

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 *AMICUS CURIAE* OF
DOUGLAS EMMETT, INC. IN
SUPPORT OF RESPONDENTS**

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INTEREST OF THE *AMICUS CURIAE*

Douglas Emmett, Inc. owns and operates office properties and luxury apartment communities in the coastal areas of Southern California and Honolulu, Hawaii.¹ With 58 Class-A office properties (totaling approximately 14.7 million rentable square feet), and nine premier apartment communities (totaling 2,868 units), Douglas Emmett is one of the largest private property owners in Los Angeles County. Douglas Emmett is a publicly traded company (NYSE: DEI) with a current market capitalization in excess of \$3.2 billion.

The economic prospects of businesses located in coastal regions such as Southern California are fundamentally tied to clean water. The property values and return on investment realized by Douglas Emmett and other owners of real estate are directly and indirectly affected by the performance of coastal industries that depend on clean water, including tourism; leisure and hospitality; beach going and other ocean recreational activities such as diving and surfing; recreational fishing and boating; commercial fishing and shellfish sales; and other related business activities. More generally, property values are supported by the large number of people who live

¹ Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that undersigned counsel have authored this Brief in whole, and that no party other than *amicus* have made any monetary contribution intended to fund the preparation or submission of this Brief. Letters of consent to file this Brief have been provided by the parties and are on file with the Court.

in Southern California seeking to take advantage of these activities without fear of pollution.

In Los Angeles County, contaminated stormwater is the single greatest cause of surface water pollution. Businesses in Los Angeles and nearby communities rely on Petitioner, the L.A. County Flood Control District (“District”), to manage its stormwater discharges so that the area’s inland streams, rivers, bays and the Pacific Ocean are not polluted. The interests of *amicus* and many other businesses in the California coastal economy would be substantially impaired if the Clean Water Act were re-interpreted, as urged by the District, to allow large municipal dischargers to avoid their statutory responsibilities to prevent harmful stormwater pollution.

SUMMARY OF ARGUMENT

Congress passed the Federal Water Pollution Control Act (the “Clean Water Act” or “Act”) in 1972, creating a comprehensive program to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In addition to protecting human health and the environment, Congress recognized the importance of clean water resources to economic and commercial activities. *See, e.g.*, 33 U.S.C. §§ 1315(b), 1343(c).

Congress established a straightforward statutory scheme to achieve the Act’s objectives. Section 301 of the Act provides that all discharges of pollutants from point sources into waters of the United States are “unlawful,” unless conducted “in compliance

with” specified provisions of the Act, including most importantly the mandate in Section 402 to obtain and comply with the requirements of a pollution discharge permit. *See* 33 U.S.C. §§ 1311(a), 1362(12).

This statutory framework encompasses large municipal stormwater systems such as the District, which operates thousands of individual point source outfalls that discharge polluted stormwater. *See* C.A. ER 155-156; Pet. App. 8. On the face of the Act, each of these outfalls is subject to individual permit requirements and discharge limitations under Section 402.

EPA did not originally promulgate regulations for municipal stormwater discharges. In 1987, however, after lengthy litigation and years of careful consideration of these issues by Congress, EPA, state and local agencies, and municipal system operators, Congress comprehensively addressed municipal stormwater discharges in the Water Quality Act of 1987 (the “WQA”).

In the new Section 402(p) of the Act, Congress provided that large municipal systems such as the District could obtain “system- or jurisdiction-wide” permits, instead of being required to obtain and comply with thousands of individual discharge permits. 33 U.S.C. § 1342(p)(3)(B)(i). By definition, such system-wide permits would *not* correspond directly to individual “discharges.” To the contrary, as further developed in EPA’s implementing regulations promulgated in 1990, these system-wide permits impose broader compliance requirements, including the obligations to (a) meet down-stream

numerical water quality standards; (b) conduct representative instream monitoring, rather than single point source sampling at outfalls, to determine compliance; and (c) implement watershed management and control strategies to reduce pollutant contributions from the localities and activities that use the permitted system for stormwater pollution drainage. *See* 55 Fed. Reg. 47,990, Nov. 16, 1990 (EPA permit application regulations for operators of large municipal stormwater systems).

Congress expressly accorded EPA and the States substantial discretion to develop stormwater permitting approaches designed to prevent violations of water quality standards. Congress understood that such permits would not apply a traditional “end-of-pipe” approach, but rather would rely on water quality sampling data to determine whether water quality standards are met, and would achieve compliance through comprehensive system-wide management strategies.

