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

REPLY TO BRIEF IN OPPOSITION

TIMOTHY T. COATES
Counsel of Record
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-Mail: tcoates@gmsr.com

ANDREA SHERIDAN ORDIN,
County Counsel
JUDITH A. FRIES,
Principal Deputy
LAURIE E. DODS,
Deputy County Counsel
OFFICE OF LOS ANGELES COUNTY COUNSEL
500 West Temple Street, Room 653
Los Angeles, California 90012
Telephone: (213) 974-1923
Facsimile: (213) 687-7337
E-Mail: jfries@counsel.lacounty.gov

HOWARD GEST
DAVID W. BURHENN
BURHENN & GEST LLP
624 South Grand Avenue, Suite 2200
Los Angeles, California 90017
Telephone: (213) 629-8787
Facsimile: (213) 688-7716
E-Mail: hgest@burhenngest.com

Counsel for Petitioner
Los Angeles County Flood Control District

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

ARGUMENT

RESPONDENTS' FAILURE TO ACKNOWLEDGE, LET ALONE DEFEND THE NINTH CIRCUIT'S UNTENABLE CONSTRUCTION OF THE CLEAN WATER ACT AND THIS COURT'S DECISIONS TACITLY CONCEDES THAT THE CASE REQUIRES INTERVENTION BY THIS COURT.

The Ninth Circuit's departure from the statutory and regulatory provisions of the Clean Water Act ("CWA") and the decisions of this Court is so profound that respondents – highly experienced institutional litigants on CWA issues – do not even attempt to defend the Ninth Circuit's actual reasoning. Instead, respondents pretend that the Ninth Circuit opinion says something quite different than it does. Indeed, respondents' attempt to rehabilitate the opinion relies on arguments that the Ninth Circuit expressly rejected.

The tip off that respondents are attempting to craft a different Ninth Circuit opinion than the one at issue in the petition, is that nowhere in their Brief In Opposition do they quote in full any passage of the Ninth Circuit's opinion. Rather, respondents string cite portions of the opinion and quote snippets of language to, in essence, manufacture a holding that simply is not there. Yet, petitioner and its amici do not have the luxury of ignoring the plain language of the Ninth Circuit's opinion, which sows confusion in the manner in which flood control agencies and other municipalities may undertake extensive and enormously

expensive improvements to safeguard the public from flooding.

A. The Ninth Circuit Expressly Held That A Discharge Of Water Occurred When Stormwater Flowed Past The Monitoring Stations In The Channelized Portions Of The Rivers Into "Naturally Occurring" Portions Of The Same Rivers, And Expressly Rejected Respondents' Theory Based On Alleged Discharges From Catch Basins, Gutters, Drains, Pipes, And Outfalls Along The Banks Of The Rivers.

Respondents acknowledge that the District's MS4 consists of improvements within the rivers themselves, as well as infrastructure outside of the river. As they note: "It is a constructed physical infrastructure that includes catch basins, gutters, drains, pipes, and outfalls, in addition to channelized portions of some natural watercourses." (Brief In Opposition ("BIO") 16; *see also* BIO 6 ("the MS4 includes channelized portions of both rivers, in addition to the drains and outfalls that discharge into the rivers").) Moreover, respondents admit that the monitoring stations required by the Permit are in portions of the rivers channelized and improved by the District (BIO 6), which is not surprising, since respondents previously admitted it in the district court. (Petition for Writ of Certiorari ("Pet.") 26 n.4) The Ninth Circuit similarly understood that the monitoring stations were located in the rivers, citing the Los Angeles

County Department of Public works website as accurately depicting the locations of the monitoring stations. (App. 18 n.4.)[1]

Respondents attempt to blur the distinction between these different parts of the District's MS4 and by so doing gloss over the Ninth Circuit's plain holding. Thus, respondents repeatedly refer to the Ninth Circuit having found that there was a "discharge" from one of petitioner's "outfalls," which they describe as "the constructed MS4 infrastructure – the storm drains and thousands of miles of underground sewer pipes that ultimately discharge to the rivers" (BIO 12) and "gutters and drains" or "external pipes and outfalls – thousands of them. . . ." (BIO 16-17.)

