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Municipal Separate Storm Sewer Systems (MS4)—Assigning Responsibility for Pollutants That Reach the Nation’s Waters

CASE AT A GLANCE

The United States Supreme Court will review a ruling of the Ninth Circuit Court of Appeals that found the Los Angeles County Flood Control District in violation of its permit under the Clean Water Act for its Municipal Separate Storm Sewer Systems (MS4) discharges into the Los Angeles and San Gabriel Rivers. Segments of those rivers that constitute a part of the MS4 have been paved to improve flood control, and the pollution levels measured as the water moves through those segments and other monitoring locations exceed the amounts allowed by the District’s permit. The District claims that pollution is not a discharge of the District, but is instead the mere passage of water from one part of the river to another.

Los Angeles County Flood Control District v. Natural Resources Defense Council
Docket No. 11-460

Argument Date: December 4, 2012
From: The Ninth Circuit

by Robert Abrams
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INTRODUCTION

The Los Angeles County Flood Control District operates a Municipal Separate Storm Sewer Systems (MS4) for the sprawling metropolitan Los Angeles area, encompassing almost 4,500 square miles of incorporated cities and unincorporated lands. Eighty-four of the municipalities (but not all) are members of the District, as are some of the unincorporated lands. As the name implies, an MS4 collects urban storm water separately from sewage and conveys and discharges that storm water into a receiving body such as a river. MS4 discharges frequently carry pollutants, including sediment, used motor oil washed off of streets, nutrients attributable to fertilizer and pesticide runoff from lawns and landscaped areas, and other pollutants that leach or otherwise find their way into storm runoff. Unlike sanitary sewer systems, MS4 systems do not treat the storm water collected; instead MS4s are required to develop and implement storm water management programs (SWMP) that reduce the amount of contaminants that enter the system and prohibit illicit discharges.

Enforcing the required management practices is one aspect of the permit issued to the District under the National Pollutant Discharge Elimination System (NPDES). Another important term in the permit issued to the District states, “discharges from the MS4 that cause or contribute to the violation of Water Quality Standards (WQS) or water quality objectives are prohibited.” The permit also requires the District to construct and operate four mass emissions monitoring stations that monitor water quality in the receiving waterbodies. Monitoring reports compiled by the District at the four mass

emissions monitoring stations located in the river system showed, over a several year period, hundreds of instances in which the WQS were exceeded. At all of the monitoring stations, however, there also are other sources of upstream discharge, including publically owned treatment works, industrial dischargers, or construction dischargers having their own separate discharge permits, which may have contributed to the exceedances. The trial court found that the plaintiff public interest groups had failed to prove that the District’s discharges had added pollutants to the receiving waters or that the District was the cause of the exceedances, both key matters in finding a violation under the District’s SPDES. (When, as here, the permit is issued by a state agency that has taken delegation of the program from the United States Environmental Protection Agency (EPA), the permits are a part of the *State*.) On appeal, the Ninth Circuit reversed in regard to pollution exceedances at two of the mass emissions measuring stations. The Ninth Circuit reasoned that because those two stations were located in channelized river segments that literally were “in a section of the MS4 owned and operated by the District,” the subsequent flow of that water containing large loadings of pollutants from those stations into the unchannelized portion of the river was a discharge under the Clean Water Act (CWA) and a violation of the District’s SPDES permit. As more fully detailed below, neither petitioner (the District) nor respondents (the public interest groups) agree with the Ninth Circuit’s disposition of the case on that ground. Petitioner wants the district court’s dismissal of all claims reinstated; respondents seek to sustain the permit violation on an entirely different basis.

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ISSUES

The Court granted certiorari limited to 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, 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?

The respondents, both in their response to the petition for certiorari and now, concede that, “the transfer of water through a concrete channel within a single river does not constitute a discharge of pollutants from a point source under the Clean Water Act.” Instead, respondents urge the Court to uphold and expand the Ninth Circuit’s finding of a permit violation. Respondents claim that the proper formulation of this case raises the following question:

Whether a discharger can escape liability for violations of a Clean Water Act permit that covers multiple dischargers on the ground that the permit’s monitoring requirements do not pinpoint the precise contribution of each discharger to the documented permit violations, when the Act requires all permits to include monitoring sufficient to establish a permittee’s compliance with permit limits and this permit’s monitoring was expressly designated for that purpose and requested by petitioner itself.

FACTS

In light of the nature of respondent’s argument, the facts of potential importance relate to the formulation of the District’s SPDES permit and the terms of the permit itself. Respondents contend, and petitioner does not challenge the assertion, that storm water runoff in the Los Angeles basin is now a principal source of pollution in the basin and the affected ocean estuary into which the basin drains. There have been toxic storm water pollution plumes that persist for weeks and extend for miles off the coast. In addition, fecal coliform bacteria and other pathogens present in stormwater discharges threaten public health and have been responsible for numerous beach closings in the region. These facts and others detailing the adverse economic impacts of stormwater pollution were before the State [California] Water Resources Control Board (SWRCB) at the time the District’s MS4 SPDES permit was written and subsequently renewed.

The District’s MS4 is a massive and complex system of interconnected storm drains, pipes, outfalls, and other infrastructure that has, literally thousands of discrete points at which it discharges the polluted runoff it collects into the regional rivers or the Pacific Ocean. The District itself maintains, owns, and operates roughly 2,800 miles of storm drains and 500 miles of open channels. In addition, Los Angeles County and 84 separate municipalities have their own system of storm water collection that feeds into the District’s MS4.

