Discharge of a Pollutant: The Clean Water Act Definition That Has Caused MUCH Confusion

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Discharge of a pollutant: The Clean Water Act definition that has caused MUCH confusion

Los Angeles County Flood Control Dist. v. Natural Res. Def. Council, Inc.¹

I. INTRODUCTION

Usually, when both parties to a case and the United States as amicus curiae agree on the answer to the question that the Supreme Court has granted certiorari, it is not hard to predict the outcome of a case.² Nevertheless, it has been proven that when parties correctly agree on the answer to the question presented, sometimes the agreement is based on the premise that the parties want to reach their true dispute in front of the Court.³ This is exactly what happened in Los Angeles County Flood Control District v. Natural Resources Defense Council Inc. ("Los Angeles") when "the parties correctly answered the sole question presented in the negative."⁴ In Los Angeles the Court granted narrow review under the single question of whether or not the flow of water out of an improved portion of a river ranks as "discharge of a pollutant" under the Clean Water Act ("CWA").⁵

Deciphering the definition of "discharge of a pollutant" is essential to knowing what occurrences may be equivalent to "discharges" and what materials or substances may be "pollutants."⁶ To assist in this analysis, Congress and the courts

⁴ Los Angeles Cnty., 133 S. Ct. at 711.
⁵ Id.
⁶ James H. Andreasen, Still Defining "Discharge of a Pollutant" after Thirty Years, 24 Natural Res. & Env’t No. 4 at 2 (2010), available at
have defined the types of acts that constitute a "discharge of a pollutant" by relying on §1362(12) of the CWA.\footnote{33 U.S.C. § 1362 (2012).} Under the CWA, when "discharge" is used with discharge of pollutants, the group of words "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."\footnote{Id. § 1362(12); see also S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 375 (2006).} But, when "discharge of a pollutant" applies to water the phrase generally means issuing out or flowing.\footnote{S.D. Warren Co., 547 U.S. at 376.} Consequently, the term "discharge" is not independently defined in § 401 of the CWA, and instead the Act states "[t]he term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."\footnote{33 U.S.C. § 1362(16) (2012).} Due to this fact, the Ninth Circuit in \textit{Natural Resources Defense Council, Inc. v. County of Los Angeles}\footnote{Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles, 673 F.3d 880 (9th Cir. 2011) (cert. granted in part, 133 S. Ct. 23 (U.S. 2012) and rev’d sub nom. Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc., 133 S. Ct. 710 (2013)). [hereinafter \textit{Natural Resources}]. In \textit{Natural Resources} the court stated a “discharge from a point source occurred when the still-polluted storm water flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways” and since the Los Angeles County Flood Control District controlled the concrete lined portions they should be held liable for the discharges. \textit{Id.} at 899-900.} erroneously defined the term "discharge" which subsequently led the Court in \textit{Los Angeles} to reverse the lower court’s judgment.\footnote{Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc., 133 S. Ct. 710, 712 (2013).} The Supreme Court’s holding in \textit{Los Angeles} has set precedent for how courts will determine the types of precautions a municipality must take when designing water treatment systems that comply with the permit system of the CWA.\footnote{Alexandra Cowen & Chanwoo Park, \textit{Los Angeles Cnty. Flood Control Dist.}}}
II. FACTS AND HOLDING

The Los Angeles County Flood Control District ("District") contains eighty-four cities and some unincorporated areas in the County of Los Angeles. Stormwater runoff in the District is collected by thousands of storm drains that are located in each municipality and channeled into a "municipal separate storm system" ("MS4"). The District operates the MS4, which is "a drainage system that transports, collects, and discharges storm water." This MS4 contains and conveys only untreated stormwater channeled into its numerous watercourses, including four Watershed Rivers located at: (1) the Los Angeles River; (2) the San Gabriel River; (3) the Santa Clara River; and (4) Malibu Creek. The Watershed Rivers drain into the Pacific Ocean by way of Santa Monica Bay, Los Angeles Harbor, and Long Beach Harbor.

More often than not, "when storm water flows over urban environs, it collects suspended metals, sediments, algae..."
promoting nutrients, floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants.”

