

Tomorrow, the Supreme Court will hear oral argument in *Los Angeles County Flood Control District v. Natural Resources Defense Council*. This case involves a lawsuit by clean-water advocates to require our County Flood Control District to take responsibility for ensuring that polluted stormwater doesn't impair our local water quality in two local rivers. The Ninth Circuit Court of Appeals has held the County responsible, and the Court is reviewing that decision. I have never seen a stranger environmental law Supreme Court case, nor a stranger grant of review by the Court. The Supreme Court has decided to review the Ninth Circuit's decision in this case to decide a question that is entirely unrelated to the issues at stake in the case.

Along with Rhead Enion, I filed an amicus curiae (friend of the Court) brief to explain this problem to the Court. We filed our brief on behalf of the local environmental advocacy groups [Friends of the Los Angeles River](#) and [Communities for a Better Environment](#), and [L.A. River Expeditions](#), a small business that runs kayaking trips on the Los Angeles River. Our brief asks the Court to change its mind and not to review the [Ninth Circuit's decision](#) after all. (All the briefs filed in the case, including [ours](#), are [available here in pdf format](#).)

This litigation involves violations by the Los Angeles County Flood Control District (often called simply the "District" in this litigation) of its municipal separate storm sewer system permit. The [permit](#), issued in 2001, is a common permit issued to the District, the County of Los Angeles, and 84 incorporated cities within the District, allowing them to discharge stormwater into various waterbodies, including local rivers and Santa Monica Bay. Together, these local governments' municipal separate storm sewer systems ("MS4," in legal and stormwater management jargon) gather up virtually all the runoff from their various jurisdictions and convey that runoff into the local waterways. Unfortunately, the stormwater carries with it all sorts of pollutants, including metals, organic materials, bacteria, and nutrients from fertilizers. Regulators have adopted "water quality standards" for the waterways into which these storm sewers discharge - including the Los Angeles and San Gabriel Rivers - that set limits on the concentrations of specific pollutants in the rivers.

The Clean Water Act recognizes that stormwater is a major cause of water pollution, and specifically requires municipal separate storm sewer system operators to obtain and abide by permits that require them to ensure that discharge from these storm sewers doesn't "cause or contribute to" exceedances of water quality standards in the receiving waters. (I wrote a short article in the [2004 UCLA Institute of the Environment Report Card](#) (full text available at the link) that explains more about the permit, and some of the political, policy, and legal dynamics relating to implementation of the 2001 Los Angeles MS4 permit.)

So what's the problem? As I discuss in my 2004 article, stormwater pollution is challenging

and expensive to control and to measure. Various cities', and the county's, stormwater collection systems connect together before they

discharge into receiving waters. There are literally thousands of discharge points, where the storm sewers connect to the river. Industrial properties often have separately-permitted discharges into waterways, and there are places where runoff finds its way into waterways without going through the storm sewer system. Finally, in systems such as Los Angeles's, where the vast majority of stormwater is never treated to remove pollutants, the quality of stormwater depends on limiting the pollutants entering the system in the first place. That means that local governments, businesses, and individuals must pollute less, and that local governments must implement measures to ensure both that pollution decreases and that the remaining pollutants get removed from stormwater before it enters the system.

There are many ways to accomplish these tasks, including (for example) passing and enforcing local laws that reduce litter and forbid practices that pollute stormwater, preventing pollutants from entering into storm drains by creating physical barriers, and creating and enforcing standards limiting public agency activities that pollute stormwater. But local governments contend that it's unreasonable and would be prohibitively expensive to require them to ensure that the receiving waters actually meet water quality standards. As a result of local governments' advocacy efforts to minimize their own obligation to make sure the water meets water quality standards, and also because of the difficulties in monitoring discharges from such a multitude of sources, the 2001 permit, like most municipal stormwater permits, requires implementation of "best management practices" and doesn't impose specific numeric limitations on pollution from stormwater discharges. (The lack of specific numeric limitations is controversial and beginning to change, as it is more broadly recognized that numeric limitations may be the only effective tool for creating an enforceable permit that will result in clean enough waterways. But local governments, including the District, have been keen to fight against permitting and enforcement decisions that make them take legal responsibility for ensuring the water actually meets the standards.)

