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

REPLY BRIEF OF PETITIONER

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

Respondents agree with the District, the United States and amici for both sides that the answer to that questions is, "no." That ends the case.

The Ninth Circuit's sole ground for finding a Permit violation by the District was its conclusion that a "discharge" from a "point source" occurred under the CWA when polluted water flowed through the monitoring stations located in improved portions of the San Gabriel and Los Angeles Rivers and then into "naturally occurring" portions of the rivers. (Appendix to Petition for Writ of Certiorari, "App." 45.) The Ninth

Circuit's reasoning may have been erroneous, but that is plainly what the court held. Hence, while the District (contrary to respondents' accusation) acknowledges that it discharges stormwater from its MS4 through outfalls into the rivers upstream of the monitoring stations (Brief of Petitioner 44), the only "discharge" from a "point source" that exceeded water quality standards found by the Ninth Circuit was based on the mere transfer of water through the monitoring stations within the rivers – in direct contravention of *Miccosukee* and the EPA's own regulations that make it clear that an MS4 is distinct from a navigable water.[1]

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[1] The United States' suggestion that a navigable water may also be an MS4, and the Court should leave the issue open (Brief of United States As Amicus Curiae (Merits), "USACM" 13) is difficult to reconcile with the EPA's regulatory definition of an MS4 as distinct from navigable waters (Brief of Petitioner 42-43) and the preamble to the initial proposed MS4 rules stating that "water bodies that are waters of the United States are not storm sewers for the purposes of this rule" and that "stream channelization, and stream bed stabilization, which occur in waters of the United States" are not subject to an NPDES permit. 53 Fed. Reg. 49416, 49442 (December 7, 1988). Given that the "reach of the Clean Water Act is notoriously unclear," and the term "waters of the United States" is in many respects "hopelessly indeterminate" (*Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)), as well as the need to underscore that the definitions contained in the Clean Water Act "conceive of 'point sources' and 'navigable waters' as separate and distinct categories" (*Rapanos v. United States*, 547 U.S. 715, 735 (2006)), the Government's reluctance to clarify the distinctions between MS4s and navigable waters seems misplaced.

Repeating what they argued in opposing certiorari, respondents assert that the Ninth Circuit was simply mistaken about the locations of the monitoring stations. (Brief for Respondents, "BFR" 30-31.) That contention is untenable – everything in the record, *including respondents' briefs*, made it manifest that the monitoring stations were in channelized portions of the Los Angeles and San Gabriel Rivers. (*See* Supplemental Brief of Petitioner 5-6; Opening Brief of Appellants, Ninth Cir. Dkt. No. 13 at 13-14 ["Two of these mass emissions stations – those in the Los Angeles River and the San Gabriel River – are located within the portion of the MS4 owned and operated by the Flood Control District. ER 11. (The MS4 includes channelized portions of both rivers.)"].) The opinion cites to the Los Angeles County Department of Public Works' website as identifying the locations of the monitoring stations and the site clearly states that the monitoring stations are within the rivers. (*See* Petitioner's Reply to Brief in Opposition at 3 n.1, citing App. 18 n.4.) And it was certainly made clear in the District's petition for rehearing, in response to which respondents did not suggest, let alone correct, any purported factual mistake in the opinion, nor for that matter attempt to reconcile the Ninth Circuit's holding with *Miccosukee*. (Appellants' Response to Petition for Rehearing, Ninth Cir. Dkt. No. 45.)

In holding that there was a discharge from an MS4 under the CWA, the Ninth Circuit expressly found a "discharge" as a matter of fact and law. (App. 44.) The Ninth Circuit's "fact" is that the monitoring

stations were located in portions of the Los Angeles and San Gabriel Rivers maintained by petitioner for flood control purposes. The "law" is that, under the court's view, an MS4 is distinct from a navigable body of water: "the MS4 is an intra-state man-made construction – not a naturally occurring Watershed River." (App. 44.) If the Ninth Circuit only premised its opinion on the mistaken factual assumption that the monitoring stations were in channels that discharged *to* the rivers, not *within* the rivers, there would be no reason to hold that as a "matter of law" these channels are somehow distinct from the rivers. The Ninth Circuit specifically held that as part of an MS4, the channels were "intra-state" and "man-made construction[s]" distinct from "naturally occurring Watershed River[s]." These terms speak to the legal status of an MS4, not its physical location.

