No. 11-460

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page (s)

Cases

TABLE OF AUTHORITIES *(cont.)*

Page (s)

TABLE OF AUTHORITIES *(cont.)*

TABLE OF AUTHORITIES *(cont.)*

Page (s)

TABLE OF AUTHORITIES *(cont.)*

TABLE OF AUTHORITIES *(cont.)*

Page (s)

INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *Amicus Curiae* brief in support of Petitioners.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members (see Appendix A). NAHB was a petitioner in another Clean Water Act ("CWA") case, *NAHB v. Defenders of Wildlife,* 551 U.S. 644 (2007).

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[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 a*micus*, its members, or its counsel contributed monetarily to the preparation and submission of this brief. The parties have given consent and the letters of consent to file this brief are on file with the Court.

Under the CWA, every construction site greater than one acre in size (or smaller if it is part of a common plan of development greater than one acre) must obtain a permit for its stormwater discharges. EPA regulates these discharges pursuant to the same CWA section that it regulates municipal separate storm sewer systems ("MS4s")—33 U.S.C. § 1342(p). Thus, NAHB's members will be impacted if the Court concludes that under the CWA a "point source" can also be legally defined as a "navigable water." 33 U.S.C. §§1362(14), (7).

SUMMARY OF ARGUMENT

For all its complexity, the Clean Water Act is simple in one respect—it creates liability for a person who adds pollutants to a "water of the United States" through a "point source." 33 U.S.C. §§ 1311(a), 1362(5), (6), (7), (12), (14). In this case, though the concrete lined portions of the Los Angeles and San Gabriel Rivers are "point sources," the Respondents have failed to prove those point sources "add" pollutants to a water of the United States.

ARGUMENT

This case involves water that flows from the natural portions of the Los Angeles and San Gabriel Rivers into two concrete lined structures created in areas where the Rivers had once flowed naturally. The water then flows out of those concrete structures back into natural portions[2] of the same Rivers—

[2] There is no dispute that the natural portions of each River are Clean Water Act "navigable waters" or "waters of the United States." 33 U.S.C. 1362(7).

downstream from the structures.[3] The structure in the Los Angeles River is approximately 51 miles in length and the structure in the San Gabriel River is approximately 9 miles long.[4] Furthermore, along those structures there exist "outfalls" where stormwater enters the concrete structures.

In addition, there are mass emissions monitoring stations in each river. The station in the Los Angeles River is located in the concrete lined portion of the River. *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 673 F.3d 880, 889 (2011) (hereinafter *NRDC*). The San Gabriel station is located upstream from the concrete lined portion of the River where it has a rip rap bank. *Id.*

Finally, amicus understands that there is no evidence that the amount of pollutants in the flowing water is greater at the outlets of the concrete structures then at their inlets.

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[3] Amicus will use the term "outlet" to describe the water that flows out of the two concrete lined structures and back into the natural portions of the Los Angeles and San Gabriel Rivers, and the term "outfalls" to describe water that enters those concrete structures through various storm drains.

[4] While the Los Angeles River is concrete lined almost its entire length, the San Gabriel is not. However, the San Gabriel is concrete lined, between Firestone Boulevard and just above the San Diego Freeway. Above the concrete lined area, the San Gabriel has rip rap banks and a natural bottom. Below the concrete area, the San Gabriel is tidally influenced. County of Los Angeles Dept. of Public Works, *A Common Thread Rediscovered, San Gabriel River Corridor Master Plan*, 2-30, 3-29, 3-31, 3-35 (June 2006), available at http://ladpw.org/wmd/watershed/sg/mp/docs/SGR_MP.pdf (last visited August 30, 2012).

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Amicus addresses the following issues: 1) whether the concrete structures are "point sources" or "navigable waters" under the CWA, and 2) whether the outlets from the structures cause a "discharge of a pollutant." 33 U.S.C § 1362 (7), (12), (14). NAHB urges the Court to hold that structures that are "point sources" cannot also be legally defined as "navigable waters" and to hold that the Respondents failed to prove a discharge of pollutants occurred.

