

No. 11-460

In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL AND
SANTA MONICA BAYKEEPER,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

**BRIEF OF *AMICI CURIAE* NATIONAL
WILDLIFE FEDERATION, HUDSON RIVER
FISHERMEN'S ASSOCIATION NEW JERSEY
CHAPTER, CATSKILL MOUNTAIN CHAPTER
OF TROUT UNLIMITED, THEODORE GORDON
FLYFISHERS, INC., AND AMERICAN
WHITEWATER IN SUPPORT OF
RESPONDENTS**

Karl S. Coplan
Counsel of Record
Daniel E. Estrin
Pace Environmental Litigation Clinic, Inc.
78 North Broadway
White Plains, NY 10603
(914) 422-4343
kcoplan@law.pace.edu

QUESTION PRESENTED

The Clean Water Act regulates the discharge of pollutants from point sources into the waters of the United States, including pollutants discharged from municipal separate storm sewer systems. 33 U.S.C. §1342(p). The question presented by the petition for certiorari is:

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 (2004), that transfer of water within a single body of water cannot constitute a “discharge” for purposes of the Act?

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INTEREST OF AMICI CURIAE

Amici curiae submit this brief in support of Respondents, the Natural Resources Defense Council, Inc. (“NRDC”) and the Santa Monica Baykeeper (“Baykeeper”).¹ Recreational water-users throughout the United States rely on clean, safe and healthy waterways for fishing, hunting, rafting, canoeing, kayaking, swimming and other water-based activities. Recreational fishing, hunting and paddling generates tens of billions of dollars of economic activity annually and supports hundreds of thousands jobs across the Country. OUTDOOR INDUSTRY ASSOCIATION, THE OUTDOOR RECREATION ECONOMY 17 (2012), *available at* http://www.outdoorindustry.org/images/researchfiles/OIA_OutdoorRecEconomyReport2012.pdf?167.

Every day, *amici* outdoor recreationists are on or in streams, rivers, lakes, bays and estuaries across the Country. Few Americans use and depend on safe and healthy waterways more than *amici*. However, polluted stormwater creates health and safety hazards to recreational water-users, diminishes fish and wildlife habitat, reduces opportunities for beneficial use and recreational enjoyment of the Nation’s waters, and reduces the

¹ Counsel for *amici curiae* National Wildlife Federation et al. authored this brief in its entirety, and no person or entity other than the *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. Both the Petitioner and the Respondents have provided written consent, on file with the clerk, to the filing of briefs in support of either, or neither, party.

economic benefits generated by recreational water use.

Amici's interests in protecting beneficial uses of the Nation's waters are directly impacted by the outcome of this case. Reducing stormwater pollution is essential to ensuring that recreational use and enjoyment of the Nation's coastal and inland waters are protected for current and future generations. Enforcement of the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permitting program is fundamental to achieving stormwater pollution reduction. *Amici* are concerned that allowing the District to escape liability for violations of its municipal separate storm sewer system (MS4)² NPDES permit will compromise long-term stormwater management goals nationwide and undermine the purpose of the CWA. *Amici* are concerned this would result in increased pollution from stormwater runoff and further jeopardize fish and wildlife habitat, degrade water quality and increase health and safety risks to recreational water-users across the Country. Such an outcome

² MS4s are the system of storm drains, pipes, tunnels and channels that collect and convey untreated stormwater from rooftops, streets, highways, parking lots and other impervious surfaces. MS4s can be highly interconnected and complex. The District's MS4 is comprised of over 500 miles of open channels and 2,800 miles of storm drains—the number and location of which “are too numerous to catalogue.” *Natural Res. Def. Council v. Cnty of Los Angeles*, 673 F.3d 880, 884 (9th Cir. 2011).

would result in direct and negative impacts on *amici's* interests.

The National Wildlife Federation (“NWF”) is the largest member supported wildlife conservation organization in the Country. NWF works to improve and conserve wildlife habitat and water quality for the next generation of anglers, hunters, and wildlife conservationists. With over four million members, partners and supporters, NWF has been the conservation voice for anglers, hunters, scientists, and outdoor enthusiasts since its founding in 1936.

