No. 11-460

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

---

BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

MELISSA A. THORME
Counsel of Record
DOWNEY BRAND LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
(916) 444-1000
mthorme@downeybrand.com

November 14, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

INTERESTS OF THE *AMICI CURIAE*[1]

The League of California Cities and the California State Association of Counties, as representatives of local government entities and municipalities throughout California, have a vital interest in ensuring that cities and counties have clear guidance concerning the application of the Clean Water Act to a Municipal Separate Storm Sewer System ("MS4"). As explained in greater detail below, the Ninth Circuit Court of Appeals' recent published opinion in *Natural Resources Defense Council v. County of Los Angeles* reflects the confusion and ambiguity in the Ninth Circuit over: 1) what it means to discharge from an MS4 to waters of the United States, particularly where the MS4 includes portions of navigable waters that have been improved for flood control purposes; 2) how the boundaries of MS4s and "waters of the United States" are defined; and 3) how MS4 regulation differs from that of other point sources.

The League of California Cities ("League") is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal

---

[1] Under Supreme Court Rule 37.2(a), counsel of record received at least 10-days notice of the intent of these *amici curiae* to file this brief, the parties have consented to the filing of this brief, and their consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation with a membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a significant matter affecting all counties in California.

The rules adopted by the Ninth Circuit affect how billions, if not trillions, of dollars will be spent in California in the coming decades, and exposes local governments and their employees to significant civil and criminal liability for operating an MS4 that accepts stormwater and urban runoff. The Court should grant certiorari in this case to clarify the issues set forth above, and rectify the confusion wrought by the Ninth Circuit's opinion.

SUMMARY OF THE ARGUMENTS

In ruling on this citizen suit filed under the Clean Water Act (hereinafter "CWA" or "Act"), the Ninth Circuit concluded that water flowing from one portion of a river to another portion of the same river

constituted a discharge of pollutants subject to the requirements of a National Pollutant Discharge Elimination System ("NPDES") permit. Here, water flows from the improved, upstream portions of two Southern California rivers (the Los Angeles River and the San Gabriel River), to the unimproved, downstream portions of the same rivers. The upstream portions are part of the MS4 operated by the Petitioner Los Angeles County Flood Control District ("District"), while the downstream portions are not. But, according to the Ninth Circuit, the flow of water through a single river constitutes a "discharge" under the Clean Water Act because that flow crosses an invisible jurisdictional line. (*Natural Resources Defense Council, Inc. v. County of Los Angeles*, -- F.3d --, 2011 WL 2712963, *17-18 (9th Cir., July 13, 2011).) In other words, the Ninth Circuit has arbitrarily divided the Los Angeles and San Gabriel Rivers into sections based on the invisible jurisdictional boundary of the District's MS4, and held that the flow of water traveling from one section of each river to another violated the CWA.

Although the Ninth Circuit recognized that plaintiffs were required to prove that polluted stormwater passed through an outfall of the District's MS4 to show a violation, the Ninth Circuit did not require the plaintiffs to actually identify such an outfall. Rather, the Ninth Circuit held 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." (*Natural Resources Defense Council, Inc. v. County of Los Angeles*, -- F.3d --, 2011 WL

2712963, *17 (9th Cir., July 13, 2011)(emphasis added).) This interpretation violates the CWA, which requires a citizen-suit plaintiff to prove a discharge of a pollutant from a point source to navigable waters. The Ninth Circuit has essentially eliminated the "point source" requirement from the Act, at least as it relates to stormwater.

In reaching this conclusion, the Ninth Circuit apparently assumed that the boundary of the MS4 is necessarily an outfall, even where that boundary lies within the confines of a single river. The Ninth Circuit's holding directly conflicts with the Supreme Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-10 (2004), and must be overturned. Failure to do so could result in billions or trillions of dollars in potential liability and compliance costs, and would make it impossible for local governments to determine the point at which regulatory compliance is measured. Failure to clarify the legal requirements would also make MS4 owners and operators sitting ducks for citizen suit plaintiffs more interested in recovering attorneys' fees than in improving environmental conditions.