I. THE CONCRETE STRUCTURES ARE "POINT SOURCES" NOT "WATERS OF THE UNITED STATES."

A. Congress Specifically Designated "Channels" as "Point Sources."

Exercises in construction "begin with the language of the statute." *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 450 (2002). Obedience to text is especially due when Congress defines statutory terms: "When a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *see also W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("statutory definitions of terms . . . prevail over colloquial meanings"); *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) ("Statutory definitions control the meaning of statutory words . . . .").

The CWA's regulatory scheme, for all its detail, is quite simple: Congress intended to regulate pollutants going into "navigable waters" by requiring permits to control pollutants coming out of "point

sources." 33 U.S.C. § 1311(a) (prohibiting the "discharge of pollutants" unless permitted elsewhere in the Act). CWA § 1362 defines two key terms: "navigable waters" at subsection (7) and "point source" at subsection (14). 33 U.S.C. §§ 1362(7), (14).[5] The term "'point source' means *any* discernible, confined and discrete conveyance, including but not limited to any pipe, ditch*, channel*, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14)(emphasis added). Congress could not have been more explicit: a "point source" is any defined, discrete conveyance, from which pollutants are or may be discharged. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) ("Tellingly, the examples of 'point sources' listed by the Act include pipes, ditches, tunnels, and conduits ….").

Congress was not, however, as clear in its definition of "navigable waters." The term "navigable waters" means "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The courts have held that the term "navigable waters" goes beyond navigable-in-fact waters, *Rapanos v. U.S.*, 547 U.S. 715, 723-25 (2006) but "the Act was not clear what non-navigable waters it intend[s] to cover." *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 212 (4th Cir. 2009). *See also United States v. Moses*, 496 F.3d 984, 988

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[5] A third statutory definition ("discharge of a pollutant") shows that "point source" and "navigable waters" are mutually exclusive categories. This is discussed at pages 11-12 infra.

(9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008) (providing that while the terms "navigable waters," and "waters of the United States" "are designed to bring clarity to the Nation's waters, they, themselves, are not hyaline."). Unlike the "point source" definition, which identifies specific features, no specific kind of waterbody is listed in the "navigable waters" definition; that broad term may include bays, lakes, sounds, gulfs, rivers, streams and even certain non-navigable wetlands. *See United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985).

When interpreting the CWA's definitional provisions, specific statutory provisions (such as the definition of "point source") govern over more general provisions (such as the "navigable waters" definition). *See*, *e.g., Edmond v. United States*, 520 U.S. 651, 657 (1997); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). The Court applied this canon of statutory construction in *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), where it analyzed whether a patent infringement suit had to be brought in the judicial district where the defendant corporation committed acts of infringement, under 28 U.S.C. §1400(b), or where the defendant corporation was doing business, under 28 U.S.C. § 1391(c). The Court explained that § 1400(b) was specifically applicable to patent infringement cases, whereas § 1391(c) is a general corporation venue statute. In determining that § 1400(b) controlled, it held that "[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco,* 353

U.S. at 228 (internal quotes omitted). Likewise, in *United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Indus., AFL-CIO v. Reno*, 73 F.3d 1134 (D.C. Cir. 1996) (hereinafter "*Reno*"), labor unions argued that aliens, operating from a foreign-owned derrick barge on the Continental Shelf could not construct oil platforms without complying with United States immigration laws. The Court of Appeals reviewed 43 U.S.C. §§ 1333(a)(1) and 1356. Section 1333 (a)(1) generally extended the Constitution and laws of the United States to "'all installations and other devices permanently or temporarily attached to the seabed,'" *id.* at 1135 (quoting the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 203, 92 Stat. 629, 635), while § 1356 directed the Coast Guard to develop rules requiring "'any vessel, rig, platform, or other . . . structure' used in regulated operations on the outer Continental Shelf be 'manned or crewed . . . by citizens of the United States or aliens lawfully admitted to the United States for permanent residence.'" *Id.* at 1136 (internal citation omitted). Section 1356(c), however, was an exception providing that "Americans would not have to man or crew any vessel . . . 'over 50 percent of which is owned by citizens of a foreign nation . . . .'" *Id.* Interpreting these two provisions and relying on the canon of statutory construction that specific statutory provisions trump general ones, the Court of Appeals explained:

> [Section] 1333(a)(1) is written in general terms. It does not expressly refer to nonimmigrant workers or to the immigration laws. In contrast, § 1356

> lays out a detailed system governing who may work on vessels and structures conducting regulated activities on the outer Continental Shelf, a system drawing distinctions between citizens and resident aliens and other workers and vesting discretion in the President to restrict or relax § 1356's rules on the composition of the workforce. The canon of statutory construction dictating that specific statutory provisions govern general ones would therefore lead us to favor § 1356 over § 1333(a)(1). *Id.* at 1140.