This process is a chief contributor to water pollution in the Pacific Ocean and southern California rivers while also negatively impacting the health of countless ocean users each year. Due to the fact that stormwater is often heavily polluted, the “Clean Water Act” ("CWA") and its implementing regulations require the operator of an MS4 serving a population of at least 100,000, to obtain a National Pollutant Discharge Elimination System ("NPDES") permit before discharging stormwater into navigable waters.

The District first obtained a NPDES permit for its MS4 in 1990, which was renewed in 1996, 2001, 2006, and 2007.

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19 Id. (citing Envtl. Def. Ctr., Inc. v. E.P.A., 344 F.3d 832, 840 (9th Cir. 2003)).
20 Natural Resources, 673 F.3d at 884.
21 33 U.S.C. § 1251. The Clean Water Act is the nation’s primary water-pollution control law whose purpose is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s water.” Natural Resources, 673 F.3d at 885.; see also 33 U.S.C. § 1251(a). To accomplish its goal, the Clean Water Act prohibits the “discharge of any pollutant by any person unless done in compliance with some provision of the Act.” Natural Resources, 673 F.3d at 885.; see also S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004). “Discharge of pollutant” is “any addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1362(12).
22 Los Angeles Cnty., 133 S. Ct. at 712.; see also 33 U.S.C. § 1311(a); 33 U.S.C. § 1342(p)(2)(C)-(D); 40 CFR § 122.26(a)(3); 40 CFR § 122.26(b)(4); 40 CFR § 122.26(b)(7). The NPDES permit requires its holder to follow the requirements of numerous Clean Water Act provisions, “which include effluent limitations, water-quality standards, water monitoring obligations, public reporting standards, water monitoring obligations, public reporting mechanisms, and certain discharge requirements.” Natural Resources, 673 F.3d at 885. According to the permit obtained by the District, “[p]ermittees are to assure that storm water discharges from the MS4 shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-storm water to the MS4 has been effectively prohibited.” Id. at 887.
23 Los Angeles Cnty., 133 S. Ct. at 712.; see also Natural Resources, 673 F.3d at 886. Under the permit obtained by the District, it was required to monitor
On March 3, 2008, Natural Resources Defense Council, Inc. ("NRDC") and Santa Monica Baykeeper ("Baykeeper") filed a citizen suit against the District and several other defendants under the CWA alleging, among other things, that the water-quality measurements from monitoring stations located within the Los Angeles and San Gabriel Rivers demonstrated the District was violating the terms of its permit regulating municipal stormwater and urban runoff discharges within the County of Los Angeles. Due to the fact that the Los Angeles and San Gabriel monitoring stations are located in a channelized portion of the MS4 owned and operated by the District, the District admitted it

the mass-emissions stations and take mass-emission readings five times per year for the Watershed Rivers. Id. at 888-89.

Natural Res. Def. Council, Inc. v. County of Los Angeles, 2010 WL 761287 *1. The other defendants were the individual County Supervisors and the Director of the Los Angeles County Department of Public Works in their official capacities. Id. Under the CWA any citizen may commence a civil action on his own behalf against any person "who is alleged to be in violation of an effluent standard or... an order issued by the Administrator or a State with respect to such a standard or limitation, or... against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(1)-(2) (2012).

Los Angeles Cnty., 133 S. Ct. at 710.; Natural Res. Def. Council, Inc. v. County of Los Angeles, 2010 WL 761287 *1. In June 2008, the district court denied the District's motion to stay the case, but granted in part and denied in part the District's motion to dismiss by finding NRDC failed to provide adequate notice to the District. Id. But, the district court allowed NRDC to refile against the District after valid notice, in which NRDC filed their first amended complaint on September 19, 2008. Id. Within the amended complaint NRDC alleged six causes of action under the CWA "for: (1) causing and contributing to exceedances of water quality standards in the Santa Clara River watershed; (2) causing and contributing to exceedances of water quality standards in the Los Angeles River watershed; (3) causing and contributing to exceedances of water quality standards in the San Gabriel River watershed; (4) causing and contributing to exceedances of water quality standards and Total Maximum Daily Load violations in the Malibu Creek watershed and at Surfrider Beach; (5) illegally discharging waste into the oceanic Area of Special Biological Significance between Mugu Lagoon in Ventura County and Latigo Point in Los Angeles County; and (6) failing to submit adequate Receiving Water Limitations Compliance Reports." Id.
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conveys pollutants via the MS4, but contended that its infrastructure alone does not generate or discharge pollutants.26