The Ninth Circuit also added to the considerable confusion over what waters are navigable waters of the United States subject to the Clean Water Act. Following this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), the federal courts are in disarray over when the Clean Water Act applies and when it does not. See, e.g., *United States v. Donovan*, -- F.3d --, 2011 WL 5120605 *5 (3d Cir. Oct. 31, 2011) ("the Courts of Appeals are split on the proper interpretation of *Rapanos* ...."). This confusion, left in place, will

haunt state and local governments on a daily basis. Clear guidance from this Court is required.

Finally, the Ninth Circuit also held that permitting of stormwater discharges for municipalities is *no* different than permitting for standard, end-of-pipe industrial discharges. (*Natural Resources Defense Council, Inc. v. County of Los Angeles*, -- F.3d --, 2011 WL 2712963, *12 (9th Cir., July 13, 2011).) This is mistaken. The Ninth Circuit failed to consider Congress's distinct approach for the regulation of municipal stormwater discharges. While NPDES permits have been required for municipal stormwater discharges since 1989 under 33 U.S.C. §1342(p), these discharges require only the reduction of pollutants to the *maximum extent practicable* ("MEP"), not strict compliance with water quality standards. (*See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999). Unlike industrial dischargers, local governments cannot simply go out of business or find another way of dealing with billions of gallons of stormwater that fall each year within our cities and counties. A municipality is required to accept urban runoff from private development. To avoid catastrophic flooding, only one realistic method exists for dealing with municipal stormwater: channeling it to the nation's greater waterways.

The Ninth Circuit failed to follow its precedent and this Court's guidance, interpreting the District's permit to impose a strict requirement to meet water quality standards instead of asking whether the District was reducing the discharge of pollutants to the MEP. This discrepancy must be remedied in order to provide regulatory certainty for the

thousands of local governments that exist within the vast expanse of the Ninth Circuit.

The League and CSAC, as *amici curiae*, respectfully request that this Court grant the District's petition for writ of certiorari and review the decision below for the following reasons:

- The Ninth Circuit ignored this Court's precedent in the *Miccosukee Tribe* case regarding what it means to discharge to waters of the United States from an MS4.

- Federal courts, as well as all dischargers under the Act, need this Court's guidance regarding the definition of "water of the United States" given the confusion in the lower courts after *Rapanos.*

- The Ninth Circuit ignored its own precedent and clear Congressional intent to treat municipal stormwater discharges differently from other discharges subject to the Act's NPDES permit program.

The ability of government entities to control flooding and facilitate drainage of the stormwater within their jurisdictions is essential. (*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.").) Indeed, flood control is one of the most basic functions of local government. In order to end the legal inconsistencies and confusion created by the decision below, and to provide a clear set of legal

guidelines for local governments regarding the location and manner of compliance for MS4 discharges, *amici* respectfully request this Court grant the petition and reverse the decision below.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.. THE CONFUSION CAUSED BY THE NINTH CIRCUIT'S DEPARTURE FROM THIS COURT'S PRECEDENT REGARDING WHAT IT MEANS TO DISCHARGE TO WATERS OF THE UNITED STATES MUST BE REMEDIED.

The CWA 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.) The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." (33 U.S.C. §1362(12)(A).) In order to prove a violation of the Act, a plaintiff must demonstrate that each element of a "discharge" occurred. (*See U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 215 F. Supp. 2d 239, 246 (D. Me. 2002).)

A Municipal Separate Storm Sewer System ("MS4") generally contains multiple point sources,[2] called outfalls. An "outfall" is "a *point source* as

[2] The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (33 U.S.C. §1362(14); 40 C.F.R. §122.2.)

defined by 40 C.F.R. 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States." (40 C.F.R. §122.26(b)(9).) An outfall "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." (40 C.F.R. §122.26(b)(9).)

This regulation is consistent with the reading of the plurality opinion of this Court in *Rapanos v. United States*, which emphasized that "point sources" and "navigable waters" are distinct and separate categories. (*Rapanos*, 547 U.S. 715, 735 (2006)("The definition of 'discharge' [*to* navigable waters *from* a point source] would make little sense if the two categories were significantly overlapping.").) Thus, a discharge from an MS4 occurs where the MS4 discharges pollutants from a non-navigable point source (i.e., an MS4 outfall) to waters of the United States. However, where an MS4 also includes portions of a waterway, and water is conveyed from the MS4 portion of a navigable water to the non-MS4 portion of the same navigable water, no addition of pollutants to a navigable water has occurred.