It is no different here. Clearly, the concrete lined portions of each river are "channels." Channels are explicitly included in the definition of "point source," and because the more general provision ("the navigable waters" definition) does not even refer to channels, the explicit definitions must prevail. A manmade channel cannot be a statutory "navigable water." *See Fourco Glass Co.,* 353 U.S. at 228 (Congress "specifically dealt with [channels] in another part of the same enactment.") (internal citations omitted). The precise inclusion of "channel" in the "point source" definition precludes an interpretation that channels are somehow penumbral to the "navigable waters" definition**.**

B. The CWA's Definitional Framework Illustrates that "Any" Channel is a "Point Source."

The manner in which the Supreme Court interpreted the definition of "air pollutant" in the Clean Air Act ("CAA") is instructive as to how the

CWA's "point source" definition should be interpreted, given the nearly identical structure of these statutory provisions.

In *Massachusetts v. E.P.A.,* 549 U.S. 497 (2007), the Court directed EPA to decide whether carbon dioxide ("CO2") and other greenhouse gases ("GHGs") cause or contribute to climate change. In reaching this decision, the Court construed the CAA's definition of "air pollutant," which provides:

> *The term* "air pollutant" *means any* air pollution agent or combination of such agents, *including any* physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

42 U.S.C. § 7602(g) (emphasis added).

In comparison, under the CWA:

> *The term* "point source" *means any* discernible, confined and discrete conveyance, *including but not limited to any* pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal

> feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (emphasis added).

In *Massachusetts*, the Court held that GHGs fit within the CAA's definition of "air pollutant." The majority explained that the CAA's definition of "air pollutant" was "sweeping" and "capacious," and that "[o]n its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.' Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt 'physical [and] chemical ... substance [s] which [are] emitted into ... the ambient air.' The statute is unambiguous." 549 U.S. at 529.[6]

The CWA's definition of "point source" is similarly unambiguous. Like the CAA's "air pollutant" definition, the "point source" definition begins with a broad description of the defined term and then provides a non-exclusive list of examples. Following the statutory construction analysis employed by the *Massachusetts* Court, because "point source" means "any" discrete conveyance,

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[6] The *Massachusetts* majority cited *Dep't of Hous. and Urban Dev. v. Rucker,* 535 U.S. 125, 131 (2002) for the proposition that "'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." (some internal quotation marks omitted).

"including . . . any . . . channel," then *any channel* must be a "point source." "On its face, the definition embraces all [channels] of whatever stripe, and underscores that intent through the repeated use of the word 'any.'" *Massachusetts,* 549 U.S. at 529.

C. The CWA Definition of "Discharge of a Pollutant" Shows that "Point Source" and "Navigable Waters" Are Mutually Exclusive.

The statutory definition of "discharge" drives home the point that Congress did not intend "point sources" to be "navigable waters." The Act provides: "'[D]ischarge of a pollutant' . . . means . . . any addition of any pollutant *to* navigable waters *from* any point source ...." 33 U.S.C. § 1362(12) (emphasis added). Several points stand out following a plain reading of this language. First, "point sources" are not themselves "navigable waters," but are features that convey pollutants and add them to "navigable waters." Second, Congress did not require permits to discharge pollutants into "point sources;" it only authorized permits for discharges into "navigable waters."