The district court granted summary judgment to the District on NRDC’s claims while acknowledging that “the data from the Los Angeles River and San Gabriel River monitoring stations indicated that water quality standards had repeatedly been exceeded for a number of pollutants, including aluminum, copper, cyanide, fecal coliform bacteria, and zinc.”27 But, the district court held “numerous entities other than the District . . . discharge pollutants into the rivers upstream of the monitoring stations.”28 The court determined the record was insufficient “to warrant a finding that the District’s MS4 had discharged stormwater containing the standards exceeding pollutants detected at the downstream monitoring stations.”29

On appeal, the Court of Appeals for the Ninth Circuit reversed the decision of the district court.30 The Ninth Circuit decided that because the monitoring stations for the Los Angeles and San Gabriel Rivers “are located in ‘concrete channels’ constructed for flood purposes . . . a discharge of pollutants occurred under the CWA when the polluted water detected at the monitoring stations ‘flowed out of the concrete channels’ and entered downstream portions of the waterways lacking concrete linings.”31 The court stated that “[b]ecause the District exercises

26 Natural Resources, 673 F.3d at 889. “The Los Angeles River Monitoring Station is located in the City of Long Beach in a concrete lined trapezoidal channel” and the “San Gabriel River Monitoring Station is located in Pico Rivera and measures an upstream tributary watershed of 450 square miles.” Id. “The Los Angeles River Monitoring Station measures “total upstream tributary drainage” of 825 square miles, as the Los Angeles River is the largest watershed outlet in the Los Angeles County.” Id.
27 Los Angeles Cnty., 133 S. Ct. at 712.
28 Id.
29 Id.
30 Id.
31 Id.
control over the concrete lined portions of the rivers . . . the District should be held liable for the discharges that occur from those concrete channels."

The Supreme Court of the United States granted review of this case limited to the single question: "Under the CWA does a 'discharge of pollutants' occur when polluted 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,' and then 'into a lower portion of the same river?'"

The parties, and the United States as amicus curiae, agreed the answer to this question is "no" based on the holding in South Florida Water Management District that states "the transfer of polluted water between 'two parts of the same water body' does not constitute a discharge of pollutants under the CWA." The Court's determination in South Florida Water Management District originated from the text of the CWA which defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." Relying on Webster's Third New International Dictionary, the Court in Los Angeles further declared, "[u]nder a common understanding of the meaning of the word 'add,' no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body." By following the South Florida

32 Id.
33 Los Angeles Cnty., 133 S. Ct. at 712-713.
34 Id. at 713 (citing S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 109-12 (2004). [hereinafter Miccosukee]). In Miccosukee, "polluted water was removed from a canal, transported through a pump station, and then deposited into a nearby reservoir." Los Angeles, 133 S. Ct. at 713. The Court held this water transfer would count as a discharge of pollutants under the CWA only is the canal and the reservoir were meaningfully distinct bodies water bodies. Id.
35 Los Angeles Cnty., 133 S. Ct. at 713; see also 33 U.S.C. § 1362(12).
36 Id. at 713. In making this determination the court used a quote from the Court of Appeals for the Second Circuit that states, "[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." Id. (quoting Miccosukee, 541
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Water Management District precedent, the Court in Los Angeles confirmed no discharge of pollutants occurs when water simply flows from one portion of the water body to another, rather than being removed and then returned to a water body. The Court in Los Angeles held "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a 'discharge of pollutants' under the CWA;" therefore the decision of the Court of Appeals for the Ninth Circuit must be reversed.

III. LEGAL BACKGROUND

A. The Clean Water Act

The first federal statute to govern water pollution was The Rivers and Harbors Act of 1890, which prohibited the dumping of pollutants and waste into the New York Harbor. Forty years later, in the 1930s, water pollution became a noteworthy problem that led Congress to propose several bills that addressed the issue at a national level. Nevertheless, it was not until 1948 when Congress enacted the Federal Water Pollution Act, which later became known as the CWA. Initially, the CWA was enacted to

U.S. at 109-10).