Even assuming the Ninth Circuit was mistaken about the location of the monitoring stations, the case still commands this Court's intervention. The Court has not hesitated to summarily correct gross factual errors by the Ninth Circuit. *Cavazos v. Smith*, ___ U.S. ___, 132 S. Ct. 2, 7 (2011) (per curiam) (reversing and noting that factual assertion in Ninth Circuit opinion "is simply false"). If the Ninth Circuit's decision is not reversed, the District faces exposure to a potentially massive fee award as well as civil penalties and unpredictable potential costs of rectifying alleged "discharges" based on what respondents concede is, at best, a gross factual error. Common sense and judicial propriety counsel that public funds

should not be diverted from vital flood protection absent a legitimate legal basis for doing so.

Nor is any purported factual error apparent on the face of the opinion. Nowhere does the Ninth Circuit suggest that the monitoring stations are anywhere other than in the rivers. The opinion says what it says, and what it says is alarming – that there is a "discharge" under the CWA when waters flow from a channel that is an "intra-state man-made" structure within a river and exits into the "naturally occurring Watershed River." This holding is untethered to any specific term of the Permit; hence, contrary to respondents' assertion (BFR 21 n.9), revision of the Permit does not dispel the pernicious impact of the opinion.[2]

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[2] A renewed permit was approved on November 8, 2012: http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/la_ms4/Revised/2nd%20REVISED%20TENTATIVE%20-%20Order_11-5-12.pdf (accessed Nov. 15, 2012). The renewed permit has not yet been posted on the Regional Water Board's website. The version considered at the hearing can be found by clicking the link "Tentative Order No. R4-2012-XXX" at http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/index.shtml (accessed Nov. 15, 2012).

While the renewed permit includes provisions for outfall monitoring, it does not change the term of the Permit on which the Ninth Circuit premised liability. The old permit prohibits discharges that cause or contribute to violations of water quality standards or water quality objectives. (App. 15, 41-42.) The renewed permit contains the same prohibition. (*See* Section V., Receiving Water Limitations, prohibiting discharges that cause or contribute to violations of "receiving water limitations" and attachment A defining "receiving water limitations" to include water quality objectives. Page 38 of http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/la_

(Continued on following page)

Neither petitioner nor its 47 amici from across the nation should be sanguine that administrative agencies and courts will ignore the plain holding of the Ninth Circuit's opinion. As the amici underscore, the mischief created by this opinion impacts not simply the critical area of stormwater control through MS4s but essentially every facet of water transfer and management.[3] There is nothing improvident about this Court's intervention – the Ninth Circuit's opinion cannot remain in place.

All parties to this case agree that the only ground on which the Ninth Circuit imposed liability on the District – a discharge premised solely on water moving through the monitoring stations within the rivers – is untenable. That is dispositive, and there are no remaining issues for resolution of these claims by any court. The suggestion of the United States that

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ms4/Revised/2nd%20REVISED%20TENTATIVE%20-%20Order_11-5-12.pdf (accessed Nov. 15, 2012); pages A-16 to A-17 (http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/la_ms4/Revised/2nd%20REVISED%20TENTATIVE%20-%20Attachment%20A_11-5-12.pdf (accessed Nov. 15, 2012).

Since the same provision that respondents contend the District violated has been retained in the renewed permit, the Ninth Circuit's construction of "discharge" would continue to apply.

[3] *See*, *e.g.*, Brief of Amici Curiae City of New York, et al., in Support of Petitioner, 10-11 (impact on water supply infrastructure); Brief of Amici Curiae Nationwide Public Projects Coalition, et al., in Support of Petitioner, 12-13 (impact on irrigation and general water transfer); Brief of Amici Curiae National Hydropower Association, et al., in Support of Petitioner, 19-25 (impact on hydroelectric power projects).

remand is appropriate for further development of the record and consideration of supposedly open issues (USACM 17-19, 24-26), is belied by the record.

There is no basis to remand for the Ninth Circuit to determine whether respondents submitted evidence of discharges from the District's outfalls above the monitoring stations. The district court gave respondents two opportunities to submit such evidence and after examining the evidence closely, properly concluded that respondents failed to show a discharge from the District outfalls that caused or contributed to the exceedances. (App. 100-02, 120-22.)

