No. 11-460

IN THE
SUPREME COURT OF THE UNITED STATES

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

-v.-

NATURAL RESOURCES DEFENSE COUNCIL, INC, and SANTA MONICA BAYKEEPER,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE CITY OF NEW YORK, NEW YORK STATE CONFERENCE OF MAYORS, AMERICAN WATER WORKS ASSOCIATION, AMERICAN PUBLIC WORKS ASSOCIATION, WATER ENVIRONMENT FEDERATION, ASSOCIATION OF METROPOLITAN WATER AGENCIES, AND NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When water flows from one portion of a river that is a 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 the transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

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INTERESTS OF *AMICUS CURIAE*

Amici curiae submit this brief in support of Petitioner, Los Angeles County Flood Control District.[1] *Amici* are or represent local governments, public utilities, water suppliers, and local water management agencies. *Amici* all have direct roles in ensuring that the water we are charged with protecting is clean and safe for a variety of uses, including consumption and recreational use, and in managing stormwater and floodwater in a safe, efficient, and environmentally responsible manner. The Ninth Circuit's ruling, if allowed to stand, would threaten these interests of *amici*.

Amicus the City of New York ("City"), a political subdivision of the State of New York, owns and operates a water supply system that provides drinking water to over eight million City residents and an additional million people in upstate communities. The City also has an elaborate network of storm, sanitary, and combined sewers. These systems all depend on the transfer of water within various bodies of water, using constructed

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[1] Counsel for *amici* authored this brief in its entirety, and no person or entity other than *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 City of New York's intention to file this brief. All parties have consented and written consents are being lodged herewith.

channels. The Ninth Circuit ruling jeopardizes the City's ability to supply sufficient water and to manage stormwater and floodwater.

The New York Conference of Mayors ("NYCOM") is a not-for-profit voluntary membership association whose members include 60 of the State's 62 cities and 526 of the State's 551 villages, thereby representing an overwhelming majority of such municipalities. NYCOM's mission is to improve the administration of municipal affairs in New York State through training for municipal officials, and to provide its members with legislative advocacy at both the state and federal levels on issues of concern to local government. This case is of significant concern to all of NYCOM members as they each have a direct role in promoting safe and efficient water management, and an interest in ensuring that suitable laws and regulations apply to their activities.

The American Water Works Association ("AWWA") is the largest and oldest association of water professionals in the world. With 50,000 members, it represents the full spectrum of the water community, including drinking water and wastewater utilities, individual members, consulting firms, manufacturers, academics, and environmental advocates. AWWA's utility members represent both public and private utilities, from the nation's largest to the very smallest, which collectively serve drinking water to about 80 percent of the American population.

The American Public Works Association ("APWA") is an international education and professional association of public agencies, private sector companies, and individuals dedicated to providing high quality public works goods and services. Originally chartered in 1937, APWA is the largest and oldest organization of its kind in the world, with 67 Chapters throughout North American. APWA provides a forum in which public works professionals can exchange ideas, improve professional competency, increase the performance of their agencies and companies, and bring important public works-related topics to public attention in local, state and federal arenas. Working in the public interest, the more than 28,000 members of APWA design, build, operate and maintain transportation, water supply, sewage and refuse disposal systems, public buildings and other structures and facilities essential to our nation's economy and way of life.

Founded in 1928, the Water Environment Federation ("WEF") is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code whose mission is to preserve and enhance the global water environment. WEF has more than 36,000 individual members and 75 affiliated Member Associations representing water quality professionals around the world. WEF members, Member Associations, and staff work to achieve its mission to provide bold leadership, champion innovation, connect and educate water professionals, and leverage knowledge to support

clean and safe water worldwide. Many WEF members are employed by drinking, wastewater and municipal stormwater utilities; the Ninth Circuit ruling could negatively impact the ability of these local government agencies to supply sufficient water and to manage stormwater and floodwater by unnecessarily expanding the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permitting requirements, the cost of which could hamper their ability to implement innovative practices that actually contribute to improved water quality.

The Association of Metropolitan Water Agencies ("AMWA") is an organization representing 181 of the nation's largest publicly-owned municipal drinking water suppliers. AMWA's members and affiliates include agencies and divisions of city governments and special purpose commissions, districts, agencies, and authorities created under state law to supply drinking water to the public. Collectively, they provide drinking water to over 130 million people throughout the United States. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. AMWA is concerned that the Ninth Circuit ruling, if upheld, would have a particularly devastating effect in

western states, whose water supply networks often rely on engineered improvements.