The Hudson River Fishermen’s Association New Jersey Chapter (“HRFANJ”) represents the interests of recreational fishermen who utilize the Hudson River, the New York Bight and its surrounding water system. HRFANJ encourages the responsible use of aquatic resources in recreational sportfishing and has worked to protect fisheries habitat by reducing industrial and other sources of pollution in the Hudson River through enforcement of the CWA since its founding in 1969.

Catskill Mountains Chapter of Trout Unlimited (“CMCTU”) works to protect and restore coldwater fisheries throughout the Catskill mountain region of New York State through stream clean-up and restoration projects, conservation and stream restoration trainings, active involvement in environmental review processes, and advocacy of clean water and fisheries issues through legal action.

Theodore Gordon Flyfishers, Inc. (“TGF”) is one of the oldest organizations of flyfishers dedicated to conservation in New York State and has worked to protect and preserve cold water fisheries since its founding in 1963. TGF’s members fish throughout waterways within New York State, including the Hudson River estuary and Long Island Sound, as well as river and marine fisheries across the United States.

American Whitewater (“AW”) works to protect and restore America’s rivers and enhance opportunities for the safe enjoyment of America’s whitewater resources through legislative advocacy, public education, organization and promotion of river stewardship programs. Founded in 1954, AW is the primary advocate for the preservation and protection of whitewater rivers throughout the United States representing individual whitewater enthusiasts, river conservationists and over 100 local paddling groups.

THE STORMWATER POLLUTION PROBLEM

Urban stormwater runoff is one of the largest sources of pollution to surface waters in the United States. Rooftops, roadways, parking lots, driveways and other impervious surfaces prevent rain water and snow melt from infiltrating the ground. Instead, the water flows across the urban landscape and accumulates heavy metals, nutrients, pathogens, bacteria, pesticides, salts, trash, rubber, oil and grease, and other pollutants. *See, e.g., UNITED STATES ENVIRONMENTAL*

PROTECTION AGENCY, PRELIMINARY DATA SUMMARY OF URBAN STORM WATER BEST MANAGEMENT PRACTICES, Ch. 4 (2006) *available at* http://water.epa.gov/scitech/wastetech/guide/stormwater/upload/2006_10_31_guide_stormwater_usw_b.pdf [hereinafter EPA URBAN STORM WATER BEST MANAGEMENT PRACTICES]; Jennifer K. Gilbert & John C. Clausen, *Stormwater Runoff Quality and Quantity from Asphalt Paver, and Crushed Stone Driveways in Connecticut*, 40 WATER RESEARCH 826 (2006) [hereinafter Gilbert & Clausen]. Polluted stormwater flows untreated into streams, rivers, lakes, bays and estuaries through MS4s. The negative impacts of untreated stormwater pollution on water quality, fish and wildlife habitat and human health are significant and wide ranging. These impacts all result in diminished recreational opportunities.

The United States Environmental Protection Agency (“EPA”) estimates that “urban runoff was the leading source of pollutants causing water quality impairment related to human activities in ocean shoreline waters and the second leading cause in estuaries across the nation.” EPA URBAN STORM WATER BEST MANAGEMENT PRACTICES 4-1. EPA estimates that approximately 5,000 square miles of estuaries, 1.4 million acres of lakes, and 30,000 miles of rivers are impaired due to urban runoff. *Id.* “Urban runoff accounts for 47 percent of impaired miles of surveyed ocean shoreline, 46 percent of the impaired square miles of surveyed estuaries, 22 percent of the impaired acres of

surveyed lakes and 14 percent of the impaired miles of surveyed rivers.” *Id.* at 4-23.