In the Ninth Circuit respondents abandoned any pretext of showing a discharge from District outfalls. They did not argue that the district court erred in construing the evidence. They disclaimed any obligation to show a discharge. The *only* argument they asserted in the Ninth Circuit was the monitoring argument that they attempt to resurrect here. As respondents put it: "This appeal presents one legal question only: whether the self-monitoring required by the Permit to determine compliance establishes the County's and Flood Control District's liability for Permit violations as a matter of law." (Appellants' Opening Brief, Ninth Cir. Dkt. No. 13 at 5; *see also infra* n.4.)

The Ninth Circuit, however, expressly rejected respondents' monitoring argument, and since it was dispositive of two claims in the District's favor that are not before this Court, it cannot be reargued here. (*See infra* section II.)

There is nothing left to be determined on remand. The Ninth Circuit already considered and rejected the monitoring argument. Respondents abandoned any other argument. The judgment of the Ninth Circuit should be reversed with directions that judgment be reinstated for the District on the San Gabriel and Los Angeles River claims.

II. RESPONDENTS' MONITORING ARGUMENT IS NOT PROPERLY BEFORE THE COURT.

Respondents resurrect the only argument they made in the Ninth Circuit and which the court soundly rejected, namely that respondents could establish a permit violation by the District (and theoretically all 85 co-permittees) merely by showing that the monitoring stations within the four subject rivers detected exceedances of water quality standards. Respondents assert via a footnote that they may do this without having filed a cross-petition because this is merely an "alternative ground [that] would sustain and not change the judgment." (BFR 34 n.14.) Not so. Resolution of this argument in respondents' favor in this Court necessarily undermines petitioner's success on two claims not before this Court involving the Santa Clara River and Malibu Creek. Hence, respondents were required to file a cross-petition to preserve their argument.

In defining the obligation of a respondent to cross-petition in order to invoke the jurisdiction of this

Court to address a particular argument, the Court has repeatedly recognized that if the rationale of an argument would undermine un-reviewed portions of a judgment in a petitioner's favor, a cross-petition must be filed.

In *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994), the Sixth Circuit had found that airlines had a private right of action under the Anti-Head Tax Act ("AHTA") 49 U.S.C. §1513(a), to challenge various fees levied by a municipal airport. 510 U.S. at 361. It upheld the bulk of fees, but agreed with the airlines that some fees were improperly calculated and remanded for a reduction. *Id*. at 362. The airlines then sought review in this Court, arguing that the AHTA barred imposition of any fees. However, the airport did not cross-petition for review of the Sixth Circuit's decision to the extent that it favored the airlines, specifically the remand to the district court for allocation of costs the Sixth Circuit had found to be improper under the statute. *Id*.

In this Court, the airport attempted to resurrect its argument that the airlines had no right to enforce the AHTA through a private right of action, asserting that this was simply another ground on which to affirm the judgment below, since if there was no private right of action there would be no basis for the airlines to challenge the costs at issue. *Id*. at 364. The Court, however, refused to consider this argument, noting that acceptance of the argument would repudiate that portion of the Sixth Circuit judgment in

petitioner's favor with respect to allocation of costs and that the airport had failed to cross-petition:

> A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment. [Citation.] A cross-petition is required, however, when the respondent seeks to alter the judgment below. [Citation.] Alteration would be in order if the private right of action question were resolved in favor of the Airport. For then, the entire judgment would be undone, including the portion remanding for reallocation of CFR costs between the Airlines and general aviation. The Airport's failure to file a cross-petition on the CFR issue – the issue on which it was a judgment *loser* – thus leads us to resist the plea to declare the AHTA claim unfit for District Court adjudication.

Id. at 364-65 (emphasis in original).

In *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), various utility companies and several states challenged license fees imposed on imported oil via Presidential proclamation. The district court rejected the challenge, but the Court of Appeals reversed and invalidated the entire regulatory scheme imposing fees. The federal government successfully petitioned for certiorari. Respondents argued that at least a portion of the import fees, based upon geographical differences, would violate Article I, Section 8 of the Constitution, requiring uniform

import duties throughout the United States. 426 U.S. at 560 n.11. The Court refused to consider the issue:

> Sustaining respondents' Uniformity Clause argument would call, not for invalidation of the entire license fee scheme, but only for elimination of the geographical differences in the exemptions allowed under it. This would represent not an affirmance of the judgments below, which effectively invalidated the entire scheme and its implementing regulations, but rather a modification of those judgments. But since respondents filed no cross-petition for certiorari, they are at this point precluded from seeking such modification.