The National Association of Clean Water Agencies ("NACWA") represents the nation's publicly owned treatment works ("POTWs") and municipal stormwater utilities. NACWA's nearly 300 member agencies provide the majority of the U.S. population with reliable sewer service and collectively treat and reclaim over 18 billion gallons of wastewater each day. For over 40 years, NACWA has maintained a leadership role in legal and policy issues affecting the public authorities responsible for cleaning the nation's municipal wastewater and stormwater. NACWA members operate their POTWs and municipal stormwater utilities under the NPDES permitting program. NACWA members are concerned, however, that the Ninth Circuit ruling will unnecessarily subject certain aspects of their operations to NPDES permitting for the first time.

SUMMARY OF ARGUMENT

The flow of water from one portion of a river, through an engineered improvement, to a downstream portion of the same river does not constitute a regulated discharge of pollutants under the Clean Water Act (the "CWA" or "Act"), as this Court has recognized in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). Should this Court rule otherwise, *amici* will be threatened with burdensome and unnecessary regulation that will

significantly encumber routine water transfers indispensible to the provision of safe and affordable public water supplies as well as safe, effective stormwater and floodwater management.

The instant challenge provides this Court with an opportunity to affirm its prior ruling on this important issue.

ARGUMENT

I

THIS COURT HAS ALREADY DECIDED THAT A TRANSFER OF UNTREATED WATER FROM ONE PORTION OF A BODY OF WATER TO ANOTHER PORTION OF THE SAME BODY DOES NOT CONSTITUTE A "DISCHARGE OF A POLLUTANT" UNDER THE CLEAN WATER ACT.

The Clean Water Act defines "discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362 (12) (emphasis added); *see also* 40 C.F.R. § 122.2 (defining "[d]ischarge of a pollutant" as an addition of a one or more pollutants to the waters of the United States from a point source). Under the Act, a discharge of pollutants to the national waters of the United States requires a NPDES permit. A review of the relevant case law interpreting the Act clearly shows that a NPDES permit is not required in the instant case.

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-12 (2004), this Court, in examining whether the petitioner was required to obtain a NPDES permit, recognized that the transfer of water between "two hydrologically indistinguishable parts of a single water body" cannot constitute the "addition" of pollutants under the CWA and thus does not require a NPDES permit. The Court approvingly quoted the Second Circuit's statement, "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.'" *Id.* at 110, quoting *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001). Accordingly, the Court recognized that the relevant question was whether the two waters at issue were "meaningfully distinct water bodies." 541 U.S. at 112. The *Miccosukee* Court's approach to water transfers was consistent with earlier Circuit Court decisions which held that the movement of pollutants already in water is not an "addition" of pollutants to that water. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 581 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982).[2]

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[2] The City has also been involved in protracted litigation over whether transfers of untreated water between distinct bodies of water require a CWA permit. *See, e.g.*, *Catskill Mts.*, 273 F.3d 481, *on remand* 244 F. Supp. 2d 41 (N.D.N.Y. 2003), *aff'd* in part, *remanded* in part, 451 F.3d 77 (2d Cir. 2006); *Catskills Mts. Chapter of Trout Unlimited, Inc. v. Sheehan*,

This Court has also made clear that physical manipulation of water within a single river does not make that water distinct. In *S.D. Warren Co. v. Maine Board of Environmental Protection*, this Court held that the "waters of the United States" remain national waters, even when they are moved or manipulated. 547 U.S. 370, 379 n.5 (2006). In rejecting the notion that when water is impounded, it "'los[es its] status as waters of the United States' . . . and becomes an *addition* to waters of the United States when redeposited into the river," this Court explained that one cannot "denationalize national waters by exerting private control over them." *Id.* (internal citation omitted, emphasis added).

No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 (N.Y. Sup. Ct. Aug. 5, 2008).

In 2008, the United States Environmental Protection Agency ("EPA") promulgated a regulation on such interbasin water transfers, 73 Fed. Reg. 33,697 (June 13, 2008), codified at 40 C.F.R. § 122.3(i), which states that water transfers do not require NPDES permits under the CWA. The various challenges to this rule have been consolidated in the Eleventh Circuit, where litigation is ongoing. *Friends of the Everglades v. United States EPA*, No. 08-13652, 08-13653, 08-13657, 08-14921, & 08-16283 (11th Circuit).

In those cases, among others, *amici* have consistently argued that transfers of untreated water between water bodies do not require NPDES permits. The question before this Court is even more straightforward than the question in those cases, since this case concerns the transfer of untreated water within a single body of water, where the water simply flows through an engineered improvement.