The Ninth Circuit, however, expressly rejected respondents' attempt to premise a violation on the mere fact that the District had outfalls, i.e., various pipes, culverts or drains, that discharged into the rivers upstream from the monitoring stations. (App.

---

[1] *See*, *Section Two: Site Descriptions*, Los Angeles Cnty. Dept. of Pub. Works, p. 2-4, *available at* http://dpw.lacounty.gov/wmd/npdes/9899_report/SiteDesc.pdf and *Section Two: Site Descriptions*, Los Angeles Cnty. Dept. of Pub. Works, p. 2-2, *available at* http://dpw.lacounty.gov/wmd/NPDES/2006-07_report%5CSection%202.pdf (stating that "The San Gabriel River, at the gauging station, is a grouted rock-concrete stabilizer along the western levee and a natural section on the eastern side" and that "[f]low measurement and water sampling are conducted in the grouted rock area along the western levee of the river" and noting that at the site of the Los Angeles River monitoring station "the river is a concrete-lined trapezoidal channel").

41-42.) In so doing, it affirmed the district court, which had similarly found that respondents had failed to present evidence that the standards-exceeding pollutants passed through the District's MS4 outflows at or near the time the exceedances were observed. (App. 100.)[2] Nor did respondents provide any evidence that the mass-emissions monitoring stations themselves are located at or near one of petitioner's outflows. (*Id*.) The district court emphasized, that under the Permit, the District was only a co-permittee and that it could not be held liable for exceedances that may have been caused by discharges from outflows maintained by other co-permittees upstream from the mass-emissions monitoring stations. (App. 101-02.)

Rather, the Ninth Circuit found a "discharge" from an "outfall" for purposes of imposing CWA liability based solely upon movement of water from the District's channelized portions of the rivers into alleged "navigable" portions of the same rivers. Specifically, the court found that the monitoring stations (which respondents concede are in the rivers) were in concrete channels maintained by the District as part of its MS4 and hence when polluted water from any upstream source entered these channels

[2] This is why respondents' assertion that reversal of the Ninth Circuit's opinion would leave them without any remedy against petitioner for such discharges (BIO 19) is patently false – respondents simply failed to present evidence to support such claims.

and flowed back into the "naturally occurring" portions of the rivers, this constituted a "discharge" from an "outfall" for purposes of imposing liability under the CWA. The court's holding is plain:

> [T]here is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River and San Gabriel River. Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in a section of the MS4 owned and operated by the District, when pollutants were detected, they had not yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction – not a naturally occurring Watershed River.

(App. 44.)

The court continued:

> The discharge from a point source occurred when the still-polluted stormwater flowed

> out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways.

(App. 45.)

It is beyond dispute that the Ninth Circuit found a CWA violation based solely on the movement of water containing pollutants through the District's channelized portions of the rivers.

B. The Entire Premise Of The Ninth Circuit's Decision Is That Improvements To A Navigable Water Of The United States Such As Channelization As Part Of Flood Control Or A Municipal Separate Storm Sewer System, Alter Its Status, A Result That Is Squarely At Odds With The Clean Water Act, This Court's Decision In *Rapanos v. United States*, And The Decisions Of Other Circuits.

As noted in the Petition, the linchpin of the Ninth Circuit's decision is its finding that a "discharge" from an "outfall" occurred when water flowed through the monitoring stations located in the District's channelized portions of the rivers and into navigable waters. According to the court, even though the monitoring stations are in the channelized portions of the rivers, "[a]s a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction – not a *naturally occurring* Watershed River." (App. 44 (emphasis added).)

The plain and necessary implication of this holding is that when waters of a navigable river flow into portions of a river that have been channelized or otherwise improved for flood control, that somehow these channelized portions are distinct from the navigable waters themselves. The language of the opinion makes it clear that the Ninth Circuit is drawing this distinction based upon the "fact" that some portions of the river are "man-made," as distinct from a "naturally occurring Watershed River."