Stormwater quality in Los Angeles has improved significantly since the 2001 permit has been in effect. But our waterways still don't meet water quality standards, and there's no serious question that municipal stormwater is the major pollution source. Advocates for clean water - most notably, the [Natural Resources Defense Council](#) and [Los Angeles Waterkeeper](#) - have long been pressing the County to do more, and believe that local governments have vastly overestimated the costs of cleaning up the water (see this recent [blog post](#) from NRDC attorney Steve Fleischli). These entities have been advocating that our

water-quality regulator, the [Los Angeles Regional Water Quality Control Board](#), get tougher with the municipal dischargers. While the Regional Board has been doing a good job in many respects, it has not enforced its own permit to the fullest extent of the law, and has not updated the permit since 2001, despite the fact that it's supposed to do that every five years (though there's a new permit in the works now).

Against that background, the Natural Resources Defense Council and Santa Monica Baykeeper (which has since changed its name to Los Angeles Waterkeeper) filed a lawsuit seeking to hold the Los Angeles County Flood Control District legally responsible for exceedances of water quality standards in several local waterways. Under the permit, the rivers each have only one monitoring station, each located in the riverbed. These monitoring stations reliably demonstrate that the stormwater is polluted above the water quality standard levels. The permit also states that the District and other permittees must use the monitoring stations to "determine if the MS4 is contributing to exceedances of Water Quality Standards." Indeed, this last requirement is the only monitoring requirement that could possibly facilitate enforcement of the permit if receiving waters exceed water quality standards. (Here are the permit's [monitoring program terms](#).) And the permit is required by federal law to be enforceable.

The federal district court agreed with the County's argument that the plaintiffs had failed to show an adequate causal connection between the District's stormwater pollution and the pollutants measured in the waterways, because the monitoring stations, in the court's view, could not establish that connection. NRDC and Los Angeles Waterkeeper, on the other hand, had argued that because the permit must as a matter of law be enforceable (with the monitoring stations specifically called out as the means to determine whether the law has been violated), and because it's clear that the District's MS4 conveyed large quantities of pollution into the rivers that contributed to the violations of water quality standards that have been documented through the monitoring, the District is legally liable for exceeding water quality standards.

The Ninth Circuit took up the case on appeal. The appellate court agreed with the federal district court that, in all but two of the rivers, there wasn't an adequate showing that the District caused or contributed to the exceedances of water quality standards. But as to two of the rivers - the Los Angeles River and the San Gabriel River - the Ninth Circuit panel found that there was adequate evidence to hold the District liable. This is a big deal, since it's the first time any of the municipal dischargers into these waterways have ever been held liable by a court over the many decades during which they've been discharging pollution into the water.

Unfortunately – and this is where the case gets bizarre – the language of the court's decision was less than clear, as explained in the [Solicitor General's brief](#) in this case. The District claimed various legal errors in [its brief](#). But the Solicitor General believes that the Court got the law correct, and has a different view of what the Ninth Circuit got wrong, as articulated in its brief:

[T]he court seems to have based its decision on a mistaken factual premise: that the monitoring stations were sampling water from a portion of the MS4 that was distinct from the rivers themselves and from which discharges through an outfall to the rivers subsequently occurred.

NRDC and Los Angeles Waterkeeper have not expressed an opinion in their briefs as to exactly what the Ninth Circuit did or didn't get wrong.

NRDC says in [its brief](#) – and I agree – that this doesn't matter. Had the Ninth Circuit applied the proper legal standard to the actual facts, it ought to have found the District liable for polluting the rivers, because the evidence makes clear that the District has caused or contributed to the Rivers' poor water quality. So the result is correct, regardless of whether the court got the reasoning correct. Thus, the case, doesn't warrant Supreme Court review, and should result in the Supreme Court upholding the decision anyway.

The District – understandably desperate to get out of legal liability for pollution in the Los Angeles and San Gabriel Rivers – petitioned to the U.S. Supreme Court, posing legal questions that were calculated to get the Court's attention. Sophisticated lawyers know that the Supreme Court doesn't review very many cases, and that it does so only if certain types of issues are raised. These include, for example, cases in which federal appellate courts may have disobeyed clear Supreme Court precedent, or cases that reveal serious and important legal disagreements between different federal appellate courts.

The Court granted certiorari (review) on this question, posed by the District:

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, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe*

of Indians, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a “discharge” for purposes of the Act?

