
In The
Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

**On A Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**

**BRIEF OF *AMICI CURIAE* WESTERN URBAN
WATER COALITION, CITY AND COUNTY OF
DENVER, ACTING BY AND THROUGH ITS BOARD
OF WATER COMMISSIONERS, NORTHERN
COLORADO WATER CONSERVANCY DISTRICT,
LOWER ARKANSAS VALLEY WATER
CONSERVANCY DISTRICT, CITY OF AURORA,
CITY OF COLORADO SPRINGS, CENTRAL
ARIZONA WATER CONSERVATION DISTRICT,
CITY OF PHOENIX WATER SERVICES
DEPARTMENT, METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA, EAST BAY MUNICIPAL
UTILITY DISTRICT, SANTA CLARA VALLEY WATER
DISTRICT, SOUTHERN NEVADA WATER AUTHORITY,
TRUCKEE MEADOWS WATER AUTHORITY,
METROPOLITAN WATER DISTRICT OF SALT LAKE &
SANDY, AND CENTRAL UTAH WATER CONSERVANCY
DISTRICT IN SUPPORT OF PETITIONER LOS
ANGELES COUNTY FLOOD CONTROL DISTRICT**

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QUESTION PRESENTED

Millions of residents of the western United States live in areas where water is naturally scarce. Their daily water supply depends upon thousands of water transfers by *Amici* and other water providers to meet their basic water needs. The question *Amici* will address is:

Whether municipal separate storm sewer systems (MS4s) are legally distinguishable from water transfers, thus making this Court's holding in *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) inapplicable to this case?

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INTERESTS OF *AMICI CURIAE*

Amici curiae submit this brief in support of Petitioner, Los Angeles County Flood Control District (“District”), urging reversal of the United States Court of Appeals for the Ninth Circuit.¹

The Western Urban Water Coalition (“WUWC”) is an association of the largest municipal water utilities in the western United States.² The goal of WUWC members is to provide a reliable, high-quality urban water supply for present and future population. WUWC members own and operate water management, water supply and hydroelectric projects. These projects consist of water conduits and reservoirs, including water transfer facilities. The continued, unimpeded operation of these facilities is essential to

¹ Counsel for *Amici* Western Urban Water Coalition, *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. Counsel of record for all parties received timely notice of the intention of Western Urban Water Coalition, *et al.*, to file this brief. All parties have consented and written consents are submitted herewith.

² WUWC includes the following urban water utilities: Arizona – Central Arizona Water Conservation District, City of Phoenix; California – East Bay Municipal Utility District, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission, Santa Clara Valley Water District; Colorado – City of Aurora, Denver Water; Nevada – Las Vegas Valley Water District, Southern Nevada Water Authority, Truckee Meadows Water Authority. Seattle Public Utilities, a WUWC member, is not participating in this *Amicus* brief.

the continued ability of WUWC members to serve the water needs of the major population centers of the west.



SUMMARY OF ARGUMENT

This case is not about water transfers. It is about storm water discharges. Specifically, the issue is whether the District’s discharges of storm water from its municipal separate storm sewer system (“MS4”) violated the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

The Act generally prohibits the discharge of pollutants by point sources except in compliance with the National Pollutant Discharge Elimination System (“NPDES”). Storm water discharges from MS4s are explicitly subject to the NPDES requirements of the Act. Conversely, water transfers are not subject to NPDES requirements, and, in fact, are not even mentioned in the NPDES section of the statute.

The District holds NPDES permits for its discharges of storm water from its MS4s. Therefore, this case can and should be resolved under the provisions of the Clean Water Act governing storm water without resort to the law applicable to water transfers, including *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (“*Miccosukee*”).



ARGUMENT

The Clean Water Act is clear regarding storm water discharges from MS4s: they are subject to NPDES requirements. Equally clear is that storm water discharges from MS4s are not water transfers. This controversy can and should therefore be resolved pursuant to the provisions of the Act governing storm water. The Court need not, and should not, reach water transfers and its holding in *Miccosukee*.

I. THE CLEAN WATER ACT GENERALLY PROHIBITS THE DISCHARGE OF POLLUTANTS BY POINT SOURCES EXCEPT IN COMPLIANCE WITH NPDES REQUIREMENTS.

In 1972, Congress enacted amendments to the Federal Water Pollution Control Act, now popularly known as the “Clean Water Act” (“Act”). The Act outlaws “the discharge of any pollutant” subject to several exceptions, including where an NPDES permit is obtained. 33 U.S.C. §§ 1311, 1342(a)(1). “Discharge” includes “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). “Navigable waters,” in turn, is defined as “the waters of the United States.” 33 U.S.C. § 1362(7); *see also Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1223 (11th Cir. 2009). In short, the Act generally prohibits point sources from discharging pollutants to waters of the United States without an NPDES permit.

