R. § 122.26(b)(1). The Ninth Circuit's reliance on this requirement is therefore entirely misplaced.

More importantly, the Ninth Circuit's decision establishes liability based on what amounts to cumulative discharges from all discharges in the watersheds at issue. In so doing, the Court of Appeals flatly ignores federal regulations at 40 C.F.R. § 122.26(b)(1) which state that an MS4 discharger "is only responsible for permit conditions relating to *the discharge for which it is operator*." 40 C.F.R. § 122.26(b)(1) (emphasis added).

This requirement was adopted to implement Section 402(p)(3)(B)(i) of the Clean Water Act. Pursuant to Section 402(p)(3)(B)(i), an MS4 NPDES permit

may be issued to multiple dischargers on a system- or jurisdiction-wide basis. 33 U.S.C. § 1342(p)(3)(B)(i). The division of liability at 40 C.F.R. § 122.26(b)(1) was adopted in recognition of the fact that where permits are issued on a multi-jurisdictional basis, discharges are likely to be co-mingled and compliance responsibilities shared. Failure of one discharger to comply with permit requirements will not result in liability for the others.

Thus, under both the Clean Water Act, and regulations implementing the NPDES Program, a "co-permittee" is only responsible, and potentially liable in an enforcement action, for permit conditions relating to its own discharges and/or management practices applying to its own system. 33 U.S.C. §§ 1342(k), 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(b)(1). By measuring compliance in the Los Angeles and San Gabriel Rivers, the Ninth Circuit ignores both the plain language of the regulation and the policy behind it.

Under the Ninth Circuit's reasoning, a permittee may be liable for any Water Quality Standards exceedance measured at a downstream monitoring station, even if all discharges from the permittee's jurisdiction meet all "effluent limitations" and otherwise comply with all permit conditions, i.e., even if the permittee has no responsibility for or authority over discharges operated by other permittees. Such a result violates the Act's clear limitation on enforcement for "discharge[s] for which [a co-permittee] is operator." 40 C.F.R. § 122.26(b)(1).

II. The Ninth Circuit's Decision Will Undermine The Function And Structure Of The Clean Water Act's NPDES Program.

The basis of the Clean Water Act's NPDES program is limiting pollutants in *discharges* to the Waters of the United States from a point source owned and/or operated by the permit holder. 33 U.S.C. §§ 1311(a); 1342. The Act specifically requires that NPDES permits for MS4s include "controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii).

This is because the Waters of the United States have multiple uses. *See New Orleans Gaslight Co. v. Drainage Comm'n*, 197 U.S. 453, 460 (1905) ("The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised."). There is constant tension between traditional uses of the nation's waters, and the need to maintain their "chemical, physical, and biological integrity" for recreation and other environmental uses. 33 U.S.C. § 1251. The main reason Congress enacted the Clean Water Act and its predecessor legislation was to help balance competing interests and restore environmental uses as a priority following decades of overuse and neglect. *Ibid.*; *see also NRDC v. Costle*, 568 F.2d 1369, 1373-77 (D.C. Cir. 1977) (superceded by statute on other grounds) (discussing legislative history of the Act).

The key development of the 1972 Clean Water Act was the creation of the NPDES program. Dischargers were given certainty that compliance with their NPDES permit's discharge limitations and management practices would be compliance with the Act. 33 U.S.C. §§ 1311(a); 1342. Under this system, regulators could manage discharges to the Waters of the United States through the permitting process and remove the uncertainty and inefficiency of regulating pollution control through nuisance claims and other common law doctrines. Regulators could also advance environmental gains by implementing an iterative approach under which each NPDES permitting cycle would focus on controls and limitations best suited to the discharge at issue. 64 Fed. Reg. 68,722, 68,731 (1999) ("At this time, EPA determines that water quality-based controls, implemented through the iterative processes described today are appropriate for the control of such pollutants and will result in reasonable further progress towards attainment of water quality standards").

Such is the case in California. Through the Clean Water Act, Congress directed California (and every other state) to develop Water Quality Standards for each Water of the United States within its jurisdiction. Congress additionally authorized the EPA to allow California to issue NPDES permits in lieu of EPA. 33 U.S.C. §§ 1313(a); 1342(b). Pursuant to this authority, the EPA made California the first state with the ability to issue NPDES permits.