37 Los Angeles Cnty., 133 S. Ct. at 713.

38 Id. The NRDC and Baykeeper argued in the alternative that based on the terms of the District's NPDES permit, the exceedances detected at the monitoring stations sufficed to establish the District's liability under the CWA for its upstream discharges. Id. at 711. But, due to the fact that this argument was not within the narrow question on which certiorari was granted the Court did not address it. Id.

39 Jason R. Jones, Comment, The Clean Water Act: Groundwater Regulation and The National Pollutant Discharge Elimination System, 8 DICK. J. ENV'T. L. & POL'Y 93, 96 (1999). The Rivers and Harbors Act was amended in 1899 "to grant the Secretary of the Army the power to regulate the discharge of waste into navigable waters through a permit system, regardless of whether such discharge impeded navigation. Id.

40 Id.

41 Id.
bolster federal responsibility by implementing local pollution control programs with technical services and money.\textsuperscript{42} Then, in 1965 Congress amended the CWA to include federal control over water quality standards for interstate waters.\textsuperscript{43} The current version of the CWA was the result of comprehensive revisions that occurred on October 18, 1972, and is now the nation’s primary water pollution control law.\textsuperscript{44} Congress structured the CWA to function through self-monitoring and self-reporting of violations to “avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement.”\textsuperscript{45}

The purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”\textsuperscript{46} The CWA states:

“[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title.”\textsuperscript{47}

To serve these ends, the CWA precludes the discharge of any pollutant by any person, unless done in compliance with an

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{Id.} at 96-97.

\textsuperscript{44} \textit{Id.} at 97.; see also David Drelich, \textit{Article, Restoring the Cornerstone of the Clean Water Act}, 34 \textit{COLUM. J. ENVTL. L.} 267, 268 (2009); \textit{Natural Resources}, 673 F.3d at 885.

\textsuperscript{45} \textit{Natural Resources}, 673 F.3d at 896.

\textsuperscript{46} 33 \textit{U.S.C.} § 1251(a) (2012).

\textsuperscript{47} \textit{Id.} § 1251(b).
exception provided in the Act. Discharge of pollutant is defined as any addition of any pollutant to navigable waters from any “point source.” Discharge is characterized as adding pollutants from the outside world to navigable water. Under the CWA, pollutant is defined broadly to include not only traditional contaminants, but also solids such as dredged soil, rock, solid waste, sand, and municipal and agricultural waste discharged into water. The CWA defines navigable waters as all waters, which are currently used, were used in the past, or may be subject to use in interstate or foreign commerce, including waters that are subject to the ebb and flow of the tide. Furthermore, point sources are defined 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.”

To determine how the discharge of water may be evaluated, the CWA uses two water quality performance standards: “effluent limitations” and “water quality standards.” An effluent limitation is “any restriction established by a state or the Administrator [Environmental Protection Agency] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from

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48 Natural Resources, 673 F.3d at 885 (citing 33 U.S.C. § 1311(a)).
50 Natural Resources, 673 F.3d at 885 (citing Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 308 (9th Cir. 1993).
52 Natural Resources, 673 F.3d at 898 (citing 40 C.F.R. § 122.2 (2012)). For a century prior to the CWA, the phrase “navigable waters of the United States” was interpreted to refer to interstate waters that are “navigable in fact” or readily susceptible of being rendered so. Rapanos v. U.S., 547 U.S. 715, 723 (2006).
53 33 U.S.C. § 1362(14). MS4s are considered point sources. Natural Resources, 673 F.3d at 885.
54 Natural Resources, 673 F.3d at 885.
point sources into navigable waters, the waters of the contiguous zone, or an ocean.” Guidelines of effluent limitations “shall require the application of the best practicable control technology currently available.” On the other hand, “[w]ater quality standards are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology based limitations, can be regulated to prevent the water quality from falling below acceptable levels.” A two-step process is used to develop water quality standards. Under the first step, the Environmental Protection Agency or the Administrator established by the state determine a waterway’s beneficial use. “Once the beneficial use is determined, water quality criteria that will yield the desired water conditions is formulated and implemented.” These water quality standards originate from the state boards charged with managing their domestic water resources. During the drafting process of water quality standards, the Environmental Protection Agency provides guidance to states in order to help obtain the Agency’s approval of any revision.