In 2001, the District chose not to seek individual discharge permits and instead applied for and obtained the system-wide permit at issue in this case (the “Permit”). The District is the “Principal Permittee” and the operator of the substantial majority of the system governed by the Permit. Among other things, the Permit prohibits discharges from or within the District’s system “that cause or contribute to the violation of Water Quality Standards.” JA 97.

It is undisputed that the Permit’s Water Quality Standards were chronically and severely violated.

The District's mass emission monitoring results for the Los Angeles River and San Gabriel River established at least 140 separate violations of the Water Quality Standards, for at least ten different pollutants, including fecal bacteria at hundreds of times the Permit limits, and serious violations for at least six different toxic heavy metals. *See* Pet. App. 108, 117.

As a factual matter, the District's thousands of upstream point source outfalls unquestionably caused or contributed to these chronic violations of the applicable Water Quality Standards, thus violating the terms of the Permit. Since the District failed to ensure compliance with its Section 402(p) system-wide Permit, its underlying point source discharges were unlawful under Section 301(a) of the Act, 33 U.S.C. §§ 1311(a). The Court of Appeals therefore correctly held the District liable for non-compliance with its Permit.

The "question presented" as articulated by the Petitioner in seeking review of this case is a red herring. Water transfers are not at issue here. The reasons provided by the Court of Appeals to support its finding of liability were neither necessary nor even relevant to the District's liability under the plain language of Sections 301(a) and 402(p) of the Act. The Record below includes admissions by the District that the stormwater managed in its system conveyed each of the categories of contaminants violating the Permit's requirements. Given the District's role as owner and operator of the vast majority of the system, its thousands of upstream outfalls unquestionably included discharges of

pollutants that “contribute[d] to” the undisputed violations of the Water Quality Standards. This evidence alone was sufficient to establish the District’s liability.

The District and its *amici* argue that the Court of Appeal’s misdirected focus on the *factual* question whether the polluted water flowed from the point of monitoring to a downstream receiving water somehow implies an overarching *legal* requirement of specific evidence of a proximate discharge. The District contends it is not enough that it plainly violated the terms of its Permit by causing and contributing to water quality exceedances. It argues the Act requires additional proof of specific pollution discharges from identified point sources located in proximity to the measurement point of the violations.

The District’s attempt to engraft this “proximate discharge” requirement as a condition to enforcement of its Permit conflicts directly with the controlling provision of the statute. When Congress authorized “system-wide” permits in Section 402(p), it expressly intended that each municipal stormwater point source would *not* be required to be separately regulated. This approach necessarily relies on representative, instream monitoring. Such monitoring must in itself be sufficient to determine compliance. The District chose to avoid monitoring individual point sources by applying for a system-wide Permit, with compliance determined based on representative sampling. But it now seeks to avoid responsibility for these undisputed violations because it did not monitor the individual upstream

point sources. The District's argument, if adopted by the Court, would make the Permit effectively unenforceable. Such a construct violates both the plain language and purposes of the Act.

In many regions of the Nation, including Southern California, stormwater pollution discharges are among the most acute threats to water quality. Beyond the manifest harm to public health and the environment, water degradation caused by stormwater pollution also has major adverse economic and commercial impacts.

Clean water is an important resource supporting a variety of economic sectors and commercial activities, including tourism; leisure and hospitality; outdoor recreation; beach going; fishing; shell fishing; wildlife-related recreation; and commercial and residential property development. In California alone, the total direct and indirect economic impact of coastal tourism and recreation has been estimated at \$22 billion as of 2000, providing over 400,000 jobs. Unchecked stormwater pollution presents a serious threat to the economic health of businesses in numerous industry sectors that rely on achievement of water quality standards as Congress mandated in passing the Clean Water Act.

In summary, after full consideration of the issues associated with municipal stormwater pollution, in 1987 an overwhelming bipartisan majority in Congress explicitly provided that operators of large municipal stormwater systems must comply with system-wide permit requirements to meet applicable water quality standards. The Court should reject the District's argument to upset that legislative

judgment and evade responsibility for compliance with its Permit. The decision of the Court of Appeals should be affirmed.

ARGUMENT

I. The Court of Appeals Correctly Held That the District Failed to Comply With Its System-Wide Stormwater Pollution Discharge Permit.