Id.

In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), airline employees brought a suit under the Age Discrimination and Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.*, against an airline and union for allegedly discriminating against pilots over the age of 60. After the district court granted summary judgment to the union and the airline, the Court of Appeals reversed, finding that both defendants had violated the ADEA. 469 U.S. at 118; *Air Line Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 955-56 (2d Cir. 1983). The Second Circuit held that the airline's violation of the ADEA was willful and hence plaintiffs would be entitled to an award of liquidated or double damages. 713 F.2d at 956-57. The court found, however, that under the ADEA, the

union, although liable, was not subject to a damages award. *Id*. at 957.

The airline petitioned for certiorari, challenging the appellate court's holding that its policies violated the ADEA, that the violation was willful, and that the union could not be subject to a damages award. 469 U.S. at 119 n.14, 120. The union cross-petitioned on the appellate court's finding that it had violated the ADEA. *Id*. at 120. The Court granted both petitions, but declined to determine whether the union could be subject to damages in the event the liability finding was affirmed, because the airline lacked standing to assert the issue and the other respondents had not cross-petitioned:

> A prevailing party may advance any ground in support of a judgment in his favor. An argument that would modify the judgment, however, cannot be presented unless a cross-petition has been filed. In this case, the judgment of the Court of Appeals would be modified by the arguments advanced by the EEOC and the individual plaintiffs, as they are contending that the Union should be liable to them for monetary damages.

Id. at 119 n.14 (citations omitted).

Similarly, in *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426 (1941) and *National Labor Relations Board v. International Van Lines*, 409 U.S. 48 (1972) the NLRB sought review in this Court to fully reinstate cease and desist orders that had been pared down by the circuit courts. In

each case, the Court refused to allow the respondent employers to urge affirmance of the truncated orders by arguing that there was no basis for any relief at all, because to do so would repudiate the circuit court judgments and respondents had failed to cross-petition. *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. at 431; *National Labor Relations Board v. International Van Lines*, 409 U.S. at 52 n.4.

Here too, the argument respondents seek to assert concerning the monitoring station results as *ipso facto* establishing the District's liability for any exceedances under the Permit is not properly before the Court. Respondents failed to file a cross-petition in order to preserve that issue – an issue expressly resolved against them by the Ninth Circuit in affirming the district court judgment in favor of the District on two other waterways – the Santa Clara River and Malibu Creek.

In the district court and in the Ninth Circuit, respondents asserted that the District was liable for exceedances in violation of the Permit terms with respect to the San Gabriel, Los Angeles and Santa Clara Rivers, and Malibu Creek. Respondents offered only a single theory of liability as to *all four* bodies of water – that exceedances measured at the monitoring station within each of the four bodies of water established the liability of the District (as well as the County of Los Angeles) for violation of the Permit.[4]

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[4] *See* Opening Brief of Appellants, Ninth Cir. Dkt. No. 13 at 3, 13-16.

In affirming judgment for the District with respect to plaintiffs' claims concerning alleged Permit violations in the Santa Clara River and Malibu Creek, the Ninth Circuit expressly rejected the argument that respondents attempt to resurrect here, i.e., that exceedances at the mass emissions monitoring stations *ipso facto* established the District's liability. (App. 41-42, 47-48.):

> Plaintiffs have argued throughout this litigation that the measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations by Defendants. Because these points are designated in the Permit for purposes of assessing "compliance," this argument is facially appealing. But the Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act, which means in compliance with the NPDES. *See* 33 U.S.C. § 1311(a); *see also Miccosukee Tribe*, 541 U.S. at 102. 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*."

(App. 41-42 (emphasis in original).)