A. MS4 STORM WATER DISCHARGES ARE SPECIFICALLY SUBJECT TO NPDES REQUIREMENTS.

Storm water conveyances through MS4s are not water transfers. As defined by EPA:

“Municipal separate storm sewer [MS4] means a conveyance or system of conveyances . . . designed or used for collecting or conveying storm water. . . .” 40 C.F.R. § 122.26(b)(8)(ii) (emphasis added).

“Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13) (emphasis added).

An MS4 *“does not include . . . conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.”* 40 C.F.R. § 122.26(b)(9) (emphasis added).

“Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.” 40 C.F.R. § 122.3(i) (emphasis added).

Two characteristics in particular distinguish MS4s and water transfers. First, an MS4 conveys “storm water,” whereas a water transfer conveys “waters of the United States.” Second, an MS4 consists of a *physical* “conveyance or system of conveyances.” A water transfer, in contrast, is an “*activity* that conveys or connects.” These distinguishing characteristics have

legal significance with regard to NPDES requirements. Most MS4s are explicitly subject to NPDES requirements under the Act, while water transfers are generally excluded from NPDES regulation.

Congress specifically subjected large MS4s to NPDES requirements. Subsection 402(p) of the Act explicitly states that the NPDES program applies to “[a] discharge from a municipal separate storm sewer system [MS4] serving a population of 250,000 or more” and “[a] discharge from a municipal separate storm sewer system [MS4] serving a population of 100,000 or more but less than 250,000.” 33 U.S.C. §§ 1342(p)(2)(C), -(D).

The history of storm water regulation under the Act underscores the applicability of the NPDES program to MS4s. EPA attempted to exempt separate storm sewers from NPDES requirements in 1973, shortly after Congress enacted the statute. *NRDC v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977). EPA’s rationale for these exemptions was that it was necessary to exclude these smaller sources of pollutant discharges from the permit program in order to conserve the Agency’s enforcement resources for more significant point sources of pollution. *Id.* at 1372-73. EPA, however, never asserted that MS4s were not subject to NPDES requirements, even when attempting to exempt them from obtaining an NPDES permit. *See, e.g.*, 38 Fed. Reg. 18,003 (July 5, 1973).

The courts rejected EPA’s attempt to exempt separate storm sewers and held that Congress intended to

require NPDES permits for storm water discharges. *NRDC v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd*, *Costle*, 568 F.2d at 1383. “Following this decision, EPA issued proposed and final rules covering storm water dischargers in 1980, 1982, 1984, 1985 and 1988.” *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). NRDC challenged many of these rules at the administrative level and in the courts. *NRDC v. EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992). EPA accordingly made little headway in bringing storm water discharges into the NPDES program.

Recognizing both the environmental threat posed by storm water runoff and EPA’s problems in implementing regulations, Congress passed the Water Quality Act of 1987 containing amendments to the CWA, portions of which set up a new scheme for NPDES regulation of storm water, including MS4s. Pub. L. No. 100-4, 101 Stat. 7, § 405 (1987) (codified at 33 U.S.C. § 1342(p)); *see also NRDC v. EPA*, 966 F.2d at 1296. The amendments set explicit and firm deadlines for NPDES regulation of storm water discharges, *American Mining Congress*, 965 F.2d at 763, including MS4s, 33 U.S.C. § 1342(p) (1987). Each of the 46 states with EPA-delegated authority to implement the Act applies NPDES requirements to MS4 storm water discharges. U.S. Environmental Protection Agency, *National Pollutant Discharge Elimination System (NPDES) State Program Status*, April 14, 2003, available at <http://cfpub2.epa.gov/npdes/statestats.cfm>.

In marked contrast to storm water – which has always been subject to NPDES requirements – water transfers never have been. In fact, water transfers are not mentioned in section 402 of the Act, which established the NPDES program. Moreover, “[a]s a matter of longstanding Agency practice, EPA has not issued NPDES permits for mere water transfers; nor has it ever stated in any general policy or general guidance that an NPDES permit is required for such transfers.” *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006), U.S. Mot. for Summ. J. and Mem. of Law in Supp., U.S. Ex. 1, Agency Interpretation on Application of Section 402 of the Clean Water Act to Water Transfers, 2005 WL 6165796, at *2 (Aug. 5, 2005). See also *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 168 (D.C. Cir. 1982); *Miccosukee*, 541 U.S. 95 (2004), Br. for the United States as *Amicus Curiae* in Supp. of Pet’r, 2003 WL 22137034, at **28-29; *Friends of the Everglades v. EPA*, Appeal Nos. 08-13652, 08-13653, 08-13657, 08-14921 & 08-16283 (consolidated) (11th Cir., Dec. 2, 2010), Br. for Resp’ts [EPA], at 37-41; National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,703 (June 13, 2008).