Here's where the case gets even more bizarre. While this question implies that the Ninth Circuit has disobeyed recent Supreme Court precedent – which would be a reason for the Court to review it – the question on which the Court has granted review has no relationship to this case!

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Court was asked to determine whether a water transfer that arguably pumped pollutants from one part of a waterbody into another part of that same waterbody needed a permit to discharge pollutants. The defendant was pumping polluted water from one place to another, but if the start and end points of the pumping were actually in the same body of water, there would arguably have been nothing added to the water, and thus legally no basis to require a permit to add pollution to the water. Here, by contrast, there's no doubt that municipal storm sewers need permits to discharge into rivers, and also no doubt that the storm sewers took pollutants that started outside the rivers, and discharged them into rivers through outfalls. The two situations have nothing in common. The main feature defining the rule stated in the question presented – that no pollutants, and indeed, no water either, were added to federally-regulated waterways, in a “transfer of water within a single body of water” – is absent in the current case. There's no question that the District's storm sewer flows into the rivers from outside, and doesn't simply flow from one part of the river into another part of the same river.

Here's the Summary of Argument from our brief:

The Los Angeles County Flood Control District has constructed a Supreme Court case out of whole cloth. No one disagrees as to the answer to the scenario in the question presented. But the answer to that scenario will not resolve this case. Rather, the question presents an entirely hypothetical scenario that has no relevance to the finding of liability in the court below. Everyone in this case agrees that the rivers at issue are navigable waters of the United States in their entirety. Man-made alterations to a river, such as artificial channelization, do not affect its status as a water of the United States. A municipal storm sewer is a legally defined entity that conveys stormwater through an outfall into a water of the United States. Congress chose to regulate municipal storm sewers precisely because those sewers take urban runoff and dump it into waters of the United

States. See *infra* Part II.A. So by legal definition—and in practice—the District's municipal storm sewer discharges into the navigable Los Angeles and San Gabriel Rivers at a set of outfalls.

The question presented, however, misuses the term “outfall” and misconstrues the legal and factual scenario to manufacture a supposed issue worthy of this Court's review. The question presented is irrelevant to the determination of liability in this case for two reasons. First, municipal storm sewers, by definition, discharge into waters of the United States, as a matter of law. The question discussed in *Miccosukee Tribe*—whether there has been an addition to navigable waters—is simply absent here. Second, the question presented contemplates a hypothetical municipal storm sewer that accepts water from a river and then “discharges” it through an “outfall” within that same navigable river. This situation is legally impossible under the Clean Water Act because it is at odds with the regulatory definitions of municipal storm sewer and outfall. It is also at odds with the undisputed fact that the District's municipal storm sewer carries runoff from local storm drains and discharges that runoff into the San Gabriel and Los Angeles Rivers.

To make matters even more complicated, [as another group of law professors has pointed out in an important amicus brief](#), even the *Miccosukee Tribe* case itself didn't actually say what the Question Presented says it said! There was no “holding” in that case that “transfer of water within a single body of water cannot constitute a ‘discharge’ for purposes of the Act,” because the parties in that case agreed that that was the law, so the Court didn't analyze the question. The law professors' brief points this out, and also points out that the issue is actually quite complex and nuanced, has implications for other parts of the Clean Water Act that the Court has never considered, and has not been properly briefed in this case. This is another reason that the Court's grant of review in this case was a mistake.

The Solicitor General (the primary Supreme Court advocate for the federal government) had earlier [argued against the grant of certiorari](#) for reasons similar to those we offer, though not identical. And now, as noted above, the Solicitor General – resigned to the Court's decision to take the case – is arguing that the Court should simply note the factual problems with the Ninth Circuit's decision and send it back to the Ninth Circuit to do a better job.

To sum up: what a mess! Dischargers of pollution from all over the country have submitted amicus briefs, hoping to convince the Court to adopt various views of the law that have only tangential relevance to this case to further their own interests. The Court would do well to

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sidestep all of this and decline to review the case. Alternatively, it could get out of this mess by confirming, based on the sound analysis in NRDC's brief, that there was a legal basis for liability, or by sending it back to the Ninth Circuit for clarification as the Solicitor General has suggested. I'm looking forward to reading the transcript of Tuesday's argument, after which I may post more thoughts about all this.