A. Overview of the Clean Water Act's Discharge Permit Requirements

The centerpiece of the Clean Water Act is its comprehensive permitting program. *See EPA v. Calif. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). The Act prohibits the *discharge* of a *pollutant* from a *point source* to *waters of the United States*, except *in compliance with* applicable requirements under the National Pollutant Discharge Elimination System (“NPDES”) permit program. 33 U.S.C. §§ 1311(a), 1342, 1362(12). The terms of the granted NPDES permit determine the requirements that must be complied with: “the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger’s obligations” under the Act. *EPA v. Calif.*, 426 U.S. at 205. “Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action.” 40 C.F.R. § 122.41(a).

A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, [or] tunnel . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). “[S]urface runoff which is collected or

channeled by man” and “discharged through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works”—also called “outfalls”—are within the definition of point source discharges under the Act. 33 U.S.C. §§ 1342(p), 1362(14); 40 C.F.R. §§ 122.2, 122.26(b)(9) (defining outfall).

The Clean Water Act requires every NPDES permit to include monitoring sufficient to determine compliance with the permit’s requirements. 33 U.S.C. §§ 1342(a)(2), 1318(a)(A); 40 C.F.R. § 122.44(i)(1) (every permit “shall include” monitoring “[t]o assure compliance with permit limitations”). Monitoring required in NPDES permits was intended by Congress to be legally sufficient to determine whether enforceable violations have occurred. *See* S. Rep. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730, 3731.

B. Congress Amended the Act in 1987 to Regulate Municipal Stormwater Pollution Discharges Through System- and Jurisdiction-Wide Permits.

From the earliest years of the Act, it was clear that municipal stormwater outfalls constituted point source discharges subject to the permit requirements of Section 402. However, EPA initially sought to exempt municipal stormwater systems from the NPDES permit program because it would be administratively infeasible to require individual permits for each outfall of large municipal stormwater systems. *See* 38 Fed. Reg. 18,000 (July 5, 1973). The Court of Appeals for the D.C. Circuit

rejected EPA's exemption on the basis that it conflicted with the plain language of the Act; the court held that EPA was not given authority by Congress to exempt whole categories of point sources from permit requirements. *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1374, 1377, 1380 (D.C. Cir. 1977). Relief could only be obtained from Congress, in the form of amendments to the Act.

Ten years later, after more than four years of hearings and consideration of proposed bills, Congress passed amendments to the Clean Water Act affirming the applicability of the NPDES permit program to municipal stormwater systems. See Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 7 (1987) (adding new Section 402(p)).

Congress had been urged by some municipalities to exempt municipal stormwater discharges entirely, similar to other exemptions such as that for return flows from irrigated agriculture. See 33 U.S.C. § 1342(l)(1). Congress rejected those efforts. Rather, “[i]n the 1987 congressional debates, the Senators and Representatives emphasized the need to prevent the widespread and escalating problems resulting from untreated storm water toxic discharges that were threatening aquatic life and creating conditions dangerous to human health.” *Bldg. Indus. Ass’n of San Diego Cnty. v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128, 134-35, 138-39 (Cal. Ct. App. 2004) (citations omitted).

Section 402(p) affirmed that municipal stormwater system discharges must be authorized by, and in compliance with the terms of, NPDES permits. 33 U.S.C. § 1342(p)(2)(C)&(D). However,

Congress provided that permits for discharges from a large or medium municipal stormwater system—those serving a population of 100,000 people or more—“may be issued on a system- or jurisdiction-wide basis.” 33 U.S.C. §§ 1342(p)(2)(C)&(D), 1342(p)(3)(B)(i). Allowing system-wide permits avoided the need for each stormwater outfall to obtain a separate permit, while still imposing the enforceable compliance requirements Congress mandated in Section 301(a) of the Act. *See* 53 Fed. Reg. at 49,451 (Dec. 7, 1988).

Congress intended that the Section 402(p) system-wide permits would facilitate the statutory goals of attaining and maintaining water quality standards. Under the Act, each state must adopt and submit for federal approval water quality standards for all waters within its boundaries. 33 U.S.C. §§ 1313(a)(3)(A) & 1313(c); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704 (1994). NPDES permits are the “primary means” for ensuring compliance with water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992) (citation omitted). In enacting Section 402(p), Congress expressly required that stormwater discharges that “contribute[] to a violation of a water quality standard” be immediately subject to NPDES permit requirements. 33 U.S.C. § 1342(p)(2)(E). This provision reflected Congress’s intent that achieving instream water quality standards be a primary focus and requirement under the WQA.

The WQA required municipal discharge permits to mandate technologies that “reduce the discharge of pollutants to the maximum extent practicable.” 33

U.S.C. §1342(p)(3)(B)(iii). The WQA further provided that system-wide permits require “such other provisions as the [EPA] Administrator or the State determines appropriate for the control of [stormwater] pollutants.” *Id.*

The WQA accorded substantial discretion to EPA, in consultation with the States, to conduct studies and promulgate regulations “establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality. . . . which may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.” *Id.* at § 1342(p)(5)(C) & (p)(6)(C).