57 Natural Resources, 673 F.3d at 886 (internal quotations and citations omitted).
58 Id.
59 Id.
60 Id.
61 Id.
62 Id.
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B. The National Pollutant Discharge Elimination System

One of the exceptions under which the discharge of a pollutant is allowed in the CWA occurs when a National Pollutant Discharge Elimination System ("NPDES") permit is obtained. The NPDES permitting program originated in the 1972 amendments to the CWA. During that time, the NPDES permitting program was the "primary means of enforcing the CWA's effluent limitations." The program was codified in § 402 of the CWA. In 1973, the Environmental Protection Agency promulgated regulations by "categorically exempting discharges from a number of point sources classes, including separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity." However, the D.C. Circuit Court invalidated the Environmental Protection Agency's exemption of certain point sources in 1977. The D.C. Circuit Court stated, "the wording of the CWA, legislative history, and precedents are clear in that the Environmental Protection Agency does not have authority to exempt categories of point sources from the permit requirements of § 402."

In 1987, Congress responded to the D.C. Circuit Court by enacting the Water Quality Act amendments to the CWA which allowed the Environmental Protection Agency to regulate stormwater discharges from MS4s. "The principal effect of the

63 Id. at 891. The Environmental Protection Agency has authorized the State of California to issue NPDES permits. Id. at 886.
64 Id. at 892-93.
65 Id. at 893.
67 Natural Resources, 673 F.3d at 893 (internal quotations omitted).
68 Id. (citing Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1376-77 (D.C. Cir. 1977)).
69 Id. (internal quotations and citations omitted).
70 Id.
1987 amendments was to expand the coverage of § 402’s permitting requirements. The purpose of the Water Quality Act was to enable the Environmental Protection Agency and states to focus their attention on the most significant problems first. The amendments included five categories of stormwater discharges that were regarded as the most significant sources of stormwater pollution. The five categories of the most serious discharges were: (1) a discharge with respect to which a permit has been issued under this section before February 4, 1987; (2) a discharge associated with industrial activity; (3) a discharge from a municipal separate storm sewer system serving a population of 250,000 or more; (4) a discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000; and (5) a discharge for which the Administrator of the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. Of the five categories of discharges required to obtain a permit, two are MS4 operators with either municipalities with populations over 250,000 or municipalities with populations between 100,000 and 250,000. Congress gave municipalities the responsibility of administrating the NPDES permitting requirement to ease the burden on the Environmental Protection Agency.

Since its implementation, “the NPDES permitting program has been the ‘centerpiece’ of the CWA and the primary method for enforcing the effluent and water quality standards established by the Environmental Protection Agency and state governments.” The NPDES is the CWA’s “most effective

71 Id.
72 Id.
73 Id.
75 Id. § 1342(p)(2)(C)-(D).
76 Natural Resources, 673 F.3d at 894.
77 Id. at 891.
weapon against pollution,” and therefore plays a significant role in water pollution litigation.  

IV. INSTANT DECISION

In Los Angeles, the Supreme Court granted certiorari under the limited question of: “Does a ‘discharge of pollutants’ occur when polluted 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,’ and then ‘into a lower portion of the same river’ under the CWA?’” In making its determination the Court noted the text of the CWA “defines the term ‘discharge of a pollutant’ as any addition of any pollutant to navigable waters from any point source.” The Court stated, “[u]nder a common understanding of the word ‘add,’ no pollutants are ‘added’ to a water body when water is merely transferred between different portions of that water body.” The Court noted that according to Webster’s Third New International Dictionary, “add” is defined as to join, annex, or unite, as one thing to another, so as to bring about an increase, as in number, size, or importance, or so as to form one aggregate.  “[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.”