Further, an MS4 conveyance that allows for the movement of water from one part of a water of the United States to another does not "discharge" pollutants. As this Court held in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004), the movement of water within a single water body "cannot constitute an 'addition' of pollutants." The flowing water represents a unified system that cannot be

arbitrarily parsed into segments. "As the Second Circuit put it in *Trout Unlimited*, '[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.'" (*South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-10 (2004)(citing to *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2nd Cir. 2001).)

In holding that the natural downstream movement of water in the Los Angeles and San Gabriel Rivers through portions of the District's MS4 constituted discharges from the District's MS4, the Ninth Circuit ignored this Court's precedent and created confusion over what is a discharge, and what is not. This Court should undertake review of this case to remedy the substantial confusion and inconsistency wrought by the decision below. This Court should confirm that the movement of water within a single water body does not constitute a discharge from a point source or outfall under the CWA, regardless of whether portions of the water body are included in an MS4.

Congress did not intend for stormwater conveyances to be treated as "waters of the United States." Rather, Congress defined these conveyances as "point sources" to be regulated at the point that they discharge into a "water of the United States."[3]

---

[3] The term "discharge of a pollutant" is defined 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...." (33 U.S.C. §1362(12) (emphasis added).) "Navigable waters" is defined as "waters of the United States, including the territorial sea," (33 U.S.C. §1362(7).)

The difference, while subtle, is important. It is akin to deciding whether an entire garden hose is regulated, or only the point at which water flows out of the hose. The Ninth Circuit blurred the line between a "point source" and "water of the United States" by considering the Los Angeles and San Gabriel Rivers to be both, simultaneously. This is untenable, and makes the point of regulatory compliance impossible to determine. Local governments now have no idea how to determine *where* to measure compliance with MS4 permits.

This issue is of critical importance to the *amici*; as most cities and counties in California are covered by an MS4 permit issued under California's discharge permitting program. (*See accord* 33 U.S.C. §1342(b).) Thus, it is critical for MS4 owners and operators to understand where the point of compliance will be measured under that program. This will allow them to measure performance, institute changes, and have certainty regarding their potential legal exposure.

II.. THE DEFINITION OF "WATERS OF THE UNITED STATES" MUST BE CLARIFIED IN VIEW OF THE CONFUSION FOLLOWING THE *RAPANOS* DECISION.

The decision below reflects and exacerbates a greater national issue, which is the confusion over what constitutes "waters of the United States" in light of this Court's decision in *Rapanos v. United States,* 547 U.S. 715, 735 (2006).

Writing for a four-justice plurality, Justice Scalia's definition of "waters of the United States" correctly focused on whether a discharge ultimately

reached a "waters of the United States." (*Rapanos*, 547 U.S. at 742.) But the plurality decision did not explain how to determine when a water body is a point source or a water of the United States. The classification of a conveyance as either a "point source" or a "water of the United States" is of critical importance in NPDES permitting in order to determine whether that conveyance requires a discharge permit and, if so, the appropriate point of compliance for the discharge from that conveyance.

The state of the law on this issue is less than clear, and is particularly murky in the Ninth Circuit. In 2001, in *Headwaters, Inc. v. Talent Irrigation District*, (243 F.3d 526, 533 (9th Cir. 2001)), the Ninth Circuit held that "irrigation canals were 'waters of the United States' because they are tributaries to the natural streams with which they exchange water." However, most point sources, including pipes, ditches, and channels, are also tributary to natural streams. (33 U.S.C. §1362(14); 40 C.F.R. §122.2.) Further, the water contained in irrigation channels is expressly exempt from the NPDES permitting requirements. (33 U.S.C. §1342(*l*)(1)("The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.") Thus, the Ninth Circuit turned the analysis on its head by transforming permit-exempt irrigation canal "point sources" into "waters of the United States."