Under California law, the California State Water Resources Control Board and nine Regional Water Quality Control Boards are the principal state agencies charged with enforcing federal and state water pollution laws and issuing NPDES permits. *See* Cal. Water Code § 13000 *et seq*. The entity responsible for issuing permits in the Los Angeles area is the California State Water Resources Control Board for the Los Angeles Region (the Regional Board).

Under this dual regulatory system, the Regional Board has the authority and responsibility for developing and adopting Water Quality Standards for each water body within its jurisdiction, and issuing NPDES permits to all discharges, including the District. EPA retains an oversight role. For water quality issues, the Regional Board is the river master, charged with developing technical standards necessary for the health of the river, and including them in the NPDES permits that it issues to dischargers such as the District.

By holding the District liable for attaining instream Water Quality Standards, in a system with multiple permitted dischargers, the Ninth Circuit has upended that regulatory scheme. Under the Court of Appeals' rationale, the District is now in charge of the water quality conditions in the Los Angeles and San Gabriel Rivers. This is despite the fact that the District has at best limited ability to control other entities' discharges into either water body, and both the State of California and the United States Army

Corps of Engineers continue to authorize discharges to both rivers.

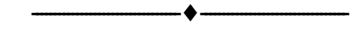
As noted by the Ninth Circuit in *NRDC I*, upstream NPDES-authorized dischargers to the Los Angeles River include at least 1,344 industrial and 488 construction storm water dischargers; three sewage treatment plants; and 42 separate incorporated cities. *NRDC I* 673 F.3d at 889-90. There are additionally thousands of acres of Federally owned and operated forest lands that discharge to the watershed. Nonetheless, the Ninth Circuit held the District liable for the condition of the Los Angeles River, without evidence that the District's discharge caused the pollution at issue.

As a result, there is uncertainty over whether these other NPDES authorized discharges can continue to operate. The District has filed claims seeking contribution from each of the upstream MS4 operators. Other NPDES dischargers may also be subject to compensation, nuisance or trespass claims by the District and other parties who will be dragged into the "Superfund" styled litigation that is likely to ensue if the Ninth Circuit's decision stands. The result will be a drain on local resources and potential cessation of otherwise lawful discharges.

The District must overcome several legal obstacles to pursue such litigation. The Clean Water Act is not a nuisance or contribution statute. Moreover, this Court has held on multiple occasions that the Clean Water Act preempts nuisance and other common law

suits. *Milwaukee v. Ill.*, 451 U.S. 304, 317, 327 (1981); *International Paper Co. v Ouellette*, 479 U.S. 481, 496-97 (1987). The District will therefore need to rely on state law claims that may or may not provide a remedy. If the District is unable to address upstream discharges to either the Los Angeles or San Gabriel Rivers because of these restrictions, the District will be placed in the untenable position of being out of compliance with its NPDES permit, and legally prohibited from doing anything about it.

The Ninth Circuit's Decision therefore has nation-wide importance. Many of the Country's largest MS4s are located within the Ninth Circuit. Seattle, Portland, the San Francisco Bay Area, Orange County, the Inland Empire, Phoenix, and Las Vegas are all bound by the precedent of this decision. These municipalities and other MS4 operators are at risk of losing the certainty associated with NPDES permit compliance, and control over their individual discharges. For that reason, the Court should grant the District's petition for certiorari, and reverse the Ninth Circuit.



CONCLUSION

Local governments need certainty; they need to understand when and how their actions may subject them to liability. The Ninth Circuit's Decision potentially subjects local governments, for the first time, to liability for the condition of the Waters of the United States without evidence of discharge, and potentially

without any ability to rectify the alleged violation. The Court should grant the petition for writ of certiorari, and reverse the Ninth Circuit's decision.

Respectfully submitted,

RODERICK WALSTON
Counsel of Record
SHAWN HAGERTY
J.G. ANDRE MONETTE
REBECCA ANDREWS
BEST BEST & KRIEGER LLP
655 West Broadway
Suite 1500
San Diego, CA 92101
Tel. (619) 525-1300
Fax (619) 233-6118
roderick.walston@bbklaw.com

CHUCK THOMPSON
General Counsel and
Executive Director
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
7910 Woodmont Ave., Suite 1440
Bethesda, MD 20814
Tel. (202) 466-5424
cthompson@imla.org

Counsel for Amicus Curiae