In making its decision, the Court in Los Angeles relied on the holding of South Florida Water Management District,  

78 Id. at 892.  
79 Los Angeles County Flood Control Dist. v. Natural Res. Def. Council, Inc., 133 S. Ct. 710, 712-713 (2013). Prior to making its determination the Court noted the parties as well as the United States as amicus curiae agree that the answer is to this question is “no.” Id. at 713.  
80 Id. at 713.  
81 Id.  
82 Id.  
83 Id.  
which states that pumping polluted water from one part of a water body into another part of the same water body does not constitute a discharge of pollutants under the CWA.\textsuperscript{85} Furthermore, in \textit{South Florida Water Management District}, "polluted water was removed from a canal, transported through a pump station, and then deposited into a nearby reservoir."\textsuperscript{86} The Court in \textit{South Florida Water Management District} declared the water transfer that occurred could "count as discharge of pollutants under the CWA only if the canal and the reservoir were meaningfully distinct water bodies."\textsuperscript{87} Following \textit{South Florida Water Management District}, the Court in \textit{Los Angeles} noted, "no discharge of pollutants occurs when water, rather than being removed and then returned to a water body, simply flows from one portion of the water body to another."\textsuperscript{88} Based on this determination, the Court in \textit{Los Angeles} held "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA."\textsuperscript{89} Therefore, the Court held the decision rendered by the Court of Appeals for the Ninth Circuit was inconsistent and reversed that court's judgment.\textsuperscript{90}

\section*{V. COMMENT}

\textbf{A. Discharge of a pollutant under the Clean Water Act}

The primary problem with the decision concocted by the Ninth Circuit is that the court misapplied the CWA's definition of "discharge of a pollutant."\textsuperscript{91} Under the CWA, a permit is

\begin{itemize}
  \item \textsuperscript{85} \textit{Los Angeles Cnty.}, 133 S. Ct at 711.
  \item \textsuperscript{86} \textit{Id.} at 713.
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} \textit{Id.}
  \item \textsuperscript{89} \textit{Id.}
  \item \textsuperscript{90} \textit{Id.}
  \item \textsuperscript{91} Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles, 673 F.3d 880, 899-900 (9th Cir. 2011) cert. granted in part, 133 S. Ct. 23 (2012) and rev'd sub
required for the “discharge of any pollutant,” which is defined as any *addition* of any pollutant to navigable waters from any discernible, confined and discrete conveyance from which pollutants are or may be discharged. Taking this into consideration, the Supreme Court’s decision in *Los Angeles* is not surprising because the Ninth Circuit failed to apply the test formulated in *South Florida Water Management District* that solidified the fact that moving pollutants around within a single water body does not involve an *addition* of pollutants to waters, and therefore does not require a permit under the CWA. The Court has also stated, “if two identified volumes of water are simply two parts of the same water body, pumping water from one into the other cannot constitute an *addition* of pollutants.”

Nevertheless, the Ninth Circuit found the District liable and wrote the CWA “does not distinguish between those who add and those who convey what is added by others,” which led to the court’s finding that “the Act is indifferent to the originator of water pollution.” To support its reasoning the court cited a Fourth Circuit opinion that held, “[t]he Act bans ‘the discharge of any pollutant by any person’ regardless of whether that ‘person’ was the root cause or merely the current superintendent of the discharge.” Under the CWA, “person” is defined as states, municipalities, and political subdivisions of a state, but the reasoning of the opinion the Ninth Circuit relied upon is inadequate and inapplicable to *Los Angeles*. The distinguishing factor between *Los Angeles* and the Fourth Circuit’s opinion is

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92 33 U.S.C § 1362(12); see also 33 U.S.C. § 1362(14).
95 *Natural Resources*, 673 F.3d at 900.
96 *Id*.
that *Los Angeles* does not concern the "discharge of a pollutant" as defined by the CWA.