Having determined that plaintiffs were required to prove a discharge from the District's MS4 into the rivers, the court found a discharge into the San

Gabriel and Los Angeles Rivers based upon what all parties now concede is flatly untenable under the CWA and *Miccosukee*, i.e., that a discharge occurred when water flowed through the monitoring stations located in portions of the rivers channelized by the District for flood control purposes. (App. 45.) The court then found that respondents had failed to show any discharge into the Santa Clara River and Malibu Creek from the District's MS4 that flowed past the monitoring stations. (App. 47-48.)[5]

Respondents are not simply asserting an additional argument for affirming the judgment; rather, they are raising a contention that, if accepted by the Court, squarely repudiates the Ninth Circuit's affirmance of judgment in favor of the District on the Malibu Creek and Santa Clara River claims. Respondents, in the words of *Northwest Airlines*, were the "judgment losers" on those claims, and acceptance of their argument here would not affirm, but as in *Algonquin SNG*, effectively modify an existing judgment which

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[5] Contrary to the suggestion of the United States (USACM 23), this further dispels, rather than supports any supposition that the Ninth Circuit was somehow factually mistaken about the location of the monitoring stations in the Los Angeles and San Gabriel Rivers. While the monitoring stations for Malibu Creek and the Santa Clara River were within those rivers, as the court noted, respondents did not explain how the District's MS4 related to the monitoring stations. This is in contrast to the monitoring stations for the San Gabriel and Los Angeles Rivers, which respondents squarely stated were located in portions of the rivers channelized by the District. (Brief of Appellants, Ninth Cir. Dkt. No. 13 at 13-14.)

expressly rejected respondents' contention in affirming judgment for the District on the Malibu Creek and Santa Clara River claims.[6] As *Northwest Airlines*, *Algonquin SNG*, *Trans World Airlines, Express Publishing Co.* and *International Van Lines* make clear, respondents were required to file a cross-petition to properly invoke the jurisdiction of this Court to consider their monitoring argument.

Respondents' failure to cross-petition is particularly egregious, as their contention was raised in their brief in opposition to certiorari, yet was not presented as an issue for a cross-petition, perhaps because it might underscore the importance of the issue presented in the petition. Moreover, by not candidly presenting an entirely separate issue than the one on which certiorari was granted,[7] respondents have effectively "sandbagged" petitioner – presenting a full-blown (if meritless) argument in almost 30 pages of briefing, with petitioner's response being necessarily constrained by the limitations of a reply brief. In addition, 47 amici in support of petitioner have provided thoughtful commentary on the significance of the Ninth Circuit decision as written and on the

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[6] Accepting respondents' belated argument would also produce the anomalous result of affirming judgment for the County of Los Angeles based on the Ninth Circuit's rejection of the monitoring argument while simultaneously imposing liability on the District based on that same theory.

[7] The United States agrees that the issue is "well outside the question on which this Court granted certiorari." (USACM 27.)

issue for certiorari framed by this Court. Allowing respondents to belatedly shift the focus to an entirely different point deprives the Court of the benefit of the expertise that these amici can provide.

Since respondents failed to preserve their monitoring argument by filing a cross-petition, there is no basis for the Court to consider the issue.

III. RESPONDENTS' MONITORING THEORY IS CONTRARY TO THE CWA AS EMBODIED IN THE PERMIT, WHICH IMPOSES LIABILITY ONLY WHERE IT IS SHOWN THAT A PERMITEE HAS DISCHARGED IN VIOLATION OF PERMIT TERMS.

Respondents' argument is straightforward. All NPDES permittees are required to engage in monitoring, including monitoring that may be conducted in-stream as opposed to at the permittee's outfall. According to respondents, the District (and all 85 other co-permittees) "agreed" that the mass emissions monitoring stations within the watershed rivers would be used to determine the liability of each individual permittee for any exceedances, without proof that any individual permittees themselves discharged substances contributing to the exceedances. Respondents contend that system-wide permits in general and this Permit in particular impose liability on all permittees without proof that a permittee's discharge in fact caused or contributed to the exceedances.

The district court and the Ninth Circuit rejected this contention as flatly inconsistent with the CWA and the Permit itself. As the Ninth Circuit noted, the Permit and the CWA do not prohibit "exceedances." (App. 41-42.) Rather, both prohibit "discharges" which violate the Permit's terms. (*Id*. (citing 33 U.S.C. §1311(a)).) Thus, respondents were required to provide evidence that District outfalls discharged storm water into the rivers containing the pollutants for which exceedances were detected at the monitoring stations. (App. 41-42.)