The type of pollutant and the corresponding concentration levels entering receiving waters are influenced by a variety of factors, including the surface over which stormwater flows and the rate and frequency of precipitation events. *See* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REPORT ON THE ENVIRONMENT 3-6 (2008) *available at*

http://www.epa.gov/ncea/roe/docs/roe_final/EPAROE_FINAL_2008.PDF [hereinafter EPA REPORT ON THE ENVIRONMENT]. Fine particles of heavy metals such as copper and zinc accumulate on roadways from normal wear and tear of cars, trucks and construction equipment and materials. *See* EPA URBAN STORM WATER BEST MANAGEMENT PRACTICES 4-16; *see also* Gilbert & Clausen 826-27. Roadways with high traffic volumes accumulate higher levels of these pollutants—particularly in areas that receive infrequent rain events (such as Los Angeles). When rain events do occur, stormwater runoff becomes highly concentrated with pollutants that have accumulated on the urban landscape. Just one rain event can lead to severe toxicity concentration spikes adversely impacting water quality and pose significant risk to aquatic species and human health.

The accumulation of heavy metals in river, stream and lake sediments is associated with increased heavy metal concentrations in fish. *E.g.*,

K.R., Campbell, *Concentrations of Heavy Metals Associated with Urban Runoff in Fish Living in Stormwater Treatment Ponds*, 27 ARCHIVES ENVIRONMENTAL CONTAMINATION & TOXICOLOGY 353-55 (1994). As concentrations increase they can become toxic to fish and cause mortality, impair reproductive ability and also threaten human health. Fish consumption advisories are often issued due to heavy metal concentrations deemed unfit for human consumption. *See* EPA REPORT ON THE ENVIRONMENT 3-59 (discussing heavy metal concentrations in fish and fish consumption advisories).

Nutrients such as nitrogen and phosphorous from lawn fertilizers or automobile exhausts are carried by stormwater runoff and negatively impact receiving waters. EPA URBAN STORM WATER BEST MANAGEMENT PRACTICES 4-9. The cumulative impacts of nutrient loading are manifest in algae blooms, decreased water clarity, and reduced dissolved oxygen levels, which can prove fatal to fish. Algal blooms also cause illness and discomfort in people through skin or eye contact. Red tide—a type of algal bloom—can lead to shellfish poisoning and respiratory irritation in humans. EPA REPORT ON THE ENVIRONMENT 3-58. These impacts accumulate over time and degrade water quality and fish and wildlife habitat, and pose health risks to recreational water-users.

Pathogens and bacteria such as *E. coli*, *giardia lamblia*, and *cryptosporidium* are picked up by

stormwater runoff and can enter storm drain systems from animal wastes, failing septic systems, atmospheric deposition or illicit discharges. The potential for public health risk increases when runoff is discharged to recreational waters such as beaches, rivers and lakes, or where runoff comes into contact with shellfish beds. EPA URBAN STORM WATER BEST MANAGEMENT PRACTICES 4-13, 14. A groundbreaking study conducted in Santa Monica Bay showed that water contaminated with high bacteria counts dramatically increases the risk of gastrointestinal illness, diarrhea with blood, earaches, nasal congestion and skin rash. R. Haile, et al., *An Epidemiological Study of Possible Adverse Human Health Effects of Swimming in Santa Monica Bay* 5 (1996). The risk of exposure to illnesses from pathogens and bacteria is especially high for fishermen, kayakers, rafters and other paddlers who come in direct contact with the waters in which they recreate on a daily basis.

Reducing the discharge of pollutants from MS4s is critical to ensuring that fish and wildlife habitat are protected and that the health and safety of recreational water-users are not at risk each time a fisherman, hunter, paddler or swimmer enters the water. The CWA requires, *inter alia*, NPDES permits for MS4 discharges. 33 U.S.C. §1342(p)(3)(B). Enforcement of these permits is critical to reducing polluted stormwater runoff and ensuring that beneficial uses of the nation's waterways are protected for current and future generations of recreational water-users.

SUMMARY OF ARGUMENT

This case does not raise the legal issue of whether there is a “discharge of a pollutant” from the District’s MS4 pursuant to this Court’s holding in *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The only legal relevance of the term “discharge of a pollutant” is to determine whether an NPDES permit is required. Because there is no dispute among the parties that the District discharges pollutants into the waters of the United States, and that the CWA subjects the District to NPDES permitting requirements under section 402(p), the application of *Miccosukee* to this case is inapposite.