The CWA controls pollutant discharges through point source permit programs. CWA § 1342, the National Pollutant Discharge Elimination System ("NPDES"), requires point source operators to obtain permits for the addition of pollutants to "navigable waters." 33 U.S.C. § 1342. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988) ("The NPDES permit program was designed to control 'point sources' of pollution."). Pursuant to § 1342, EPA and 45 delegated States regulate

pollutants that exit "point sources." *Miccosukee,* 541 U.S. at 105 (explaining that "point sources" require permits when they add pollutants to "navigable waters"). Similarly, § 1344 of the CWA requires point source operators to obtain a Corps permit for discharges of a specific type of pollutant, namely, dredged or fill material. 33 U.S.C. § 1344. In short, operators must obtain § 1342 or 1344 permits when pollutants leave "point sources," and enter "navigable waters." The *Rapanos* plurality emphasized the importance of the statutory definitions. Referring to the definitions of "discharge of a pollutant" and "point source," the plurality concluded: "The definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." *Rapanos,* 547 U.S. at 735 (2006). If "point sources" are simultaneously "navigable waters," then a discharge would ridiculously become either "any addition of any pollutant to navigable waters from any [*navigable waters*]," or "any addition of any pollutant to [*point sources*] from any point source[s]." 33 U.S.C. § 1362(12).

D. Municipal Separate Storm Sewer Systems are "Point Sources," not "Navigable Waters."

The County's MS4 is permitted under 33 U.S.C. § 1342(p). In 1987, Congress amended the CWA and added § 1342(p) which, among other things, required EPA to develop regulations for an MS4 permit

program regarding stormwater discharges.[7] By putting the MS4 program in § 1342, Congress expressed its intent that MS4s are "point sources." EPA thereby defined "MS4" to track the Act's "point source" definition. *Compare* 33 U.S.C. § 1362(14) (*supra* at 4), *with* 40 C.F.R. § 122.26(b)(8).[8] Courts also recognize that storm sewers are "point sources" subject to NPDES permitting requirements. *Natural Res. Def. Council, Inc. v. Costle,* 568 F.2d 1369, 1379 (D.C. Cir.1977).

To manage the pollution from MS4s, Congress further required that permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design, and engineering methods." 33 U.S.C. § 1342(p)(3)(B)(iii).[9] Modern MS4s are waste treatment systems because they reduce pollutants by treating stormwater with such features as settling structures to collect sediment, and racks to capture trash. *Tons of L.A. River trash will be captured*

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[7] *See* 33 U.S.C. §§ 1342(p)(3)(B), (4). The history of the MS4 permit program, and its phased approach for regulation of municipalities based on their population size, is traced in *Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency,* 344 F.3d 832, 841-42 (9th Cir. 2003).

[8] EPA defines MS4 as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, *man-made channels* or storm drains)" owned and operated by a State or municipality and "[d]esigned or used for collecting or conveying storm water …." 40 C.F.R. § 122.26(b)(8) (emphasis added).

[9] "Best management practices" include "treatment requirements." 40 C.F.R. § 122.26(d)(iv)(D).

before it hits the sea, http://latimesblogs.latimes.com/lanow/2011/11/massive-la-river-trash-capturing-project-completed.html (last visited July 20, 2012); Ben Urbonas, *et al.*, *Stormwater, Best Management Practices and Detention for Water Quality, Drainage, and CSO Management* 42, 416-433 (1993); *Design and Construction of Urban Stormwater Management Systems* 454, 489-511 (Am. Soc'y of Civil Eng'rs 1992). Indeed, EPA identifies stormwater as a "waste."[10] The key point is this: EPA expressly excludes "waste treatment systems" from the definition of "waters of the United States" 40 C.F.R. § 122.2. Thus, when a third party discharges into an MS4, which itself discharges directly into a "navigable water," EPA "always addresses such discharges as 'discharges *through* [MS4s]' as opposed to 'discharges to waters of the United States.'" 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (emphasis supplied).

Amicus also cautions the Court to consider the ramifications of determining that an MS4 is a water of the United States. If true, all of the CWA's requirements and programs for "navigable waters" would be triggered for MS4s. But "statutes should be interpreted to avoid ... unreasonable results whenever possible." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). For example, § 1313 requires States to adopt and submit to EPA water quality standards ("WQSs"), 33 U.S.C. § 1313, which "consist

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[10] 40 C.F.R. § 122.26(b)(8)(i) (MS4 is a conveyance system owned and operated by a municipality with jurisdiction over the "disposal of sewage, industrial wastes, storm water, *or other wastes*") (emphasis supplied).

of a designated use or uses for the waters of the United States ….” 40 C.F.R. § 131.3(i). If MS4s are “navigable waters,” then § 1313 requires States to develop WQSs and “designated uses” for the water in municipal sewer systems.