Even so, the Ninth Circuit further erroneously found that since "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, [and] . . . [a]s a matter of law and fact, the MS4 is distinct from the two navigable waters." To support this proposition, the Ninth Circuit declared that because the MS4 is an intrastate man-made construction and not a naturally occurring watershed, a "discharge of a pollutant" occurred when the still-polluted storm water flowed out of the concrete channels where the monitoring stations are located, through an outfall, and into the navigable waterways. But, the mere fact that NRDC and Baykeeper admitted the monitoring stations at issue are located *in* the Los Angeles and San Gabriel Rivers proves there was no "discharge of a pollutant" in *Los Angeles* because the flow of water was within a single body of water. The Ninth Circuit's finding that there may be a "discharge" from channelized portions of a river into "naturally occurring" portions of a river simply because one is man-made contradicts uniform statutory, regulatory and case authority that makes it clear that the physical infrastructure of a body of water is irrelevant to the question of whether or not it is a navigable water of the United States. Furthermore, the legislative history of the CWA does not suggest Congress intended to require an NPDES permit for the purposes of a "discharge of a pollutant"

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98 *Natural Resources*, 673 F.3d at 899.
99 *Id.* at 899-900.
100 *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 2010 WL 761287
102 *Id.* at 23.
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when the mere passage of water through water bodies is improved for flood control purposes.103

B. The Natural Resource Defense Council, Inc. and Santa Monica Baykeeper's Untouched Argument

In Los Angeles, NRDC and Baykeeper argued the Ninth Circuit reached the correct result by stating the monitoring system proposed by the District indicated numerous instances in which the water quality standards allowed under the District’s permit were exceeded.104 According to NRDC and Baykeeper, the exceedances detected at the monitoring stations were “by themselves sufficient to establish the District’s liability under the CWA.”105 Nevertheless, the Court declined to answer that question, and as a result, the ruling in Los Angeles was narrow and avoided a potential weakening of the CWA by leaving open the question of whether conceded permit violations by the District meant the District deserved to be held liable.106 If the Court had not taken this position, Los Angeles “could have weakened the centrality of self-reported discharge permit violations” and many court rulings that have held such violations result in strict liability.107 The Court evaded such a result by

103 Id. at 24.
105 Id. at 713-14.
106 Id. at 714.; see also William Buzbee, How the Los Angeles County Flood Control District MS4 Case Supreme Court Loss is a Win for the Clean Water Act (Jan. 8, 2013), http://www.progressivereform.org/CPRBLOG.cfm?idBlog=1BF6B21F-B185-5DE8-468CA81DF2806262.
"explicitly leaving the issue open in reversing and remanding the case."¹⁰⁸

When looking at the CWA’s cooperative federalism delegated program provisions, it becomes obvious that states have great latitude when making decisions regarding how they will protect their waters, “provided that they are no more lax than required by federal law and regulations.”¹⁰⁹ Considering this fact, NRDC and Baykeeper argued that because the District’s MS4 permit, which had been approved by California, required particular types of pollution control, water control, and monitoring, the District could be held liable in this case.¹¹⁰ NRDC and Baykeeper believed by holding otherwise, the Court would undercut the federalism linked strict liability and self-reporting violation provisions of the CWA.¹¹¹ Nonetheless, this issue was not embraced within, or even touched by the narrow question on which certiorari was granted.¹¹² Additionally, if the Court would have decided to address NRDC and Baykeeper’s alternative ground for affirmance the Court would have had to decide whether NRDC was required to file a cross petition to preserve the argument first.¹¹³ Furthermore, the alternative argument would have only applied to this one permit, and only for this one case because “the permit has since been altered to require monitoring at the outfalls as well.”¹¹⁴

¹⁰⁸ Id.
¹⁰⁹ Id.
¹¹⁰ Id.
¹¹¹ Id.
¹¹⁴ Kevin Russel, Argument recap: Now that we all agree the Ninth Circuit was wrong..., SCOTUSblog (Dec. 6, 2012 11:49 AM) http://www.scotusblog.com/2012/12/argument-recap-now-that-we-all-agree-
C. Water Transfers Rule

One problem with the Supreme Court’s ruling in *Los Angeles* is that it “leaves open important questions about the validity of the Water Transfers Rule (‘WTR’))” adopted by the Environmental Protection Agency in 2008.115 In addition to the *South Florida Water Management District* holding and the CWA, the WTR states, “discharges of pollutants from activities that convey waters between water bodies, through pumps or channels for example, do not require a permit.”116 Additionally, the rule also states, “no permit is required for activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.”117 The exception in the WTR only applies when pollutants are transferred between navigable waters, and the water being conveyed must be a navigable water of the United States “prior to being discharged to the receiving water body.”118 Therefore, according to some courts the WTR is a reasonable interpretation of the ambiguous “discharge of a pollutant” provision of the CWA.119

According to the Environmental Protection Agency, an addition of a pollutant under the CWA occurs when pollutants are introduced from outside the waters being transferred.120 But, under the WTR, the Environmental Protection Agency accepts

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116 Id.