Section 1365(a) of the CWA establishes that effluent limitations and other conditions set forth in an NPDES permit create obligations on the part of NPDES permittees that are enforceable by citizens. The District’s permit prohibits stormwater discharges from the District’s MS4 that cause or contribute to water quality standard violations. The permit also requires the District to implement a monitoring and reporting program to determine whether discharges from the MS4 cause or contribute to water quality standards violations and to design and implement control techniques and best management practices to ensure that pollution in stormwater runoff is reduced to the maximum extent practicable and complies with water quality standards. The terms of the permit are enforceable.

The CWA bars collateral challenges to the terms of an NPDES permit in an enforcement proceeding. 33 U.S.C. §1369(b)(2). This bar extends to State issued NPDES permits and collaterally estops the District from challenging the terms of its permit here.

Affirming the judgment of the Ninth Circuit would confirm that MS4 discharges are subject to the NPDES permitting requirements of the CWA, the terms of NPDES permits are enforceable, and those terms may not be collaterally challenged in an enforcement proceeding.

ARGUMENT

I. This Case Does Not Invoke A *Miccosukee* Analysis

This Court granted certiorari on the question of whether there can be a “discharge”³ from an “outfall” when water flows from one portion of a river into a lower portion of the same river. The answer to this question is no. *Miccosukee*, 541 U.S. at 109. The answer to the question presented however is not relevant to whether stormwater discharges from the District’s MS4 require an NPDES permit, a question that has already been answered definitively by Congress. 33 U.S.C. §1342(p).

³ 33 U.S.C. §1362(16) states “[t]he term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.”

In *Miccosukee*, this Court was asked to determine whether pumping polluted water from one water body to another water body constitutes the discharge of a pollutant for the purpose of determining whether an NPDES permit is required. *See* 541 U.S. at 102-03 (“the question . . . is whether the operation of the S-9 pump constitutes the ‘discharge of [a] pollutant’ within the meaning of the Act”); *see also S.D. Warren Co. v. Maine Bd. Env’tl. Protection et al.*, 547 U.S. 370, 381 (2006) (“[t]he question in *Miccosukee* was whether a pump between a canal and an impoundment produced a ‘discharge of a pollutant’ within the meaning of §402 . . .”).

The only legal relevance of the statutory term “discharge of a pollutant” is to trigger the requirement that a person obtain an NPDES permit. *See* 33 U.S.C. §1311(a) (requiring a permit pursuant to §1342 for the “discharge of a pollutant”). Here, all parties agree that the District discharges pollutants from its MS4 into navigable waters of the United States and requires an NPDES permit.⁴ Once the permitting requirement has been triggered, the interpretation of the term “discharge of a pollutant” as used in section 1311(a)

⁴ Stormwater discharges from MS4s require an NPDES permit. 33 U.S.C. §1342(p); *Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (EPA does not have discretion to exempt stormwater discharges from MS4s from NPDES permitting requirements).

does not govern what may be required in an NPDES permit under section 1342. Rather, those requirements are established by sections 1311(b), 1312, 1314, 1316, 1317 and 1342, which refer to effluent limitations and water quality standards, but which do not turn on the definition of the statutory term “discharge of a pollutant.”

Since the District has an NPDES permit, and all parties agree that the District requires an NPDES permit, *Miccousukee* is not relevant to the question of whether the District’s discharges violated the permit.

II. NPDES Permits Are Enforceable

Congress enacted the CWA to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. §1251(a). In order to achieve this goal, Congress declared “the discharge of any pollutant by any person shall be unlawful” except as in compliance with the CWA. 33 U.S.C. §1311(a). At the heart of the CWA is the NPDES permit program, which requires a permit with enforceable effluent limitations for every point source discharge of pollutants into waters of the United States. 33 U.S.C. §§1311, 1342; *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992) (“The primary means of enforcing these [effluent] limitations and [water quality] standards is the NPDES, enacted in 1972 as a critical part of Congress’ complete rewriting of federal water pollution law.”).