Congress fully understood when it passed the WQA that these system-wide permits would have broader requirements than traditional discharge permits. As Senator Stafford observed in the Senate debate on the Conference Report, in discussing why additional time would be needed for EPA and the States to develop a comprehensive municipal stormwater permitting system:

These permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge. As an EPA official explained in a meeting of the conferees: “These are not permits in the normal sense we expect them to be. These are actual programs. These are permits that go far beyond the normal permits we would issue for an

industry because they in effect are programs for stormwater management that we would be writing into these permits.”²

Notably, Congress enacted the WQA with overwhelming bipartisan majorities. The vote approving the Report of the Conference Committee was 406 in favor to 8 opposed in the House of Representatives, and 93 in favor to 6 opposed in the Senate.³ Congress knew exactly what it was doing when it created this regulatory program and it did so with near-unanimous approval.

C. The District’s System-Wide Permit Prohibits Upstream Pollution Discharges That Cause or Contribute to Violations of the Applicable Water Quality Standards.

It is undisputed that the District operates point sources that discharge numerous pollutants regulated under the Act, including fecal bacteria, arsenic, cyanide, mercury, copper, lead, and zinc on a regular basis. Pet. App. 6-8, 17. The District directly owns and operates approximately 2,800 miles of storm drains and 500 miles of open channels, as well as thousands of individual point

² Senate Debate on the Conference Report to Accompany S. 1128, October 16, 1986, Cong. Rec. vol. 132, daily ed., S16424-S16611, 2 Legislative History of the Water Quality Act of 1987 (Public Law 100-4) 616, 617-18.

³ See Bill Summary and Status, 100th Congress, H.R. 1, Public Law 100-4, <http://thomas.loc.gov/cgi-bin/bdquery/z?d100:HR00001:@@R>

source outfalls that discharge these toxic pollutants. Pet. App. 106.

The District applied for, and received, the Permit in question here. The Permit prohibits “discharges from the MS4 that cause or contribute to the violation of Water Quality Standards.” JA 97.

The applicable Water Quality Standards establish the permitted limits for fecal bacteria, arsenic, cyanide, mercury, zinc, and other pollutants. Pet. App. 14, 19; JA 370. The District agreed to assume the legal obligation to attain these Water Quality Standards “through timely implementation of control measures and other actions to reduce pollutants” in discharges from the parts of the MS4 “for which it is the operator.” JA 93, 98; 40 C.F.R. § 122.26(b)(1). The Permit also requires the District to hold other dischargers into its system “accountable for their contributions of pollutants and flows.” JA 109. As Principal Permittee, the District agreed to “facilitate activities necessary to comply” with the permit by all other co-permittees and that it would implement the specified self-monitoring program. JA 103.

As required by the Act, the District’s permit included specific monitoring requirements. *See* 33 U.S.C. § 1342(a)(2). Consistent with its “system- and jurisdiction-wide” nature, however, the Permit’s monitoring program does not require sampling of discharges from each individual outfall. JA 454. Instead, the District requested and received approval to conduct its monitoring at a small number of representative “instream stations” instead of at each of thousands of individual outfalls.

EPA's regulations required that these "[s]amples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." 40 C.F.R. § 122.41(j)(1). The District's Permit expressly stated that its instream station monitoring was intended to meet this requirement. JA 218. Sampling is conducted five times a year at designated "mass emission stations" located in major rivers, including in the Los Angeles River and San Gabriel River. Pet. App. 17-18; JA 219. The stated purpose of the Permit's monitoring program is to assess compliance with the Permit, characterize stormwater discharges, and identify pollutant sources. JA 218. This is the entire basis on which the District meets the statutory requirement to demonstrate compliance; as a system-wide permit, there are no further requirements for monitoring any of the District's thousands of individual outfalls. JA 218-221.

D. The Undisputed Evidence Below Proved That the District Violated the Requirements of Its Permit.

The District admits that its monitoring reports proved hundreds of violations of the Permit's Water Quality Standards. Pet. App. 108, 117. The District's undisputed monitoring results show chronic and severe violations of the Water Quality Standards for fecal bacteria, toxic metals, and other pollutants in the Los Angeles and San Gabriel Rivers, at levels that are in some cases hundreds of times greater than the limits permitted under the Permit. See C.A. ER 355-364 (table of reported monitoring results).