This requirement creates two major problems. First, the amount of resources that the states would need to expend to develop WQSs for every section of MS4 in their state would be astronomical.[11] Second, the main purpose (or “use”) of an MS4 is to transport stormwater (a waste) away from upland areas. However, using a “navigable water” in such a manner would plainly violate EPA’s regulation that provides: “[i]n no case shall a State adopt waste transport … as a designated use for any waters of the United States.” 40 C.F.R. § 131.10(a).

“[A] statute is to be considered in all its parts when construing any one of them.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998). *See also Comm’r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (court should “find that interpretation which can most fairly be said to be imbedded in the statute [and is] … most harmonious with its scheme and with the general purposes that Congress manifested”). Section 1342(p)’s structure and EPA’s regulations make clear that MS4s are “point sources,” not “navigable waters.” Accordingly, because the concrete lined portions of the Los Angeles and San Gabriel Rivers are considered to be part of the Los Angeles County MS4, *NRDC,* 673 F.3d at 889, they must be legally

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[11] This would total over 3,300 miles in the Los Angeles Flood Control District alone. *NRDC*, 673 F.3d at 884.

defined as "point sources" and not "navigable waters."

E. The CWA Distinguishes Between Conveying Pollutants and Adding Pollutants.

The Court of Appeals misreads the CWA by stating that the "Clean Water Act does not distinguish between those who add and those who convey what is added by others . . .." *NRDC*, 673 F.3d at 900. Congress provided that "point sources" are conveyances "from which pollutants are *or may be discharged*." 33 U.S.C. § 1362(14) (emphasis added). However, § 1311(a) in combination with § 1362(12) only makes it unlawful for a person to actually "add" a pollutant to a water of the United States. 33 U.S.C. §§ 1311(a), 1362(12); *Nat'l Pork Producers Council v. U.S.E.P.A.*, 635 F.3d 738, 751 (5th Cir. 2011) ("The[ ] cases leave no doubt that there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority."); *Waterkeeper Alliance, Inc. v. U.S. E.P.A.* 399 F.3d 486, 505 (2d Cir. 2005) (explaining that the Act does not regulate potential discharges of pollutants, only actual discharges). Congress did not create liability for "conveying" pollutants. Thus, the language of the Act indicates that a conveyance can be a "point source" and not actually "discharge" anything.

For example, assume a person places a culvert in a single natural water of the United States that runs underneath a road from side A to side B. A culvert is a metal pipe that is capable of adding pollutants to side B. Therefore, it satisfies the definition of a

"point source." 33 U.S.C. § 1362(14). The culvert, however, simply conveys the water from side A of the road to side B in the same waterbody. The water that exits the culvert does not constitute a "discharge" because any pollutants that exit the culvert would have ended up in side B naturally and are already present in the waterbody. Thus, the culvert (a point source) "conveys" pollutants, but does not "add" them. Furthermore, the CWA does not create liability for the person because she did not discharge pollutants into side B.

* * *

As shown above, the concrete lined portions of the San Gabriel and Los Angeles Rivers clearly fall within the CWA definition of "point source." Moreover, the structure and requirements of the CWA suggest that those conveyances cannot also be defined as "navigable waters."

II. NO DISCHARGE HAS BEEN PROVEN.

In *Miccosukee,* the Court addressed whether pumps that moved water from canals, over a levy and into a reservoir required an NPDES permit because they added pollutants to a water of the United States. The Court explained that to be a "point source" a confined discrete conveyance need only convey pollutants; it does not need to be the original source of the pollutants. *Id.* at 105. However, the Court also held that if the pumps simply moved water within the same waterbody, no addition of pollutants occurred and thus, no NPDES

permit was necessary. *Id.* at 109-112.[12] Thus, the rule that arises from *Miccosukee* is that a "point source" that simply conveys pollutants within a single waterbody, and does not itself increase the amount of pollutants, does not cause an "addition of pollutants" and does not cause a "discharge." 33 U.S.C. § 1362(12).

Unlike *Miccosukee*, in this case there is no dispute that the concrete conveyances connect two natural portions of the Los Angeles and San Gabriel Rivers, respectively. Thus, under *Miccosukee*, if the two concrete conveyances (the point sources) simply convey pollutants, no addition of pollutants and therefore no "discharge" occurs at the outlets. If however, the concrete conveyances increase (add) the amount of pollutants, then an addition and discharge does occur at their outlets.