The Ninth Circuit concluded that its decision in *Headwaters* was consistent with this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531

U.S. 159 (2001) ("SWANCC"). According to the Ninth Circuit, "[t]he irrigation canals in this case are not 'isolated waters' such as those that the Court concluded were outside the jurisdiction of the Clean Water Act[,] [b]ecause the canals receive water from natural streams and lakes, and divert water to streams and creeks." (*Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001).) Certainly no such leap of logic or holding follows from *SWANCC*. The fact that isolated waters are beyond the reach of the Clean Water Act does not sanction the contrary; that every *non-isolated* water *is* within the Act's reach.

In *Headwaters*, the Ninth Circuit also relied on another pre-*Rapanos* decision, *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), in which the court held that a drainage ditch, which was "part of a storm drainage system designed to discharge stormwater into Tampa Bay," was "a tributary of Tampa Bay and thus a 'water of the United States.'" (*Eidson*, 108 F. 3d at 1342-43.) However, the *Eidson* decision was expressly called into question by the plurality in *Rapanos*. (*See Rapanos*, 547 U.S. at 725 (plurality opinion).)

Despite intervening developments, the Ninth Circuit has concluded that the *Rapanos* decision "has not undercut our prior analysis," and has continued to apply the *Headwaters* rule. (*See United States v. Moses*, 496 F.3d 984, 989-90 (2007)(stating that Justice Kennedy's concurring opinion in *Rapanos* "is the controlling rule of law" and that "[t]he plurality's first requirement-permanent standing water or continuous flow, at least for a period of 'some months,'- makes little practical sense").)

The practical impact here cannot be overstated. A conveyance is either a "point source," or a "water of the United States." It cannot logically be both. This classification is material, of course, because without this knowledge, cities and counties cannot know which water quality standards apply to the waters to which they discharge,[4] and cannot make improvements to reduce pollutants to the maximum extent practicable with the ultimate goal of eventually achieving water quality standards.

The Act specifically requires MS4s to employ controls or best management practices to the maximum extent practicable. (33 U.S.C. §1342(p)(3)(B)(iii).) These measures can be easily accomplished within the MS4, from which weeds, algae and trash can be removed, or in which booms or filters can be placed to halt or reduce pollutants before they reach the downstream "water of the United States." But no such management can take place within a "waters of the United States" without significant federal oversight. For example, moving dirt within a river-bottom or placing equipment into a "navigable" ditch to remove weeds and promote the free flow of water would require a CWA section 404 permit. (33 U.S.C. §1344.) Doing those same activities within the MS4 would not.

---

[4] Different "waters of the United States" may possess different beneficial uses and water quality criteria set to protect those uses (e.g., water quality standards). (*See* 33 U.S.C. §1313(c)(2)(A)). Water quality standards generally do not apply within an MS4 (i.e., on municipal streets, or in curbs, gutters, ditches, manmade channels, and storm drains). (*See* 40 C.F.R. §122.26(b)(8)(definition of "municipal separate storm sewer").)

Moreover, a stormwater discharge or a non-storm water spill within an MS4 system does not necessarily flow downstream to a "waters of the United States." In some instances, a discharge or spill could be fully contained and remediated within the MS4 system. (*See accord* 40 C.F.R. §122.2 (definition of "waters of the United States" excludes waste treatment systems designed to meet the requirements of the CWA).) For example, trash falling into an open MS4 could be screened out and removed prior to discharge into "navigable waters." But if the MS4 itself is a navigable water, then the Act has been violated as soon as the object makes contact with the water.

Further, discharges or a spill to a non-flowing MS4 channel or the dry bed of a seasonal non-navigable tributary stream should not constitute discharges to a "water of the United States." Such spills could be (and often are) fully remediated and never mix with any navigable waters. (*See Rapanos v. U.S.*, 547 U.S. at 734 (including "storm sewers and culverts" within the definition would stretch "the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction."), and at 716 (the CWA authorizes federal jurisdiction only over "waters").) In addition, retention ponds placed within an MS4 to slow the flow of water and allow pollutants attached to the soil to be deposited before the water flows on to a water of the United States should be excluded from the definition of "waters of the United States." (*See accord* 40 C.F.R. §122.2 (definition of "waters of the United States" exclusion for waste treatment exception).)

