

No. 11-460

In The
Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL
DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL,
INC.

and SANTA MONICA BAYKEEPER,

Respondents.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

**BRIEF AMICUS CURIAE OF
THE FLORIDA STORMWATER
ASSOCIATION
IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Can stormwater that exceeds either water quality criteria or water quality standards when sampled at a mass emissions sampling point located in a municipal separate stormwater sewer system constitute a violation of the Clean Water Act's prohibition on the discharge of a pollutant from a point source?
2. Does the Ninth Circuit's holding that stormwater exceeding either water quality criteria or water quality standards when sampled at a mass emissions sampling point located in a municipal separate stormwater sewer system constitute a significant and intolerable burden on the operators of municipal separate stormwater sewer systems nationwide?
3. Is a co-permittee of a municipal separate stormwater sewer system permit responsible as a matter of law under the Clean Water Act or its permit for permit violations arising from the combined discharges of its co-permittees?

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INTERESTS OF THE AMICUS CURIAE¹

The Florida Stormwater Association (FSA) was organized in 1993 as the Florida Association of Stormwater Utilities (FASU). FASU was created to promote greater awareness of stormwater utilities and to improve the operational capacities of the stormwater utilities already in existence. Over time, FASU became more involved with general stormwater management throughout Florida. In June 2001, the organization was renamed the Florida Stormwater Association, a not-for-profit Florida corporation. One of FSA's primary mission has been to monitor and become actively involved in the decision-making processes of the state and federal regulatory agencies and to disseminate information about stormwater, stormwater management, flooding, and water quality.

FSA has grown to be a 300 member association consisting of city and county governments, consulting and engineering firms, academic institutions and various special districts created under Florida law that have an interest in stormwater management and infrastructure finance in Florida. All of FSA's city and county members discharge to surface waters in the State of Florida. These discharges are regulated by the

¹ Under Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus*, its members, or its counsel contributed monetarily to the preparation and submission of this brief. Counsel of record for all parties received timely notice of the intent to file the brief under Rule 37.2(a), and letters of consent to file this brief are on file with the Clerk of the Court under Rule 37.3.

Florida Department of Environmental Protection (FDEP) through a delegation of authority from the United States Environmental Protection Agency (USEPA). All of FSA's government members are subject to regulation as part of a municipal separate stormwater sewer system (MS4).

FSA has a direct interest in the outcome of this case. Many of FSA's members own or operate municipal separate stormwater sewer systems throughout Florida. The Court of Appeals' unprecedented interpretation of the Clean Water Act (CWA) in this case sets a precedent that directly contravenes key operative provisions of existing MS4 stormwater permits issued by FDEP. Moreover, allowing a citizen suit action against a single permittee for exceeding mass emissions limitations for pollutants measured at a monitoring point turns established stormwater permit compliance programs across the nation on their heads.

As a result, this amicus strongly urges this Court to grant certiorari to review the Ninth Circuit's erroneous and misguided interpretation of the CWA. FSA's experiences with the stormwater permitting program in Florida under the CWA and its insight on the serious and severe problems that the Court's interpretation will cause will be helpful to this Court in its disposition of this matter.

SUMMARY OF THE ARGUMENT

The Ninth Circuit radically departed from existing case law by its interpretation of what constitutes a “discharge” from a “point source” under the Clean Water Act (CWA) as those terms apply to stormwater discharges from municipal separate storm sewer systems (MS4s).

1. The Ninth Circuit held that a co-permittee of a MS4 permit issued under the Clean Water Act is responsible for civil penalties for violations and for pollution reduction in combined discharges of its co-permittees. This holding is erroneous as a matter of law.
2. The Ninth Circuit’s decision that exceedances of water quality criteria at a mass emissions sampling station are sufficient to state a violation of the CWA erroneously rejects the “iterative process” in the MS4 permit that is the mechanism for compliance.
3. The Ninth Circuit’s decision negates the established structure of MS4 permits in place across the country, including Florida, that do not consider such exceedances to be violations of the permit, thereby creating a significant and intolerable burden on operators of MS4s.
4. The Ninth Circuit's decision creates uncertainty in the regulated community nationwide due to the significantly different

approaches to compliance set forth by EPA and the Ninth Circuit. The decision creates two disparate MS4 permitting systems as evidenced by a MS4 permit from Lee County, Florida.