The District also admits that the relevant “discharges” governed by its Permit are those located *upstream* of the mass emissions monitoring stations. It states in its Brief to this Court that: “Petitioner’s pipes, drains and other elements of its storm sewer system that discharge to the Los Angeles and San Gabriel Rivers plainly fall within the definition of ‘outfall’ and are therefore subject to the Clean Water Act’s proscriptions.” Brief of Petitioner at 44.

Finally, the District admitted in its deposition testimony under Rule 30(b)(6), Fed. R. Civ. P., that each of the types of measured contaminants found in violation of the applicable Water Quality Standards under the Permit were conveyed in the stormwater in its system. JA 325. Given that the District owns and operates the vast majority of the system, more than all of the other co-permittees combined, as a factual matter its upstream outfalls necessarily were the source of at least some of the measured contamination, if not the substantial majority.

The Permit prohibits “discharges that cause *or contribute*” to exceedances of Water Quality Standards. JA 97 (emphasis added). As the operator of a substantial majority of the permitted system and outfalls, the District’s thousands of upstream point sources unquestionably *contributed* to the violations of the Water Quality Standards proven by the instream monitoring. The District therefore failed to ensure “compliance with” the Permit and its upstream discharges were “unlawful” under Section 301(a) of the Act.

E. The Court Should Reject the District’s Argument Seeking to Engraft a “Proximate Discharge” Evidentiary Requirement as a Condition to Enforcing the Terms of its Permit.

The Court of Appeals ultimately held—correctly—that the District’s permit violations had been proven. In seeking reversal, the District argues that the instream monitoring reports are not sufficient to establish liability. Because it obtained a system-wide Permit, thus avoiding monitoring in proximity to any specific discharge outfalls, the District asserts that the violations of the Permit cannot be traced to any specific outfall and it therefore is not liable. Pet. App. 115. The District effectively seeks to create an additional legal requirement not included in either the Act or the Permit. It argues that it can ignore violations of the plain language of the Permit unless the measuring point for compliance (chosen by the District) can be shown to be geographically proximate to the specific source of the pollutants.

The District’s proposed construction is in direct conflict with the controlling provision of the Act governing municipal stormwater discharges, Section 402(p)(3)(B), which allowed the District to elect to obtain its Permit with representative sampling “on a system- or jurisdiction-wide basis.” 33 U.S.C. § 1342(p)(3)(B)(i). As a “system-wide” Permit, the compliance monitoring points are by definition *not* tied to individual point source discharges. Nor as a practical matter could they be, given the nature of municipal stormwater systems.

The “question presented” as articulated by the Petitioner—whether water flowing from a constructed portion of a waterway to a natural portion of that waterway is a discharge from a point source—is irrelevant as a matter of law. This supposed question is a red herring, framed by the Petitioner based on the Court of Appeals’ misdirected focus on whether there was a “discharge” *downstream* from the monitoring stations. That factual point is not relevant; the controlling question in this case is whether the District was in compliance with its Permit, given that its thousands of *upstream* point source outfalls unquestionably contributed to the violations of the Permit’s Water Quality Standards. Because the evidence below overwhelmingly established the District’s severe and ongoing violations of the Permit, the decision of the Court of Appeals should be affirmed.

The District essentially asks the Court to issue an advisory opinion; it poses an abstract question of law not actually generated by the facts of the case. The District’s intent is clear: to have the Court make a pronouncement altering the legal framework of the Act with the objective of being relieved of enforceable responsibility to comply with its Permit.

The Court should reject these arguments as contrary to the plain language of the statute and the Permit. The result is vitally important given the broader implications for stormwater regulation and the economic and commercial stakes for parties such as the *amicus*. EPA estimates that approximately 1,000 large and medium municipal stormwater

systems (greater than 100,000 persons served) are presently regulated under the Phase 1 program.⁴ The holding advocated by the District—seeking to engraft a further specific requirement of proof of proximate discharge, in addition to evidence of permit violations—could be expected to eviscerate the entire “system-wide” permitting scheme enacted by Congress, leaving the statute ineffectual, as a practical matter, to deal with the major water quality problems it was intended to solve. The Court should conclusively reject the District’s efforts to have it rework the statutory framework created by Congress.

II. The Clean Water Act’s Municipal Stormwater Permit Program Promotes Vital Economic and Commercial Interests in Clean Water.