Respondents acknowledge, as they must, that given clear statutory and case authority, "an improved river can be a navigable water." (BIO 10.) But they contend that the Ninth Circuit found that "the Los Angeles River and the San Gabriel River are navigable waters, App. 42, even though much of each river has been converted into a concrete channel." (BIO 12.) Yet, the cited passage from the Ninth Circuit's opinion merely states that the "Watershed Rivers are all navigable waters" (App. 42), a necessary fact for CWA jurisdiction. The opinion's only references to man-made improvements are in the passages petitioner quoted above, where the court plainly distinguished between man-made portions of the rivers maintained by the District as part of its MS4, from "naturally occurring Watershed Rivers." (App. 44.)

Respondents try to explain away the Ninth Circuit's reference to "naturally occurring Watershed Rivers" by again turning a blind eye to what the Ninth Circuit actually decided, and instead, remarkably

claiming the Ninth Circuit found a violation based upon the very argument the court rejected. Respondents assert that:

> [T]he court alluded to naturally occurring watershed rivers to distinguish the rivers from the District's MS4 outfalls and the rest of the constructed MS4 infrastructure – *the storm drains and thousands of miles of underground sewer pipes that ultimately discharge to the rivers.*

(BIO 12 (emphasis added).)

That assertion is belied by the plain language of the opinion cited above. The Ninth Circuit did not find a CWA violation based upon a discharge from storm drains or underground sewer pipes. It found a violation based upon an artificial and improper distinction between channelized portions of the rivers and allegedly "naturally occurring" portions of the *same* rivers. Again, respondents acknowledge that the District's MS4 consists both of infrastructure outside of the rivers, and infrastructure in the rivers – including the monitoring stations in the channelized portions of the rivers. That respondents have to omit the latter in attempting to defend the Ninth Circuit's decision speaks volumes as to the utter lack of any case or statutory basis for the Ninth Circuit's rationale.

Respondents acknowledge that if petitioner's characterization of the Ninth Circuit's decision is true, it most assuredly conflicts with Justice Kennedy's

opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) and creates confusion concerning federal jurisdiction over similar waterbodies. (BIO 11.) The egregious nature of the Ninth Circuit's opinion is manifest, and underscored by the fact that amici from across the nation have recognized the alarming uncertainty it has injected into basic day-to-day planning and operation of municipal stormwater systems throughout the country.

C. By Premising A CWA Violation On A Discharge Resulting From Waters Of The Los Angeles And San Gabriel Rivers Passing Through The District's Channels Within The Rivers, And Into Portions Of The Same Rivers, The Ninth Circuit's Decision Is Contrary To *South Florida Water Management District v. Miccosukee Tribe of Indians*, Which Bars Claims Premised Upon Mere Transfer Of Water Within A Single Body Of Water.

Respondents acknowledge the clear holding of *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that merely transferring pollutants within a single water body would not require a NPDES permit. (BIO 14.) They argue, however, that the Ninth Circuit's opinion is consistent with *Miccosukee* because the District's MS4 does not transfer water within a single body of water. (BIO 16-17.) Respondents assert "[c]ollecting polluted stormwater from parking lots, streets, and

industrial sites, and then discharging it through gutters and drains into local rivers is not a transfer of water within a single water body" (BIO 16) and that the "District's MS4 includes external pipes and outfalls – thousands of them – that are separate from the rivers at issue in this case and that discharge polluted stormwater into those rivers." (BIO 17.)

Once again, respondents have essentially redrafted the Ninth Circuit opinion, which did not find a discharge based upon water flowing from the District's "gutters and drains" or "external pipes and outfalls . . . that are separate from the rivers at issue in this case. . . ." The only portions of the MS4 from which the Ninth Circuit found there to be a "discharge" were channelized portions of the rivers operated by the District for flood control purposes as part of its MS4. (App. 44-45.)[3] Quite simply, the Ninth

[3] Moreover, respondents' assertion that the District is merely challenging the Permit's requirements and not imposition of liability based on the court's strained construction of what constitutes a discharge under the CWA (BIO 18) is untenable. Again, this is precisely the argument the Ninth Circuit *rejected*:

> 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. [Citations.] While it may be undisputed that exceedances

(Continued on following page)

Circuit concluded that the District was liable solely because it conveyed polluted water – whatever its source – through its portions of the Los Angeles and San Gabriel Rivers, i.e., the water enters the channelized portions of the rivers, goes past the monitoring stations, and is discharged from the channelized portions into the "naturally occurring Watershed River[s]." (*Id*.) This is the quintessential transfer of pollutants within a single body of water that this Court rejected in *Miccosukee*.