But if, as the Ninth Circuit held, the MS4 also constitutes "waters of the United States," these remedial activities cannot occur without a separate dredge and fill permit under CWA section 404, and possibly approval under the Rivers and Harbors Act of 1899. (33 U.S.C. §1344; 33 U.S.C. §403.) The Ninth Circuit's interpretation reduces the entire exercise to an absurd vortex of permitting, in which a local government that cannot refuse stormwater flow would be in automatic violation for months and years while it awaits permits to add the simplest management practices to its system. In short, the state of the law is a mess that must be cleaned up.

For these reasons, this Court should grant the petition and explicitly spell out the differences between MS4s, tributaries, and "waters of the United States."

III.. THIS COURT MUST VALIDATE CONGRESS' INTENT TO TREAT MS4 DISCHARGES DIFFERENTLY FROM OTHER DISCHARGES.

The decision below fundamentally misconstrues the Act's mandates for municipal stormwater regulation. Under section 402(p)(3)(B) of the Act, Congress established a distinct approach for the regulation of municipal stormwater discharges and subjected them to a different set of requirements. (33 U.S.C. §1342(p)(3)(B).) By imposing liability based simply on the presence of pollutants within the MS4 conveyance, the Ninth Circuit fails to respect the special treatment that the Congress afforded to municipal storm water systems.

NPDES permits for other categories of discharges, including *industrial* stormwater

discharges, must contain technology-based effluent limitations and any more stringent water quality-based effluent limitations necessary to meet applicable water quality standards. (*See* 33 U.S.C. §1311(b)(1)(A) and (C) (CWA §301(b)(1)(A) and (C) requiring Best Practicable control Technology ("BPT") or "any more stringent limitation, including those necessary to meet water quality standards"); 33 U.S.C. §1311(b)(2) (CWA §301(b)(2) requiring Best Available Technology economically achievable ("BAT") for toxic pollutants and Best Conventional pollutant control Technology ("BCT") for conventional pollutants); 33 U.S.C. §1342(p)(3)(A) (CWA §402(p)(3)(A))(industrial stormwater regulation).)

In contrast, municipal stormwater discharges from MS4s are to be regulated by NPDES permits that:

(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 State determines appropriate for the control of such pollutants.

(33 U.S.C. §1342(p)(3)(B)(i)-(iii) (CWA §402(p)(3)(B)(i)-(iii)) (emphasis added).)[5]

The "Maximum Extent Practicable" standard in Section 302(p)(3)(B)(iii) mandates that an MS4 permit require municipalities to pursue sound pollutant control techniques that are technically and economically feasible. The Clean Water Act recognizes that MS4s are unlike individual facility NPDES permittees, such as an industrial facility or a wastewater treatment plant. Municipalities may have little control over the drainage received from private property within their boundaries, or from other permitted entities that discharge stormwater or wastewater into the local storm drains and waterways.[6]

---

[5] Importantly, the CWA does not prescribe water quality-based requirements for municipal stormwater. (*See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999).) Water quality-based requirements differ from technology-based requirements in that water quality-based requirements are set based on the ambient water quality of and the applicable water quality standards for a particular water body, while technology-based standards focus upon the water quality achievable by particular pollution control measures or technologies. This partial exemption is not unusual as the CWA also *totally exempts* some types of discharges from the permitting requirements of the Act. (*See* 33 U.S.C. §1342(*l*)(1)-(2)(CWA §402(*l*)(1)-(2))(exempting agricultural return flows from irrigated agriculture and certain discharges of stormwater from mining operations or oil and gas production from the requirement to obtain an NPDES permit).)

[6] Moreover, municipalities never requested coverage under the CWA for these discharges of rainwater falling on the ground inside their municipal boundaries; this liability was involuntarily thrust upon them by Congress in 1989 without a source of funding for this expensive and extensive regulatory program. And, unlike industrial dischargers, cities and

The decision below appears to misconstrue the purpose of the "maximum extent practicable" standard as to make the permitting agency's job easier:

> Rather than evincing any intent to treat permitting "differently" for municipalities, the EPA merely explains why state authorities that issue permits should draft site-specific rules, as the Regional Board did here, and why water-quality standards may be preferable over more-difficult-to-enforce effluent limitations.