In the instant case, water is transferred from one portion of a river, to a lower portion of the same river, through an engineered improvement. The water is not treated or otherwise processed in any way; thus, the water upstream of the sampling point is hydrologically indistinguishable from the water downstream. The mere presence of an engineered improvement between two portions of a single water body does not thereby render the two portions distinct. *Cf. S.D. Warren Co.*, 547 U.S. at 379 n.5. As in the earlier cases discussed above, nothing has been added to the water body at issue.

As the Ninth Circuit itself recognized, "[w]hile it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant." *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 673 F.3d 880, 898 (9th Cir. 2011). The process of conveying water from one portion of a river to another, hydrologically indistinguishable portion of the same river does not add any pollutants to the water and thus cannot constitute a "discharge." *See* 33 U.S.C. § 1362 (12) ("'discharge of a pollutant' . . . means . . . any *addition* of any pollutant to navigable waters from any point source" (emphasis added)); *see also* 40 C.F.R. § 122.2. In the instant case, there is no addition of pollutants and

therefore no "discharge" under the CWA; thus, no NPDES permit can be required.[3]

II

AMICI RELY ON THE TRANSFER OF WATER WITHIN SINGLE BODIES OF WATER FOR MANAGEMENT OF PUBLIC WATER SUPPLY, STORMWATER, AND FLOODWATER.

Transfers of untreated water through engineered improvements are essential to the design and operation of public water supply systems, flood control efforts, management of stormwater, and structures designed to assist in inland navigation. For example, the operation of canals, locks, and dams involves the movement of water through engineered improvements. All surface water supply systems rely fundamentally on local governments' ability to move water

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[3] When requested to submit a brief in response to the petition for a writ of certiorari in this case, the United States took the position that the Ninth Circuit mistakenly believed "that the part of the [Petitioner's sewer system] in which the monitoring stations sit [i.e., where the "engineered improvement" is located] is distinct from the rivers." Brief for the United States as *Amicus Curiae* at 20. However, the United States admits that "the court's holding would conflict with *Miccosukee*" if the Ninth Circuit had correctly understood the facts and ruled as it did. *Id.* Thus, the only way the United States can construe the Ninth Circuit's opinion as consistent with *Miccosukee* is by assuming that the court failed to understand the facts of the instant case.

through municipal infrastructure designed to meet local water supply needs. Water management systems throughout the country transfer water to areas that need water and away from areas in danger of flooding.

Amici are aware of no engineered structure conveying water *within a single water body* – including the millions of dams and other structures used by the federal, state, and local governments and public utilities to manage water for public water supply, flood control, navigation, and other governmental and public purposes – that is currently subject to a NPDES permit. Many such water management structures predate the enactment of the CWA in 1972 and have been in continuous operation since that time.

EPA has never required that such transfers operate pursuant to CWA permits. In fact, EPA's regulations make clear that EPA does not consider such transfers to be "outfalls." Pursuant to 40 C.F.R. § 122.26(b)(9), the term "[o]utfall . . . 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." Similarly, none of the more than forty states with delegated authority to administer the CWA permit program has historically required permits for these intra-basin water transfers. The consequences of applying the NPDES permit program to such transfers of water as directed by the Ninth Circuit could be devastating to water

suppliers, local governmental water managers, and the citizens they serve every day across the nation.

If the Ninth Circuit ruling is upheld, all engineered improvements to water bodies across the nation currently operating without permits would be subject to the CWA regulatory program; *amici* would be required to apply for, and NPDES permitting authorities to issue, hundreds of thousands of permits. Such a process, as well as the implementation of permit requirements, could restrict *amici*'s critical activities and impose costly operating conditions with no attendant benefits. Where the water at issue contains no pollutants that are introduced by the engineered improvement, this requirement would place an infeasible burden on the entity operating such improvement – a burden Congress never intended to impose. The CWA was intended to regulate entities that *introduce* pollutants to the navigable waters of the United States, not entities that merely move such water that already contains pollutants discharged by others or naturally occurring. *See* 33 U.S.C. § 1362 (12); *see also* 40 C.F.R. § 122.26(b)(1) (a co-permittee is "only responsible for permit conditions relating to the discharge for which it is operator"); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) (water constituents that are pre-existing in the navigable waters "do not constitute an addition of pollutants by a plant through which they pass"). Accordingly, the Ninth Circuit's holding that water flowing through an engineered improvement in a

single water body constitutes a discharge through an outfall is incorrect and must be struck down.

CONCLUSION

For all the foregoing reasons, *amici* respectfully urge the Court reverse the Ninth Circuit's ruling that water flowing through an engineered improvement in a single water body constitutes a discharge through an outfall requiring a NPDES permit, to avoid serious negative consequences for the many public agencies and authorities nationwide involved in water management for water supply, flood control, and related public purposes.

Respectfully submitted,

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