EPA promulgated the Water Transfers Rule, 40 C.F.R. § 122.3(i) • excluding water transfers from NPDES requirements – in response to judicial decisions holding that water transfers were subject to NPDES requirements. 71 Fed. Reg. 32,887 (June 7, 2006). And the Eleventh Circuit Court of Appeals

has sustained EPA's Water Transfers Rule. *See Friends of the Everglades*, 570 F.3d at 1228 (upholding the Water Transfers Rule "until the EPA rescinds or Congress overrides the regulation."). Finally, neither EPA nor any of the 46 states with EPA-delegated authority to implement the NPDES program applies the NPDES requirements of section 402 of the Act to water transfers.³

B. THE DISTRICT HOLDS NPDES PERMITS FOR ITS MS4s.

The two LA Basin MS4s involved here carry urban runoff from Los Angeles and surrounding areas to inland rivers and eventually to the ocean. *NRDC v. County of Los Angeles*, 2010 WL 761287, at *2 (C.D. Cal. Mar. 2, 2010). The District operates the specific MS4s at issue. *NRDC v. County of Los Angeles*, 673 F.3d 880, 884 (9th Cir. 2011). The District's storm water discharges to two rivers are the heart of this appeal: the Los Angeles River, which has a watershed of 825 square miles, and the San Gabriel River, which has a watershed of 450 square miles. *NRDC*, 673 F.3d at 889.

The NPDES program applies to "[a] discharge from a municipal separate storm sewer system serving a population of 250,000 or more." 33 U.S.C. § 1342(p)(2)(C). The two LA Basin MS4s each serve a

³ Pennsylvania issues "NPDES" permits for some water transfers pursuant to state law.

population of 250,000 or more. Indeed, the District, Los Angeles County, and 84 municipalities have operated their MS4s since 1990 pursuant to NPDES permits. *NRDC v. County of Los Angeles*, 673 F.3d at 886.

The District has not disputed that its MS4s are subject to NPDES permitting, nor that the District's MS4s carry storm water. *NRDC v. County of Los Angeles*, 2010 WL 761287, at *2.

In short, this is a storm water issue involving the District's MS4. The Court can and should decide this case pursuant to the provisions of section 402 of the Act governing storm water discharges, associated EPA regulations, and the MS4 Permits.

II. *MICCOSUKEE* IS NOT APPLICABLE TO THE DISTRICT'S MS4.

The District asserts that it is merely transferring water within single bodies of water, i.e., the Los Angeles River and San Gabriel River. Pet. for Writ of Cert., at 42-43. Thus, the District argues, it is not liable for discharges of storm water passing through its man-made channels within the rivers where the mass emission monitoring stations required by its NPDES permit are located, citing this Court's holding in *Miccosukee*, *supra*.

The Court should not be misled by this mischaracterization of the District's MS4 storm water discharges. The issue in this case is whether the District is liable for violations of its MS4 permits

and/or the Clean Water Act, not whether the District's MS4s require permits.

Indeed, the District does not dispute that its MS4s are subject to NPDES permitting, or that its MS4s carry storm water. *NRDC v. County of Los Angeles*, 2010 WL 761287, at *2. The District also admits that “assessing compliance with the Permit . . . would be accomplished through various activities, including monitoring of “mass-emissions” at seven mass-emission monitoring stations.” Pet. for Writ of Cert., at 9-10. Those stations are located in the man-made channels within the two rivers. *Id.*; see also *NRDC v. County of Los Angeles*, 673 F.3d at 900. And the District does not dispute that storm water passing through the stations causes exceedances of the water quality standards specified in its NPDES permit. *NRDC v. County of Los Angeles*, 2010 WL 761287, at **2-3.

These facts amply demonstrate that this is an MS4 storm water case that the Court should decide pursuant to the NPDES provisions of the Act applicable to MS4s. This Court need not, and should not, reach the issue of water transfers and its decision in *Miccossukee*.



CONCLUSION

For all the foregoing reasons, *Amici* respectfully urge the Court to decide this case pursuant to the provisions of section 402 of the Act governing storm water discharges, associated EPA regulations, and the District's MS4 Permit. The Court need not, and should not, reach the issue of water transfers and its decision in *Miccosukee* because this is simply a storm water case that does not involve water transfers.

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