(*Natural Resources Defense Council, Inc. v. County of Los Angeles*, -- F.3d --, 2011 WL 2712963, *12 (9th Cir., July 13, 2011).)

This interpretation is misguided. While regulatory efficiency was certainly a goal of Congress' in enacting the program, Congress also applied a different standard based on the unique position and function of local government entities.

The Ninth Circuit summarily dismissed the District's arguments about the challenges and special nature of municipal storm water regulation. In so doing, the decision below sets up a false dichotomy between the CWA and the District's position, which it labels "immunity for municipal discharges":

---

counties cannot go out of business to avoid regulation and the associated costs and civil and criminal liabilities. (33 U.S.C. §1319(a)-(d).)

> Avoiding wooden permitting requirements and granting states flexibility in setting forth requirements is not equivalent to immunizing municipalities for stormwater discharges that violate the provisions of a permit.

(*Id.*)

This Court must review this case to confirm that municipal storm water permits should be interpreted consistently with the unique character of storm water conveyance by MS4 owners and operators, who have a critical public mandate to transport water from sources they do not control to protect their citizens from flooding and related health and safety problems.

The decision below not only ignores the separate statutory regulation of MS4s, but also ignores its own precedent. In *Defenders of Wildlife v. Browner*, the Ninth Circuit held that MS4 permits were ***not*** required to strictly meet water quality standards, (191 F.3d 1159, 1164-66 (9th Cir. 1999)), a holding ignored when it decided the case at hand.

In *Defenders*, the Ninth Circuit held:

> Congress' choice to require industrial storm-water discharges to comply with 33 U.S.C. §1311, but not to include the same requirement for municipal discharges, must be given effect. When we read the two related sections together, we conclude that 33 U.S.C. §1342(p)(3)(B)(iii) does not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. §1311(b)(1)(C).

> Application of that principle is significantly strengthened here, because 33 U.S.C. §1342(p)(3)(B) *is not merely silent* regarding whether municipal discharges must comply with 33 U.S.C. §1311. Instead, §1342(p)(3)(B)(iii) *replaces* the requirements of §1311 with the requirement that municipal storm-sewer dischargers "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 ... determines appropriate for the control of such pollutants." 33 U.S.C. §1342(p)(3)(B)(iii). In the circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. §1311(b)(1)(C).

(*Defenders,* 191 F.3d at 1165-66 (emphasis added).)

In the decision below, the Ninth Circuit takes the opposite tack, holding that strict compliance with water quality standards ***was*** required. In so doing, the Ninth Circuit not only ignored its own precedent, but disregarded the other 70 pages of the MS4 Permit that give context to the sentence at issue, the MS4 Permit's explanatory Fact Sheet, and other relevant state-wide precedent on the matter.

For these and the other reasons set forth herein, this Court should review this matter of vital importance to cities and municipal entities nationwide. The magnitude of the problems created by the Ninth Circuit's Opinion for counties and other municipalities around California is immense.

California's cities and counties are already experiencing financial crises and the decision below, mandating immediate and strict compliance with water quality standards, will cost these entities billions of dollars. The Ninth Circuit's ruling will place many local governments on the verge of bankruptcy, and will subject all to massive civil liability to any "person" who decides to file suit. (*See* 33 U.S.C. §1365(a).) The Court should grant the petition, wipe this bad decision off the books, and clarify where and how the Clean Water Act regulates MS4 discharges.

CONCLUSION

For the foregoing reasons, *amici curiae* the League of California Cities and the California State Association of Counties support the Petition for a Writ of Certiorari of the Los Angeles County Flood Control District.

Respectfully submitted,

Melissa A. Thorme
DOWNEY BRAND LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
(916) 444-1000
mthorme@downeybrand.com

Counsel of Record
for the *Amici Curiae*
LEAGUE OF CALIFORNIA CITIES and the
CALIFORNIA STATE ASSOCIATION OF
COUNTIES

Dated: November 14, 2011