A. The Act’s Comprehensive Water Quality Program Was Intended to Achieve Economic Benefits.

In passing the Act in 1972, Congress recognized that in addition to protecting human health and the environment, clean water resources are fundamental to economic growth and the creation of jobs. The Act required EPA and the States to establish water quality standards and mandated ongoing reporting by the States regarding the economic benefits achieved in seeking to meet those standards,

⁴ National Research Council of the National Academy of Sciences, *Urban Stormwater Management in the United States* (2009) (“NRC Stormwater Report”) at 36, available at <http://www.nap.edu/catalog/12465.html>.

including “propagation of shellfish, fish and wildlife,” “recreational opportunities” and other “economic and social benefits.” *See, e.g.*, 33 U.S.C. § 1315(b). Section 1343(c) of the Act imposed specific requirements for preventing degradation of oceans and coastal waters, including provisions addressing “the effect of disposal of pollutants on esthetic, recreation and economic values.” *Id.* § 1343. The Act provided that, “wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.” *Id.* § 1251(a)(2). As reflected in these provisions, Congress clearly recognized the important link between clean water, commercial interests and economic growth.

B. Unchecked Stormwater Pollution Threatens the Economic Benefits of Clean Water.

Municipal stormwater pollution is continuing to impede the achievement of water quality standards and related economic benefits. In October 2008 the National Research Council released the report *Urban Stormwater Management in the United States* finding, among other things, that “the rapid conversion of land to urban and suburban areas has profoundly altered how water flows during and following storm events, putting higher volumes of water and more pollutants into the nation’s rivers, lakes, and estuaries. These changes have degraded

water quality and habitat in virtually every urban stream system.”⁵

EPA followed on these findings in a subsequent notice:

The role of MS4s in reducing stormwater impacts from the built environment is crucial and growing, given that these sources of adverse water quality impacts are continually expanding. As the urban, suburban and exurban human environment expands, there is an increase in impervious land cover and therefore an increase in stormwater discharges. This increase in impervious land cover reduces or eliminates the natural infiltration of precipitation, which greatly increases the volume of stormwater discharges. This increased volume of stormwater discharges results in the scouring of rivers and streams; degrading the physical integrity of aquatic habitats, stream function and overall water quality.⁶

Stormwater pollution is a “major cause of water quality impairment nationwide,” 64 Fed. Reg. at 68,726. According to the National Research Council, citing data from the EPA’s 2002 305(b) report, urban

⁵ NRC Stormwater Report at 1, 25.

⁶ EPA Notice, Stakeholder Input: Stormwater Management Including Discharges From New Development and Redevelopment, 74 Fed. Reg. 68,617-01 (December 28, 2009).

stormwater was listed as the primary source of water quality impairment for 13% of all rivers, 18% of all lakes, and 32% of all estuaries in the Nation.⁷ EPA's most recent water quality report found that more than half of ocean and near coastal waters remain impaired, with urban related stormwater runoff contributing to approximately 25% of the impaired waterway miles.⁸ "Urban-related runoff/stormwater" is listed as the third largest source of impairment for assessed ocean and near coastal waters.⁹

In California, contaminated stormwater is now the single greatest cause of surface water pollution. Pet. App. 6; JA 432. Los Angeles and surrounding areas "face[] the largest concentration of [stormwater] pollution" in the state. C.A. ER 302 (State Water Res. Control Bd. Resolution No. 2003-0013). Toxic stormwater runoff plumes resulting from discharges from the District's system can persist for days at a time, causing beach closures as well as major health and environmental impacts. JA 361.

Stormwater impacts have substantial economic effects in other regions of the country as well. For example, a 2007 Brookings Institution study estimated the direct economic benefits of Great Lakes clean up and restoration from tourism, fishing and recreation at \$6.5 to \$11.8 billion. They also

⁷ NRC Stormwater Report at 25.

⁸See EPA Water Quality Assessment and Total Maximum Daily Loads Information, National Summary, available at: http://ofmpub.epa.gov/waters10/attains_nation_cy.control.

⁹ *Id.*

estimated a \$12-\$19 billion increase in property values following the cleanup.¹⁰

Similarly, the Chesapeake Bay watershed in Delaware (1) contributes over \$2 billion in annual economic activity from benefits associated with water quality, water supply, ecotourism, recreation, agriculture, forest, open space, and navigation, and (2) is directly and indirectly responsible for 47,000 jobs with \$1.2 billion in annual salaries.¹¹

The economic benefits of clean water with respect to a variety of industries and commercial activities are discussed below:

Tourism, Beach Going, Boating, and Leisure and Hospitality. The recreation and tourism industry is one of the top employers in the United States. Each year, Americans take more than 1.8 billion trips to water destinations, largely for recreation, spending money and creating jobs in the process.¹²

¹⁰ See Austin, et al., The Brookings Institution Great Lakes Economic Initiative, *Healthy Waters, Strong Economy: The Benefits of Restoring the Great Lakes Ecosystem* (Metropolitan Policy Program September 2007) at 6, available at www.brookings.edu/metro/pubs/20070904_gleiecosystem.pdf.