The District’s current system-wide SPDES permit was issued in 2001. The permit includes water quality standards for several pollutants, including among them fecal bacteria, arsenic, cyanide, mercury, copper, and zinc. The permit requires that the WQS must be satisfied through timely implementation of control measures and other actions to reduce pollutants in discharges. Important to the present controversy, as required by EPA MS4 permitting regulations, the permittee must have the ability to undertake “monitoring procedures necessary to determine compliance and non-compliance with permit conditions.” The monitoring required by the District’s permit consisted of the four mass emission stations located in the receiving body rivers. The permit details at considerable length the sampling techniques to be used in the operation of those stations. This was the monitoring proposed by the District when applying for the permit.

CASE ANALYSIS

Once again, it is important to point out that the question on which review was granted is a very narrow one that both sides and the EPA treat as settled in favor of petitioner on the basis of the *Miccosukee* case. Under that ruling, the transfer of water from the channelized portion of the river to points further downstream do not constitute the discharge of a pollutant into a navigable water of the United States and, therefore, are not a violation of this portion of the CWA.

The more probing legal analysis lies in the question raised by respondents as an alternative ground on which to affirm and enlarge the finding of a permit violation. That approach would force the Court to overlay the CWA, which focuses heavily on discrete outfalls as the point of regulation, on large MS4s having thousands of outfalls like that of the District.

The starting point for that approach would be with the history of the CWA as it applies to MS4s, particularly the response of EPA to the initial enactment and subsequently to the 1987 Water Quality Act. Within a year after passage of the CWA in 1972, EPA by administrative rule tried to exempt MS4s from the NPDES program. Although that rule was invalidated by the courts (see *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977)), EPA dragged its feet on MS4 regulation for another ten years. Faced with EPA’s inactivity, in one portion of the Water Quality Act, Congress required EPA to take on the task of MS4 NPDES regulation. That statute and its implementing regulations allow system-wide permits, such as the one involved in this case, but when such master permits are utilized, the permittee must establish its ability to “[c]arry out all . . . monitoring procedures necessary to determine compliance and non-compliance with permit conditions.” 40 C.F.R. § 122.26(d). Importantly, that same regulation authorizes permits to substitute representative water quality sampling to be done in the stream rather than at each outfall from the MS4 into the stream. Citing a portion of the legislative history that placed the burden on the permittee to use the monitoring and reporting to demonstrate compliance, EPA in the Preamble to the rule stated, “Congress intended that prosecution for [MS4 system-wide] permit violations be swift and simple.” (44 Fed. Reg. 32,854, 32,863 (June 7, 1979).)

The second key point in the legal analysis is consideration of the District’s MS4 permit to ascertain its requirements and whether there has been compliance. On this issue the respondents have

weighed in at length, devoting the bulk of their brief to demonstrating that the recorded exceedances at the four mass emissions monitoring stations are sufficient to establish that the District has violated its SPDES permit and must therefore remediate the situation by taking action to reduce the inflow of pollutants into the MS4. The force of their argument rests on acts that are obligatory under the permit and regulations. A central portion of that argument is stated as follows:

Specifically, when violations are detected at the mass emission stations, the permittees “shall assure compliance” with water quality standards by preparing a compliance report that identifies the violations and adopts more stringent pollution control measures to eliminate them. JA 98. This compliance report “shall include” (1) a plan to comply with water quality standards, (2) revised pollution control measures to eliminate exceedances, (3) “[e]nhanced monitoring to demonstrate compliance,” and (4) the results of implementation of these measures. JA 213. Each permittee must apply these steps to “discharges within its boundaries.” JA 104. [JA is the Joint Appendix]

The petitioner has not fully joined the issue, so it is somewhat speculative to try to sketch out their arguments. To date, the District and its copermitees have consistently argued that there is not sufficient evidence to demonstrate that the MS4 discharges are causing or contributing to the exceedances and petitioner seems likely to follow that tack in the future. Assuming that is the case, the eventual outcome of the case may turn on a decision about burdens of production and proof. If respondents’ view prevails, a pattern of exceedances establishes a prima facie case of violation and, if the District cannot rebut that inference by showing it is not a causing or contributing to the violation, the District will be required to take steps to remedy the problem. If petitioner’s position prevails, proof of violation will have to be based on more than the pattern of exceedances at the mass emission monitoring stations, probably requiring evidence of specific polluted discharges from a number of MS4 outfalls sufficient to demonstrate that the MS4 is causing or contributing to the WQS violations.

SIGNIFICANCE

There are two quite different scenarios that could come out of this case. If the Court limits itself to the issue on which it granted certiorari, it will almost certainly agree with the position of both sides and the United States as amicus that the transfer of water from the channelized portion of the river to a more natural portion of the river is not a discharge and cannot, therefore, be the basis for a finding of permit noncompliance. The only significance of such a ruling is the unsurprising affirmation that the Court does not wish to overrule its recent precedent in *Miccosukee* (when neither the parties nor any of the numerous amici are asking the Court to do so). The more significant issues will be left for some later case.

If, instead, the Court reaches the issue of how system-wide MS4 permit compliance is to be addressed, this case can be of great environmental significance. MS4 discharges are now one of the major sources of water pollution in the nation. A ruling such as that sought by respondents that makes the permits readily enforceable

will force MS4 operators to be much more active in developing effective SWMPs to prevent the entry of pollutants into their systems. A ruling that requires those seeking to enforce compliance to attack the problem outfall-by-outfall will tend to immunize MS4 operators from any meaningful compliance obligations.

Finally, there is a possibility that the Court will seek a fuller record and ventilation of the respondent’s noncompliance argument. In that event the Court might schedule rebriefing and reargument, or remand with instructions to consider that issue.

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PREVIEW of United States Supreme Court Cases, pages 129–132.
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