Respondents' argument essentially reads out of the CWA the statutory requirement that there be a "discharge" that adds pollutants to a navigable waterway. Rather, under respondents' view, a single permittee covered by a system-wide permit is deemed to have caused an exceedance measured at a monitoring station in a river, even though that station measures the collection of pollutants flowing in that river from all upstream permittees in the system, as well as natural sources and other NPDES and non-NPDES dischargers that discharge into the river, without evidence of any discharge by the permittee being held liable.

Neither the Act nor implementing regulations support respondents' position. Respondents flatly assert that municipal stormwater dischargers are necessarily subject to the same monitoring requirements as other NPDES dischargers. Yet, this is questionable given that municipal stormwater dischargers are expressly treated differently under the Act. 33 U.S.C.

§1342(p)(3)(A) states that: "Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title." As set forth in 33 U.S.C. §1342(a)(1), included among the "applicable provisions of this section" are the monitoring requirements of 33 U.S.C. §1318. Significantly, there is no similar requirement to "meet all applicable provisions of this section" for municipal dischargers. 33 U.S.C. §1342(p)(3)(B). If anything, under the plain language of the statute municipal dischargers, unlike industrial dischargers, may not be subject to "all applicable provisions of this section," including monitoring requirements, but rather, are subject to more flexible requirements as the "administrator or the State determines appropriate for the control of . . . pollutants." 33 U.S.C. §1342(p)(3)(B)(iii).

Moreover, even if a monitoring requirement could be read into the provisions concerning municipal stormwater dischargers, neither the statute, regulations nor common sense support the conclusion urged by respondents here. Although monitoring results from a location other than an outfall might properly be used to characterize an individual discharge, most particularly with a single municipal or industrial point source,[8] that does not mean that one can use

[8] The only case respondents cite concerning monitoring other than at an outfall addresses internal monitoring for a waste treatment plant at a point *before* discharge into navigable waters. (*See* BFR 37, citing *Texas Mun. Power Agency v. Adm'r of the*

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monitoring results that do not characterize a specific discharge for the same purpose. This case illustrates the infeasibility of such a system, since the monitoring stations within the rivers do not measure the contribution of any single permittee but only the "mass emissions" within the river generated by *all* upstream permittees. The notion that the mass emission monitoring stations in the San Gabriel and Los Angeles Rivers can detect exceedances attributable to any particular permittee is untenable. The Regional Board staff member who served as the chief Permit drafter acknowledged that the monitoring stations were not in fact designed for that purpose. (*See* Supplemental Excerpts of Record, Ninth Cir. Dkt. No. 19 at 82, 144, 146-49.)

Nor did the District or any of its co-permittees "agree" that the monitoring stations would be used to affix individual liability on any permittee. The regulations require a permittee to propose an appropriate monitoring site, but as the United States notes, the regulatory agency retains final authority on the issue. (USACM 9; *see also* Excerpts of Record, Ninth Cir. Dkt. No. 15 at 353.) Moreover the Permit states that the monitoring site was selected to measure the contribution of the MS4, i.e., the collection system as a

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U.S. EPA, 836 F.2d 1482, 1489 (5th Cir. 1988).) The case does not suggest that monitoring at a point in a navigable water itself, where a permittee's discharges have been added to those of hundreds of others upstream, can be used to determine the liability of a particular discharger.

whole, not the discharge of any one permittee. The Permit states that the purpose of the mass emissions monitoring is to "(e)stimate the mass emissions *from the MS4*; (a)ssess trends in the mass emissions over time; and (d)etermine if the MS4 is contributing to exceedances of Water Quality Standards. . . ." (1 JA 219 (emphasis added).) This reference to "the MS4" as a whole and not to any individual permittee's MS4 belies any attempt to bootstrap this monitoring into some sort of compliance monitoring for individual permittees.

Contrary to the assertion of respondents and their amici, the District is not attempting to collaterally attack the terms of the Permit. Instead, the District is insisting that its plain terms be followed – that the District only be responsible for its own discharges and not for those of any co-permittee. If anything, it is respondents that are collaterally attacking the Permit terms. Had respondents wanted the Regional Board to impose permittee-specific outfall monitoring, as opposed to collective monitoring, they could have made this request during the permitting process or challenged the Permit after adoption. Respondents did not do so.