The study notes that: “With 8 million swimmers and 80 million swimming days annually in the Great Lakes, the economic benefit from a 20 percent reduction in beach closings and advisories would be \$130 to \$190 million per year, which translates into a present value of about \$2 to \$3 billion dollars.”

¹¹ See Kaufman et al., *Socioeconomic Value of the Chesapeake Bay Watershed in Delaware*, University of Delaware, March 2011, accessible at: <http://www.ipa.udel.edu/publications/DelChesapeakeWatershed.pdf>.

¹² EPA, *Liquid Assets 2000: America’s Water Resources at a Turning Point* (“Liquid Assets 2000”) (May 2000).

Nationally, the economic value of coastal recreation—including beach-going, angling, bird watching and snorkeling/diving—and related tourism, has been estimated as high as \$60 billion to \$70 billion annually.¹³ In the California coastal zone, beach recreation and tourism is the single largest economic sector,¹⁴ creating an estimated \$22 billion in annual expenditures and more than 400,000 jobs in 2000.¹⁵ In Los Angeles and Orange Counties alone, the annual economic output resulting from beach recreation is estimated at approximately \$3.53 billion.¹⁶

Recreational boating also generates considerable economic value for the coastal economy. In 2008, 28.3% of U.S. adults went boating at least once. Recreational marine manufacturers employed more than 135,900 people and retail boating/service businesses employed another 217,718 people.¹⁷

¹³ See Restore America's Estuaries, *The Econ. & Mkt. Value of Coasts and Estuaries: What's At Stake?* (Pendleton, ed.) ("Value of Coasts") at 165, available at http://www.era.noaa.gov/pdfs/052008final_econ.pdf; see also State of the Ocean and Coastal Economies 2009 at 6, available at: <http://www.oceaneconomics.org/nationalreport/>.

¹⁴ Kildow et al., *California's Ocean Economy, Report to the Resources Agency*, State of California (July 2005), available at http://resources.ca.gov/press_documents/CA_Ocean_Econ_Report.pdf.

¹⁵ *Id.* at 123.

¹⁶ Wiley, et al., *Economic Impact of Beach Closures and Changes in Water Quality for Beaches in Southern California* at 15 (NOAA 2006).

¹⁷ Southwick Assoc., *The Economics Associated with Outdoor Recreation, Natural Resources Conservation and Historic*

The leisure and hospitality sectors are responsible for approximately \$73.5 billion in GDP in California annually, employing approximately 1.6 million workers in more than 86,000 establishments.¹⁸ Beaches and coastal areas are a major focus of this industry in California.

These and other economic activities are put at risk by the discharge of polluted stormwater. Nationally, an estimated 36% of the approximately 22,000 days of beach closures in 2011 were caused by polluted runoff and stormwater.¹⁹ In California, the Los Angeles County Department of Health Services has identified increased health danger associated with storm water pollution and has a standing rain advisory that “recommends that beach users avoid contact with ocean water, especially near flowing storm drains, creeks and rivers for a period of 3 days after rainfall ends.”²⁰ In one study on the health of Los Angeles County’s beaches conducted in 2002-2003, 56 percent of monitored beaches received a failing grade during wet weather (when storm drains

Preservation in the United States, Report for the National Fish and Wildlife Foundation (2010).

¹⁸ Kildow, et al., National Ocean Economics Program, *State of the U.S. Ocean and Coastal Economies, 2009*, available at <http://www.oceaneconomics.org/NationalReport/>.

¹⁹ NRDC, *Testing the Waters, A Guide to Water Quality at Vacation Beaches* (2011), available at <http://www.nrdc.org/water/oceans/ttw/ttw2012-ExecutiveOverview.pdf>.

²⁰ Cal. Environmental. Protection Agency, State Water Resources Control Board, *Erase the Waste* (Updated 3/26/2009), available at http://www.waterboards.ca.gov/water_issues/programs/outreach/erase_waste/swpollution.shtml.

are active), meaning the conditions were hazardous to human health and would have adverse health effects to swimmers who enter the water.²¹ During 2002, there were 269 warnings posted on Los Angeles County beaches for a total of 1,181 beach-days where the ocean was too polluted for human use.²² This represents 1,181 days of lost revenue to businesses. More generally, if pollution discharges continue, ultimately many tourists will vacation elsewhere, and many residents will move. Beach closures have a significant economic impact on coastal regions.