ARGUMENT**I. WHETHER THE NINTH
CIRCUIT’S ERRONEOUS
CONSTRUCTION OF THE
CLEAN WATER ACT’S
“DISCHARGE” FROM “A POINT
SOURCE” IMPOSES A
SIGNIFICANT AND
INTOLERABLE BURDEN ON
OPERATORS OF MUNICIPAL
SEPARATE STORMWATER
SEWER SYSTEMS (MS4s)
NATIONWIDE****A. Single Permittee of a MS4 is not
legally responsible for combined
discharges of its Co-Permittees.****1. The Ninth Circuit
determined that a single
Permittee is responsible for
systemwide discharges to a
MS4 as a matter of law.**

The federal regulatory scheme under the Clean Water Act (CWA), 33 U.S.C. §1251 et seq., for stormwater discharges is unparalleled in environmental law for scope of coverage area, types of pollutants and sheer volume of water at issue as a result of water draining large urban areas and flowing into receiving waters. The CWA generally prohibits the discharge of any pollutant from a point source into the navigable waters of the United States unless the point source is regulated by a NPDES permit. Defenders of Wildlife v. Brunner, 191 F.3d 1159 (9th Cir.

1999) (quoting 33 U.S.C. § 1311(a) 1362 (12)(A)). The NDPEs stormwater permit at issue in the Petition and this amicus brief was issued by the Los Angeles Regional Water Quality Control Board to the County of Los Angeles, the Los Angeles Flood Control District (District) and eighty-four (84) incorporated municipalities (Permittees or Co-Permittees) in Los Angeles County (Permit). The Ninth Circuit interpreted this Permit and made significant new law with national implications for MS4s. Natural Resources Defense Council Inc. v. County of Los Angeles, No. 10-56017, 2011 WL 2712963 (9th Cir. 2011) (NRDC or Opinion). Understanding the impact of the new law on MS4s across the country requires background information on the facts.

The 3,100 square miles of territory covered by this MS4 Permit is home to more than 10 million people. To provide perspective on the size of the Permit, both the States of Delaware (2,489 square miles) and Rhode Island (1,545 square miles) are smaller. It is undisputed that when it rains, the territory encompassing the MS4 generates rainwater runoff from across the County of Los Angeles. NRDC, 2011 WL 2712963, at *2. As the runoff flows across the land and into various collection channels, ditches and conveyance, it picks up a myriad of different types of pollutants. These pollutants include oils, greases and antifreeze from road surfaces. They include excess fertilizers that wash over lawns, public rights of way and golf courses. These variable stormwater discharges originate from sources within each Permittee's territory and are transmitted through ditches, culverts and other devices that co-mingle

the waters as they flow into the receiving body of water. Prior to the exit of this combined stormwater flow from the MS4, it is also undisputed that the flow contains pollutants at varying concentrations. This scenario is repeated across the country in urban and nonurban areas alike. For stormwater pollution, the whole is truly the sum of its parts.

At issue before the Ninth Circuit in NRDC were certain stormwater flows that exceeded numerical criteria for mass loading of pollutants. The pollutants were detected at two monitoring stations located within the conveyance system of the MS4. Waters in that conveyance system, along with pollutants in those waters, flowed downstream into the waters of two watersheds – the Los Angeles and the San Gabriel Rivers. The Ninth Circuit more precisely determined that “...the Monitoring Stations for these two rivers [Los Angeles River and San Gabriel River] are located ***in a portion of the MS4 owned and operated by the District.***” (emphasis added.) NRDC, 2011 WL 2712963, at *19. In addition, the “...Monitoring Stations detected pollutants in excess of the amount authorized by the NPDES permit [water quality criteria and water quality standards], and ...this polluted water “discharged” into the Los Angeles River and San Gabriel River.” Id.

This determination was sufficient for the Ninth Circuit to find a violation of the CWA. It meant that the violations of the CWA occurred not in the rivers or other waters receiving flow

from the MS4, but at a monitoring point physically located in a concrete MS4 conveyance structure owned by the District. Because of its physical ownership of this conveyance structure, the District became responsible for control of the stormwater flowing through its conveyance, and logically, for the reduction of pollutants in that stormwater flow mandated by the Permit.