In *Miccosukee*, it was understood that the pumps did not add any pollutants that were not already present in the canals. *Miccosukee,* 541 U.S. at 105. In this case the only evidence of pollutants comes from mass emission stations. *Natural Res. Def. Council, Inc. v. County of Los Angeles*, No. 08-1467, 2010 WL 761287, at *7 (C.D. Cal. Mar. 2, 2010); *NRDC,* 673 F.3d at 888 (9th Cir. 2011). And it is unclear whether the concrete conveyances add pollutants that were not present in the upper natural portion of the two rivers.

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[12] There was, however, a factual dispute concerning whether the canals and reservoir were the same, or distinct waterbodies. Therefore, the Court remanded the matter back to the Court of Appeals. *Id.*

The Los Angeles River mass emission station is located near the outlet of the concrete channel. *Supra* p. 3. Thus, there is evidence of pollutants in the point source and evidence that those pollutants flow into the downstream natural portions of the River. However, those pollutants may have been present in the upper natural portion of the River. Thus, like the culvert example, the concrete conveyance may simply convey those pollutants downstream.

In comparison, the San Gabriel River mass emission station is located in a channelized portion of the River, but upstream of the concrete lined structure. *Supra* p. 3. Thus, there is evidence of pollutants above the concrete structure, and one can infer that those pollutants flowed through the concrete lined channel back into the natural portion of the San Gabriel River. However, there is no evidence that the amount of pollutants increased between the station and the outlet of the structure. In addition, the pollutants detected at the station were likely present in the natural portion of the San Gabriel River above the station, and therefore the concrete lined structure merely conveys those pollutants downstream.

"To establish a violation of the [CWA's] NPDES requirements, a plaintiff *must prove* that defendants 1) discharged, i.e., added 2) a pollutant 3) to navigable waters 4) from 5) a point source." *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.,* 13 F.3d 305, 308 (9th Cir.1993) (emphasis added); *see also Gwaltney of Smithfield, LTD. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 66 (1987) (explaining that at trial plaintiffs must prove their

allegations). The lower courts agreed that the Petitioner violated the Act if it discharged pollutants in violation of the permit. Amicus submits that Respondents have not proven a discharge, because they have not submitted evidence of an addition of a pollutant.[13]

[13] Respondents may have been able to meet their burden in at least two ways. As suggested by the District Court, if they had had taken samples from at least one outfall, then they could have asserted that the concrete lined point sources do "add" pollutants where the outlets connect to the natural waterbodies; or they could have taken samples before and after the concrete lined structures and shown that the amount of pollutants leaving the structure was higher than entering it—thus proving the concrete structures "add" pollutants. *See*, *Natural Res. Def. Council, Inc.,* 2010 WL 761287, at *8 n.11.

CONCLUSION

The definition of "point source" is broad and covers the distinct concrete lined channels located in the Los Angeles and San Gabriel Rivers. However, the evidence in this case does not prove that those point sources added any pollutants to the natural rivers. Thus, amicus respectfully submits that the Court should vacate the lower court's decision.

Respectfully submitted,

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987); *Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Franconia Assocs. v. United States,* 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005); *Kelo v. City of New*

London, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife,* 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States,* 551 U.S. 130 (2008); *Summers v. Earth Island Inst.,* 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms,* 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation,* 131 S. Ct 1723 (2011); *Am Elec. Power Co., Inc. v. Connecticut,* 131 S. Ct 2527 (2011); *Sackett v. United States Envtl. Prot. Agency,* 132 S. Ct. 1367 (2012); *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012); *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012).

11-460

In the
SUPREME COURT OF THE UNITED STATES

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, *Petitioner,*	)	
v.	)	No. 11-460
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., *Respondents.*	)	

CERTIFICATE OF COMPLIANCE

Pursuant to rule 33.1(h) of the Rules of the Supreme Court of the United States (adopted July 17, 2007), I hereby certify that this brief contains 4,244 words, including footnotes. In making this certification, I have relied on the word count of the word-processing system used to prepare this brief.

Dated: September 13, 2012

/s/ Thomas J. Ward

Thomas J. Ward