Commercial and Recreational Fishing and Wildlife-Related Recreation. Spending associated with fishing and wildlife supports hundreds of thousands of jobs in related industries. In 2006, 29% of the U.S. population participated in fish- and wildlife-related recreational activities. This group spent more than \$122 billion, accounting for approximately 1% of the nation's gross domestic product (GDP).²³

In 2009 alone, 11 million recreational anglers across the U.S. spent \$4.5 billion on fishing trips and \$15 billion on durable fishing-related equipment.²⁴

²¹ *Id.*

²² *Id.*

²³ U.S. Fish and Wildlife Service, *2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation National Overview, Preliminary Findings* ("FWS 2006 Survey") at 4, available at www.fws.gov/fisheries/pdf_files/nat_survey2006.pdf.

²⁴ National Oceanic and Atmospheric Administration, *National Overview*, ("2009 NOAA Report") at 11, available at

Coastal county residents made up 84% of total anglers.²⁵ Expenditures related to recreational fishing kept over 327,000 people employed on a full- or part-time basis across the U.S., including 13,567 people employed in California.²⁶

Commercial fishermen earned \$3.9 billion annually for their 7.9 billion pounds of catch.²⁷ The U.S. seafood industry—including the commercial harvest sector, seafood processors and dealers, seafood wholesalers and distributors, importers and seafood retailers—employ approximately 1 million people on a full- or part-time basis, contributing \$48.2 billion in GDP.²⁸ In California the seafood industry employs 120,583 people, and generates \$20 billion in annual sales.²⁹

Waters threatened by stormwater pollution support all of these activities.³⁰ Wetlands and estuaries play essential roles in the lifecycles of 75 percent of fish and shellfish commercially harvested and up to 90 percent of fish recreationally caught in

http://www.st.nmfs.noaa.gov/st5/publication/econ/2009/US_ALL_Econ.pdf.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 5.

²⁸ *Id.* at 5.

²⁹ *Id.* at 6.

³⁰ Liquid Assets 2000 at 2; Lellis-Dibble *et al.*, *Estuarine Fish and Shellfish Species in U.S. Commercial and Recreational Fisheries: Economic Value as an Incentive to Protect and Restore Estuarine Habitat*, (NOAA 2008), available at <http://spo.nmfs.noaa.gov/tm/TM90.pdf>.

the United States.³¹ Since 1998, degradation of the Nation's waters has resulted in thousands of fish consumption advisories or bans.³² According to EPA, in 1998 "2,506 fish consumption advisories or bans were issued in areas where fish were too contaminated to eat."³³ Unpolluted water ensures that fish remain healthy and protects the economic viability of our fisheries.

Commercial and Residential Property Values. All of the economic benefits associated with clean water discussed above, as well the broader quality of life experience of residents and visitors in coastal regions, impact property values. For example, one report found that a home's proximity to water raises property values by up to 28 percent.³⁴ EPA has estimated that improved water quality can raise property values by up to 18% next to the water, 8% at 1,000 feet from the water, 4% at 2,000 feet from the water, and 2% at 3,000 feet from the water.³⁵ Commercial and residential property values in coastal areas such as Los Angeles County

³¹ EPA, *Economic Benefits of Wetlands* (1995), available at <http://www.epa.gov/owow/wetlands/pdf/EconomicBenefits.pdf>.

³² Liquid Assets 2000 at 2.

³³ *Id.*

³³ Value of Coasts at 66.

³⁴ Environmental Protection Agency, *Economic Benefits of Runoff Controls* (September 1995), available at http://water.epa.gov/polwaste/nps/econ_ben_runoff_control.cfm.

³⁵ Environmental Protection Agency, *Benefit of Water Pollution Control on Property Values*, (Oct. 1973), available at [http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0009.pdf/\\$file/EE-0009.pdf](http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0009.pdf/$file/EE-0009.pdf).

unquestionably reflect the underlying value of these natural resources.

* * * * *

Continued implementation and enforcement of the Act's Section 402(p) municipal stormwater program is vitally important to realizing the substantial economic growth and jobs benefits generated by the sectors and activities discussed above. Congress passed the Clean Water Act with the intention of ensuring the availability of clean water resources to support these benefits. The Court should uphold the system-wide permit framework enacted by Congress and reject the District's arguments seeking to avoid responsibility for compliance with its Permit.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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