This determination also means that exceedances at the conveyance structures become the basis for civil penalties assessed against the District for each occurrence and the non-compliance can be enforced in a citizens' suit enforcement action against the District, which is precisely the procedural posture of this case. It also follows that a citizen's suit can be prosecuted for any future exceedance ad infinitum until compliance with numerical criteria is achieved.

Ironically, in 2004 the California Court of Appeals found it was "speculation" that citizens groups would "race to the courthouse" to file lawsuits against municipalities and seek penalties for violations of water quality standards after that court held that California regulators could require MS4s to comply with water quality standards. Building Industry Association of San Diego County v. State Water Resources Control Board, 124 Cal App. 4th 866, 22 Cal. Rptr. 3d 128, (2004). This case was proof that it is no longer speculation that citizens' suits will be filed. This Ninth Circuit decision provides a green light for citizen groups to race to the courthouse to file against the District or any other MS4 permittee.

To establish this new law, the Court of Appeals focused on establishing the CWA's well-established requirement that a “discharge” from a “point source” occurred. The discharge from a point source occurred “when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways.” NRDC, 2011 WL 2712963, at 17*. To conclude that such a discharge had occurred, the Opinion crafted a convoluted “navigable waters” analysis that has been challenged by the Petitioner in its Petition for Writ of Certiorari. Petitioner's legal objections to the Court's navigable waters analysis will not be repeated here. Instead, the purpose of this amicus brief is to focus the Court on the impact of the Ninth Circuit's contorted construction on MS4 permittees nationwide and how the Ninth Circuit's legal contortion turns stormwater management programs on its head, calling into question key operative provisions of MS4 permits in force across the country.

2. The Permit Terms And The Regulations Fail To Support The Conclusion That The District Is Responsible As A Matter Of Law

The plain reading of the Permit's terms, coupled with the USEPA regulations for stormwater permits do not authorize shared responsibility among co-permittees to a MS4

permit. "Each Permittee is responsible only for discharge for which it is the operator." (Excerpt of Record, "ER" 199, California State Water Resources Control Board for the Los Angeles Region NPDES Permit ¶ G.4) (2007). Even as the principal permittee for the MS4, the District was nonetheless "not responsible for ensuring compliance of any individual Permittee." ER 204, California State Water Resources Control Board for the Los Angeles Region NPDES Permit Part 3, D 1.(2007)². These terms in the Permit track closely with USEPA regulations defining a co-permittee as an entity that is "only responsible for the conditions related to the discharge for which it is the operator." 40 C.F.R. §122.26 (b)(1)(2011) For an appellate decision to hold otherwise makes the permittee chosen as the plaintiff in a citizen suit financially and technically responsible for pollution in discharges that permittee did not create. Or in the alternative, it requires a permittee to remediate pollution that beyond its governmental authority to control or abate. FSA is not aware of any such allocation of responsibility in any MS4 in Florida.

² This Permit term was cited in the District's Petition at p.9. It was not cited by the Court of Appeals in its opinion because the term directly contradicts its holding that only the District was responsible for discharges from the MS4.

B. The District May Own The Stormwater Conveyance Structure, But Cannot As A Matter Of Fact And Law Control The Stormwater Discharge For The Purpose Of Complying With Water Quality Standards

The Ninth Circuit fails to indentify any statutory or regulatory authority granted under California law or by agreement among the Co-Permittees that grants the District the power to mandate upstream MS4s to control emissions of pollutants in their stormwater discharges into the District's conveyances. Likewise, there is no cited authority allowing the District to take enforcement action against recalcitrant upstream sources to reduce pollution flowing into the District's flood control structures. The Permit states that “Permittees shall possess adequate legal authority to ... require persons [not Permittees] within their jurisdiction to comply with the conditions in the Permittee's ordinances, permits, contract or orders...” California State Water Resources Control Board for the Los Angeles Region NPDES Permit Part 3.G.2, (2007). NRDC, 2011 WL 2712963, at *12 (emphasis added.)³

Consistent with these terms and the facts of the case, the District takes the position that it “does

³ A review of the Los Angeles County Flood Control Act that created the Flood Control District does not contain a grant of enforcement authority over municipalities within its territory. Cal. Water Code Appendix § 28-2

not generate any of the pollutants in the system, but only transports them from other permitted and non-permitted sources.” *Id.* at *16. As a consequence, the District's physical channels and conveyances are simply conduits of stormwater flow whose chemical and physical characteristics have been dictated in whole or in part by the actions of others, some stormwater sources within the boundary of the MS4 and some outside that boundary.⁴ This factual scenario is true for many MS4s in Florida and elsewhere in the nation.