117 W. Va. Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159,167 (4th Cir. 2010) (citing 40 C.F.R. § 122.3(i)).

118 Id.


the unitary waters theory that transferring pollutants between navigable waters is not an addition of a pollutant to navigable waters. Under the unitary waters theory, it is not an addition to navigable waters to move existing pollutants from one navigable water to another. Rather, an addition occurs only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters. Therefore, there is a distinct difference between the CWA and the WTR: the WTR explicitly allows entities to introduce pollutants into navigable bodies of water and imposes no restrictions on entities engaged in water transfers. The rule exempts governments and private parties engaged in water transfers from the procedural and substantive requirements of the Administrator’s permit program and frees the industry from the constraints of the permit process. The WTR neither issues nor denies a permit and instead exempts a category of activities from the requirements of a permit while ensuring no permit will ever be issued or denied for discharge from a water transfer. Due to this policy environmental groups have challenged the WTR and unfortunately the holding in Los Angeles does not give any indication of how this important dispute might be resolved. The dispute is further exacerbated when considering the fact that Justice Alito concurred in the judgment of Los Angeles, but did not join the majority opinion, suggesting there may be aspects of the decision he does not fully support. However, despite

121 *Huffman*, 625 F.3d at 167 (citing **Friends of the Everglades v. S. Fla. Water Mgmt. Dist.**, 570 F.3d 1210, 1227 (11th Cir. 2009)).
122 **Friends of the Everglades**, 570 F.3d at 1217.
123 *Id.*
125 *Id.*
126 *Id.* at 1287.
127 Cook & Stam, *supra* note 115.
Justice Alito’s concurrence, he did not give any further insight into his reasoning for not joining the majority.\[129\]

VI. CONCLUSION

Los Angeles is an important case for municipal governments desiring to address flooding and storm water management challenges in a provincial context.\[130\] Initially, the District sought certiorari on “(1) whether channelized portions of the Los Angeles and San Gabriel Rivers that are part of an MS4 remain “navigable waters” under the CWA, and (2) whether water passing from engineered portions of the river to the natural sections of the same river constitutes a regulable discharge that requires an NPDES permit under the CWA.”\[131\] But, under the view of the U.S. Solicitor General the Court declined the first question, and for the second concluded that in order for a discharge to be regulated under the CWA, “the pollutant has to move from a point source to navigable waters.”\[132\] In Los Angeles the ostensible pollutant moved from the engineered, concrete lined, portions of the natural river to the un-engineered natural river.\[133\] Thus, the Court held no discharge of a pollutant occurred under the CWA.\[134\]

This is consequential because “[i]f a municipality can be held responsible for pollutants found in improved portions of a river, regardless of whether the municipality has added the pollutants or merely just transported them, it will bear significant costs and face uncertainty about its liability.”\[135\] The reason for

\[129\] Id.
\[130\] Virginia S. Albrecht, Facts Can be Pesky Things: SCOTUS Takes up LA County Flood Control District v. NRDC, 44 ABA Trends, Feb. 2013, at 14.
\[131\] Id. at 16.
\[132\] Id.
\[133\] Id.
\[135\] Alexandra Cowen & Chanwoo Park, Los Angeles Cnty. Flood Control Dist.
this is because flood control cannot be modified without difficulty and the funds available to municipalities for flood control measures are scarce.136 If the Court had imposed liability on the District for permit violations under the CWA, it would have disrupted "the partnership that Congress intended to create between federal and state regulation of water quality and water use."137 The CWA purposely delegates authority to the states to "oversee their own management of water pollution and does not require states to implement the NPDES permit program."138 The Court's decision in Los Angeles clarifies the relationship between the Environmental Protection Agency's NPDES and the Court's decision in South Florida Water Management District that recognized "the transfer between two points in a single body does not add anything under the CWA."139

ARSENIO L. MIMSS


136 Id.
137 Id.
138 Id.
139 Id.