The CWA provides that NPDES permits for discharges from municipal storm sewers “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system design and engineering methods and other such provisions as the Administrator or State determines appropriate for the control of such pollutants.” 33 U.S.C. §1342(p)(3)(B)(iii).

EPA regulations require, *inter alia*, MS4 operators to develop stormwater management programs (“SWMPs”)⁵ describing a permittee’s relevant ordinances, other regulatory requirements and legal authority, and the programs and procedures that an MS4 operator will implement and enforce to comply with the permit. 40 C.F.R. §122.26(d).

This Court has explained that “an NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger . . .” *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976).

⁵ The District’s Stormwater Quality Management Program (“SQMPs”) is the same as a stormwater management program (“SWMPs”) referred to in the Code of Federal Regulations.

The District's permit states that "[t]he objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County." CAL. REG'L WATER QUALITY CONTROL BD., LOS ANGELES REGION, ORDER NO. 01-182 at 20. To meet this objective, the permit transforms water quality standards set by the state of California into obligations with which the District must comply. "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." *Id.* at 24.

To determine whether discharges from the MS4 cause or contribute to the exceedance of water quality standards, the District, as the Principal Permittee, is responsible for implementing the permit's Monitoring and Reporting Program. CAL. REG'L WATER QUALITY CONTROL BD., LOS ANGELES REGION, MONITORING AND REPORTING PROGRAM FOR ORDER NO. 01-182 at T-6. This Program requires the District to monitor mass emissions from designated mass emission stations to, *inter alia*, "determine if the MS4 is contributing to exceedances of Water Quality Standards . . ." *Id.* Because discharges from the MS4 that cause or contribute to water quality standard violations are prohibited by the permit, mass emission monitoring results that show water quality standard exceedances demonstrate a violation of the permit. Permit violations are violations of the CWA. 33 U.S.C. §1342(k).

The CWA provides citizens the authority to enforce NPDES permits. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). Section 1365(a) provides that

any citizen may commence a civil action on his own behalf (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by . . . a State with respect to such a standard or limitation.

The term “effluent standard or limitation” includes “(2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; and (6) a permit or condition thereof issued under section 1342 . . .” 33 U.S.C. §1365(f). The District’s permit is enforceable and the District is obligated to comply with the terms of the permit. *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 205.

III. NPDES Permits May Not Be Challenged In Enforcement Proceedings

The District’s contention that it is not liable for permit violations in the Los Angeles River and the San Gabriel River is nothing more than a collateral challenge to the terms of the District’s NPDES permit. The District, the County and many of the co-permittee municipalities challenged the validity of the permit in California state court. This

challenge failed and the California courts upheld the permit. *See Cnty of Los Angeles v. Cal. State Water Res. Control Bd. et al.*, 143 Cal. App. 4th 985 (Cal. Ct. App. 2006). The decision by the California courts collaterally estops the District from collaterally challenging the terms of its permit in this enforcement proceeding. 33 U.S.C. §1369(b)(2). *See General Motors Corp. v. EPA*, 168 F.3d 1377, 1383 (D.C. Cir. 1999) (holding that the bar against challenging the validity of a permit in an enforcement proceeding extends to permits issued by states as well).

Entertaining the District's collateral challenge to the terms of this permit will invite MS4 NPDES permit holders across the Country to challenge permit terms as a defense to enforcement actions. Such a result would fly in the face of Congressional intent, undermine the ability of regulators and the public to enforce NPDES permits and delay compliance with effluent limitations and water quality standards. This outcome would diminish fish and wildlife habitat, endanger public and environmental health and welfare, and reduce opportunities for the beneficial use and safe enjoyment of the Nation's waters.

CONCLUSION

For the foregoing reasons, *amici* request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Karl S. Coplan
Counsel of Record
Daniel E. Estrin
Pace Environmental Litigation Clinic, Inc.
78 North Broadway
White Plains, NY 10603
(914) 422-4343
kcoplan@law.pace.edu