Undeterred by facts, the Ninth Circuit mandated that the District must “control” the polluted stormwater flow at mass emission stations so that as not to cause or contribute to violations of water quality criteria downstream when its conveyance system discharges into the rivers. The Court of Appeals opined that “...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.” *Id.* at *17. Assuming that the District lacks the practical ability as a matter of law to control or regulate the upstream constituents of that flow, how can the District comply with the Court's mandate and avoid citizens’ suits? The real answer (and the

⁴ The Permit includes stormwater that originates beyond the MS4 Permittees from unincorporated areas in Los Angeles County within the jurisdiction of the Regional Board. *NRDC*, 2011 WL 2712963, at *4. Extraterritorial flows into the MS4 makes the District’s alleged authority to control discharges even more tenuous.

eight hundred pound gorilla in the room with the District's Permit) is that the District alone cannot "control" the discharges no matter what the Clean Water Act says or how the Ninth Circuit interprets the provisions of the Permit as they apply to the District.

Apparently lacking its own legal mechanism to control stormwater pollution mass loading generated by its Co-Permittees, coupled with the mandate not to discharge pollutants to receiving waters under threat of fines for exceedance, the only logical option for the District acting alone would be the unthinkable and the undoable – to construct a series of diversions or dams to stop or divert the flow at the mass sampling station and treat the discharge such that it could not "cause or contribute" to water quality criteria violations downstream.⁵

The Ninth Circuit's holding puts the District in an untenable position of a mandate to not to exceed water quality criteria, coupled with an inability as a matter of law to control upstream sources or perhaps even to raise capital to finance

⁵ It could be argued that in order for the District not to be in violation of the Permit for either "causing or contributing" to exceedances of water quality criteria, the level of pollutants measured at a mass emissions monitoring station would have to be somewhere below the water quality criteria in order not to "contribute" to a possible exceedance. What that level would be the 9th Circuit does not say.

its own stormwater treatment,⁶ assuming that it could technically design and operate such a facility to remove the pollutants. It would also follow that this remedy should be repeated at various points of conveyance throughout the District's system where mass emissions data indicated the potential to "cause or contribute" to exceedances of water quality criteria. For MS4s across the country, this result would impose an impossible burden.

To illustrate why FSA believes that this mandate imposes an impossible burden on MS4 permittees, consider the City of Santa Monica's Urban Runoff Recycling Facility (SMURRF) located within the MS4 at issue in the case. The SMURRF is a state-of-the-art, first-of-its-kind water recycling plant that treats dry weather, not wet weather urban runoff, for reuse for beneficial purposes. SMURRF cost approximately \$12 million to construct including both the treatment and distribution systems for its recycled urban water. It drains a total of a little over 5000 acres (not square miles) and treats approximately 500,000 gallons of runoff per day. According to the City of Santa Monica figures, 100 million gallons of runoff flow through the County of Los Angeles on a dry day, which is more than 200 times the SMURRF's

⁶ The District's municipal powers for source control appear to be limited to raising funds by user fees to reduce stormwater and urban runoff pollution. Of those fees, the District is limited to receiving a 10% allocation of administrative and planning costs, while remaining fees are allocated to cities within the boundary of the District and nine (9) watershed authority groups. See Cal Water Code Appendix § 28-2-8a (2011).

treatment capacity. Wet weather flows in the same area can increase to 10 billion gallons per day. www.smgov.net/uploadedFiles/Departments/OSE/Categories/Urban_Runoff/UR_SMURFF_Info_Sheets.pdf.

Doing the rough math leads to the approximation that the County could need the capacity of around 200 SMURRFs to process the dry day flow at a rough cost of \$2.4 billion dollars. To take the example one step further, even if the 10 billion gallon per day wet weather flow could somehow be captured in order to be treated, which is a physical impossibility due to the volume⁷, the costs for treatment would be astronomical. It would be clearly more economical for the permittee to pay the citizens' suit penalties as they occur.