As the district court and Ninth Circuit correctly concluded, respondents, pursuant to the Permit's plain terms, were required to show that a permittee – here the District – contributed to the exceedances by submitting proof that the District discharged storm-water containing pollutants for which exceedances were detected. While respondents and their amici

attempt to paint a parade of horribles to the effect that this means the District and its co-permittees can never be held liable for discharges of pollutants into the rivers,[9] as the Ninth Circuit and district court found, respondents' problem was a failure of proof – they did not attempt to satisfy even the minimal burden of showing a discharge from any of the District's outfalls that caused an exceedance at the monitoring stations. Though respondents complain of the vast size of the MS4 and the District's MS4 in particular, and assert it would be impossible to sample what respondents describe as thousands of drains and outfalls (BFR 50 n.20, 52), as the district court and Ninth Circuit recognized, respondents could have satisfied their burden with something much less. (App. 48 ("[Appellants] could heed the district court's sensible observation and, for purposes of their evidentiary burden, 'sample from *at least one* outflow that included a standards-exceeding pollutant.'" (emphasis in original).)) Respondents simply failed to undertake that minimal effort.

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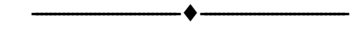
[9] Respondents go so far as to misleadingly cite a non-lawyer District employee's understanding as to whether the District could be held responsible for merely conveying as opposed to generating pollutants, to suggest the District is taking a legal position that it could not be held liable even for discharging flaming oil from its MS4 into the rivers. (BFR 53.) The District has always acknowledged that it is responsible for pollutants it conveys and discharges even if it did not originally generate the pollutants itself. Respondents' problem here was that they failed to present any evidence of a discharge of standards-exceeding pollutants.

Respondents' contention that all upstream permittees are liable for exceedances at the mass emissions stations cannot be squared with the Permit's clear statement – consistent with applicable regulations (40 C.F.R. §122.26(b)(1)) – that a permittee is responsible only for its own discharge. (1 JA 93.) Neither respondents nor any of their amici has identified any case where a discharger had been held liable for pollutants not in their discharge. Indeed, the lower court cases that have addressed the issue have found that a discharger is liable only for its own discharges or those over which it has control. *See Jones v. E.R. Snell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1348 (N.D. Ga. 2004); *United States v. Sargent Cnty. Water Res. Dist.*, 876 F. Supp. 1081, 1888 (D. N.D. 1992). And the District certainly has no control over its co-permittees – while the District is identified as a principal permittee, all that imposes is an agreement to act as a coordinating entity for the other permittees – as the provision makes plain, the District is not responsible for ensuring compliance of any individual permittee. (1 JA 103-04.) While there may be actions the District can take within its own system to ameliorate pollution, it has no control over what co-permittees do in theirs. More significantly, there are over a thousand entities upstream from the monitoring stations that are not subject to the system-wide Permit that also discharge into the rivers (App. 20-21), and the District has no control over their actions either.

Respondents' entire argument is dependent upon parsing out "responsibility" as something different

than "liability" for a Permit violation. Thus, they contend that while all permittees are liable and subject to civil penalties and potentially injunctive relief anytime there is an exceedance measured at the monitoring stations, each will only be "responsible" to the extent it contributed to the exceedance – with the permittee itself required to prove the extent to which it did or did not contribute to the exceedance. (BFR 53-56.) But, under the CWA, a party's liability is premised upon a "discharge." 33 U.S.C. §1311(a). A party is not liable for exceedances of water quality standards where there is no discharge. Similarly, under the Permit, liability is the same as "responsibility." Indeed, the pertinent provision of the Permit does not use the term "liable," but only "responsible" and makes it clear that each permittee is only "responsible" for its own discharges. (1 JA 93.)

Respondents may have wished that the Regional Board had imposed individual monitoring requirements on each permittee. But the Regional Board did not do so, nor did respondents request it to do so when the opportunity arose during adoption of the Permit. As the district court and Ninth Circuit recognized, the results of the monitoring could not establish the liability of any one permittee without evidence of a discharge by that permittee that contributed to the exceedances measured at the monitoring stations. The Ninth Circuit properly rejected respondents' argument, and this Court should as well.



CONCLUSION

For the foregoing reasons, petitioner requests that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed with directions that judgment for petitioner be reinstated.

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