Moreover, to the extent that respondents are contending that there can be a "discharge" of a pollutant based merely upon water flowing through an improved channelized section of a navigable water, so long as the MS4 also includes improvements beyond just the channelized portions of the river (BIO 16), then creation of such an exception to *Miccosukee* and the resulting expansion of the statutory and regulatory scope of the MS4 provisions of the CWA mandate review by this Court. The need for intervention is again underscored by the concerns expressed by amici as to the impact of the Ninth Circuit's decision on

---

> 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 Water Quality Standards or water quality objectives *are prohibited*."

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

The court then found a discharge under the CWA, as described in the text above. (App. 44-45.)

their operation of MS4s, including flood control measures undertaken within navigable rivers to protect the public safety.

D. Review Is Essential To Provide Clear Guidelines On Fundamental Provisions Of The Clean Water Act And Specific Provisions Concerning Regulation Of Stormwater.

As noted, respondents concede that if petitioner's characterization of the Ninth Circuit's decision is accurate, the case indeed warrants review by this Court. (BIO 11.) Municipalities must improve traditional navigable waters for purposes of flood control. Whether these improvements alter the status of these navigable waters under the CWA (as well as under other federal statutes that regulate navigable waters such as the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401 et seq.) such that the waterbody becomes, in the words of the Ninth Circuit, "distinct" as "a matter of law and fact" (App. 44) is an issue of national importance. The Ninth Circuit opinion creates confusion regarding obligations imposed on local entities arising from basic flood control. The alarming and disruptive nature of the Ninth Circuit's opinion is underscored by the concerns expressed by amici from across the country who must necessarily engage in extensive planning and commitment of financial resources in performing the core public service of flood control, a task made infinitely more difficult because of the uncertainty created by the

Ninth Circuit's opinion. (*See*, *e.g.*, Brief of Amicus Curiae National Association of Flood and Stormwater Management Agencies at 13; Brief of Amicus Curiae The California Stormwater Quality Association at 4-5, 17-18.)

The opinion similarly causes confusion as to the jurisdiction of the Environmental Protection Agency and Army Corps of Engineers to regulate those portions of rivers that have been improved, and are hence, under the Ninth Circuit's reasoning, purportedly distinct from the navigable waters themselves. (Pet. 36-38.)

Even were the Ninth Circuit's opinion limited solely to those states within its jurisdiction, or even to petitioner alone, its impact would be profound, directly affecting the manner in which the District performs its basic function of safeguarding the persons and property of millions of citizens.

This Court has never addressed the scope of the CWA's stormwater permitting requirements. The Ninth Circuit's radical departure from what had been assumed to be established law makes it necessary for the Court to now do so.

CONCLUSION

For the foregoing reasons and those stated in the petition, petitioner urges that the petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY T. COATES
Counsel of Record
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

ANDREA SHERIDAN ORDIN, County Counsel
JUDITH A. FRIES, Principal Deputy
LAURIE E. DODS, Deputy County Counsel
OFFICE OF LOS ANGELES COUNTY COUNSEL
500 West Temple Street, Room 653
Los Angeles, California 90012
Telephone: (213) 974-1923
Facsimile: (213) 687-7337

HOWARD GEST
DAVID W. BURHENN
BURHENN & GEST LLP
624 South Grand Avenue, Suite 2200
Los Angeles, California 90017
Telephone: (213) 629-8787
Facsimile: (213) 688-7716

Counsel for Petitioner
Los Angeles County
Flood Control District