II. THE OPINION REJECTS THE MS4 PERMIT'S "ITERATIVE PROCESS" AS A RESPONSE TO EXCEEDANCES AT MASS EMISSIONS SAMPLING STATIONS.

The Ninth Circuit ignored pertinent provisions of the Permit that addressed the specific issue of how a Permittee is required to

⁷ To hold one (1) million gallons, one would require a structure 267 feet long (almost as long as a football field), 50 feet wide, and 10 feet deep. U.S. Geological Survey, <http://ga.water.usgs.gov/edu/mgd.html>. One hundred football fields hold 100 million gallons. Ten billion gallons would require 10,000 structures.

respond to exceedances. Part 2.3 of the Permit requires Permittees to comply with discharge prohibition set forth in parts 2.1 and 2.2 “through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with [the Los Angeles Stormwater Quality Management Program] (SQMP) and its components and other requirements of this permit ...” NRDC, 2011 WL 2712963, at *5. Most importantly, Part 2.3 of the Permit further provides that if exceedances of the water quality objectives or water quality standards persist, notwithstanding the implementation of the Stormwater Quality Management Plan and its components and other requirements of the Permit, Permittees “shall assure compliance with discharge prohibitions and receiving water limitations” by engaging in the “iterative process” procedure. Knee jerk enforcement of the numeric standards using civil penalties is certainly not the Permit’s remedy for non-compliance.

This iterative procedure means the Permittee shall “promptly notify and thereafter submit a Receiving Water Limitations (RWL) compliance report ... to the Regional Board that describes [Best Management Practices (BMPs) that are currently being implemented] and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to exceedances of the Water Quality Standards.” Id. at *6.

The process also requires that the Permittee revise its SQMP to incorporate approved modified BMPs that have been and will be implemented according to an implementation schedule. Part 3.A.3 requires Permittees to implement additional controls where necessary, to reduce the discharge of pollutants and stormwater to the [maximum extent practicable (MEP)]. In FSA's view, MEP is the performance standard for compliance with stormwater permits by statute and regulation.

The iterative process, written as an enforceable section of the Permit, is applicable to each and every Permittee and, focuses on the only viable control for discharges from MS4s – controls at the sources of the pollution before they enter the stormwater. If such controls do not result in stormwater that meets water quality criteria or standards, more stringent, additional management practices must be put in place, meaning controls will be put in place for each and every construction site, parking lot, and other discharge sources located within the boundaries of each Permittee. This comprehensive approach spreads the burden of compliance across the MS4 Permittees, and does not allow it to rest with only one. It reflects the fact that stormwater compliance is truly the sum of all efforts undertaken throughout the MS4.

Even when water quality standards have been violated, the importance of the iterative process has been expressly recognized by the California courts, yet rejected by the Ninth Circuit.

In Building Industry Assn., the California Court of Appeals addressed the interplay between violations of water quality standards and BMP in a legal challenge to the MS4 permit in San Diego. The key findings by the California Court of Appeals in that case are directly on point with the facts of this case. That court expressly stated that compliance with water quality standards was to be done through “timely implementation of control measures” by engaging in a “co-operative iterative process” where the Regional Water Quality Control Board as regulator, and the municipality work together to identify violations of water quality standards in a written report and then incorporate approved modified BMP to achieve compliance. Id at 146.

After noting that the Regional Water Quality Control Board could certainly enforce water quality control standards during this process, nonetheless appellate court stated that “the Water Boards have made clear in this litigation that *they envision the ongoing iterative process as the center piece to achieving water quality standards.*” Id. (emphasis added). The court also remarked that there was nothing in the record to indicate that the permittees would be subject to penalties for violation of water quality standards. Id. This case proves those remarks to be incorrect certainly as far as citizens suits are concerned.

So Building Industry Assn. sets a precedent to interpret the MS4 permit as requiring the “iterative process” in the Permit to achieve water quality standards. This approach should not be wholeheartedly cast aside in favor of penalty

actions based on the Ninth Circuit's misconstruction of the CWA.

III. THE OPINION ERRONEOUSLY MANDATES COMPLIANCE WITH WATER QUALITY CRITERIA AND STANDARDS AT THE MASS SAMPLING POINT NEGATING MORE THAN 25 YEARS OF NPDES STORMWATER PERMITTING USING BASIN PLANS, BMAPS, TMDLS AND MEP IN ACCORDANCE WITH CWA.

The Court of Appeals ruled that compliance with Water Quality Standards or Water Quality Objectives, as measured by mass sampling at monitoring locations, was now the numeric standard for NPDES MS4 permit violations in lieu of the Maximum Extent Practicable (MEP) standard used in USEPA regulation and Florida MS4 permits. This ruling is contrary to all of the MS4 permits issued in the State of Florida to FSA members and non-members alike. The significant difference in approach between California and Florida is cause for serious concern among the regulated community because of the fundamental difference in how to comply – performance standards versus numeric criteria in monitoring stations. This concern will come into play when the USEPA has the opportunity to revise permit terms nationwide to incorporate numeric limitations in compliance with this opinion, a feat it attempted to implement unsuccessfully by

revising its own guidance document in 2011. See discussion in section V.

To understand the difference between the Ninth Circuit's approach and the Florida approach, the following paragraphs will discuss pertinent provisions of the current Lee County, Florida MS4 Permit (Lee County Permit) effective September 2011 – September 2016. The Lee County Permit was issued by FDEP, covers about 1200 square miles and includes 22 co-permittees including Florida Department of Transportation. Lee County, Florida. <http://www.leegov.com/gov/dept/NaturalResources/NPDES/Documents/LeefinalpermitpackageCycle3signed91311.pdf>.

Lee County's MS4 permit starts with the provision that all existing stormwater discharges by the permittees are authorized under Florida law with a few enumerated exceptions that do not involve stormwater discharges that exceed numeric criteria. This starting point eliminates the result in NRDC where exceedances of numeric limitations were considered to be permit violations.

Part VIII of the Lee County Permit discusses the MEP standard and its critical role in Florida stormwater management. Directly contrary to the Ninth Circuit, FDEP asserts in Part VIII that "narrative effluent limitations requiring implementation of best management practices (BMPs) are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements (including reduction of pollutants to the MEP) and to protect water

quality.” Id. at p.87. Under Florida law, implementing the BMPs consistent with a stormwater management program (SWMP) “constitutes compliance with the standard of reducing pollutants to the MEP.” Id. Furthermore, the MEP standard is applied to MS4s “in recognition of the fact that an operator typically does not have total control over the quality or quantity of stormwater entering its system and ultimately entering waters of the State.” Id. This is exactly the situation facing the District in the case at bar.

For so-called Impaired Waters, where USEPA or FDEP has adopted Total Maximum Daily Loads (TMDLs) for the water body, the stormwater regulatory process for Lee County becomes more complex. TMDLs set specific daily loads for chemical parameters in the impaired water. TMDLs are not water quality standards but are based on water quality standards set in the receiving waters. This daily load is allocated to individual dischargers by means of wasteload allocations (WLAs) that are exactly what they sound like – allocation of waste load for a given discharger. For stormwater discharges, adequate progress toward achieving the WLA is demonstrated through “implementation of structural and nonstructural best management practices [BMPs] and other program activities that are targeted at the TMDL pollutant” and apply to the specific watershed. Id. Exceeding WLAs at the source (not at the monitoring station) is not a violation of the permit as long as parameters subject to TMDLs/WLAs are reduced to MEP through implementation of the BMPs in the

SWMP. So exceedances of numeric limits do not constitute permit violations in Florida.

Contrast Lee County's methodical, phased approach to compliance with the holding in this case. Ironically, Lee County's permit terms are totally in line with the iterative process in the San Diego MS4 Permit discussed in Building Industry Assn. In the Ninth Circuit, however, these permit provisions for implementation of MEP through an iterative process in the District's Permit are given short shift.

**IV. THE NINTH CIRCUIT'S
MANDATE THAT WATER
QUALITY CRITERIA AND WATER
QUALITY STANDARDS BE
POINTS OF COMPLIANCE FOR
MS4s OVER AND ABOVE THE
REQUIREMENT TO COMPLY
WITH BEST MANAGEMENT
PRACTICES TO THE "MAXIMUM
EXTENT PRACTICABLE" WAS
PROPOSED BY EPA AS A POLICY
CHANGE IN 2010, WAS
REJECTED BY STAKEHOLDERS
IN 2011 AND HAS NOT BEEN
IMPLEMENTED TO DATE**

The Ninth Circuit's yearning to impose numeric water quality standards on stormwater discharges from MS4s is not new and is certainly not unique. In 2010 USEPA took the opportunity to update its 2002 guidance memorandum on stormwater discharge control in an attempt to

effectuate that goal – to encourage states almost to the point of mandating them to use numeric criteria in MS4 permits they issue. See EPA’s November 2010 “Revisions to the November 22, 2002 Memorandum “Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirement Based on Those WLAs” (2010 Memorandum). USEPA, <http://www.epa.gov.npdessp u/pubs/establishingtmdl wla revision.pdf>.

USEPA had noted in 2002 that water quality based effluent limitations (WQBEL) for NPDES-regulated MS4s would most likely be in the form of Best Management Practices (BMPs), not numeric limitations. But in 2010, USEPA believed times had changed. For example, USEPA thought that by 2010 the regulatory authorities had more experience in developing TMDLs and WLAs for stormwater sources, the technical capacity for stormwater monitoring had become more widespread and “sophisticated,” and the effectiveness of BMP was now more easily measured. Id. at p. 1. As a result, in the 2010 Memorandum USEPA opined that WQBELS “can clarify permit requirements and improve accountability and enforceability.” Id. at p. 2. Finally, EPA recommended that permitting authorities exercise discretion to include numeric effluent limitations as necessary to meet water quality standards where it is feasible to do so. Id.

MS4s and other interested parties immediately filed objections with USEPA to the approach in Memorandum, arguing that the

addition of numeric criteria was not supported by the requirements of the USEPA's MS4 permit regulations nor the requirements of the CWA. MS4 permit regulations provided in pertinent part that the stormwater management program required for a permit must contain a comprehensive planning process to reduce the discharge of pollutant to the Maximum Extent Practicable [MEP] using management practices, control techniques and system design and engineering methods and such other provisions which are appropriate. 40 C.F.R. Section 122.26 (d)(2)(iv)(2011). There is no mention of numeric limitations in the regulations, let alone the concept that numeric limitations should supersede MEP.⁸ Requiring a numeric limitation in MS4s permit blatantly ignores the text regulation and raises the question of whether such a change can be accomplished without notice and comment rulemaking.⁹

⁸ The Ninth Circuit expressly rejected MEP as the exclusive standard for compliance. NRDC, 2011 WL 2712963, at *14.

⁹ The 9th Circuit cites with approval the Building Industry Assn decision rejecting the argument that under federal law, MEP is the exclusive measure that may be applied to municipal storm water discharges. NRDC WL 2712963, at *14. In turn, Building Industry Association cited *dicta* from the 9th Circuit case in Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999) to the effect that CWA Section 1342 (p)(3)(B)(iii) gave USEPA the authority to determine that ensuring MS4 permits must strictly comply with state water quality standards is necessary to control pollutants, thereby falling within the gamut of "such other provisions as the Administrator... determines appropriate for the control of such pollutants" Id. at 1166-1167.

The MS4's comments also fundamentally disagreed with the USEPA's assertion that the regulated communities' knowledge of stormwater has improved significantly since 2002. To the contrary, while the industry knowledge about the complexity of the system has improved, it is the MS4 community's view that correlation between monitoring and understanding of pollutant impacts on water quality has not kept pace with the knowledge. As a result, MS4s believed that factual rationale for the EPA's 2010 Memorandum was insufficient to support the Agency's analysis or conclusions.

These objections from MS4s throughout the country, coupled with the outcry from others in the regulated community were apparently significant enough to cause the USEPA to issue a call for formal public comments on the proposed 2010 Memorandum by letter dated March 17, 2011. http://www.epa.gov/npdes/pubs/sw_tmdlwla_comments.pdf. A final version of the 2010 Memorandum, revised or not, has never been released by the Agency. The fact that the Ninth Circuit apparently took up where EPA policy voluntarily left off calls for scrutiny by this Court to decide whether the CWA along with its implementing regulations and policies for MS4s can be reinterpreted by the Ninth Circuit in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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