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.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner had caused or contributed to exceedances of water-quality standards in the operation of its municipal separate storm sewer system, in violation of petitioner's Clean Water Act permit.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Respondents sued petitioner, an operator of a municipal separate storm sewer system (ms4)[1] in the Los Angeles area, for violating the terms of a permit issued under the Clean Water Act (CWA or Act). The district

[1] Consistent with the court of appeals' convention (see Pet. App. 8 n.2), this brief uses "ms4" to refer to municipal separate storm sewer systems in general, and "MS4" to refer to the Los Angeles County system at issue in this case.

court granted summary judgment for petitioner, holding that respondents had presented insufficient evidence that petitioner was responsible for the permit violation. The court of appeals reversed in pertinent part. Pet. App. 1-50.

1. a. The CWA establishes a comprehensive program designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that objective, CWA Section 301(a) prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to navigable waters from any point source—except "as in compliance with" specified provisions of the Act. 33 U.S.C. 1311(a), 1362(12). For most point-source discharges, as relevant here, regulated entities achieve compliance by obeying the terms of a permit issued under the National Pollution Discharge Elimination System (NPDES) pursuant to CWA Section 402, 33 U.S.C. 1342.

NPDES permits contain "effluent limitation[s]" that restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents" that may be discharged into navigable waters. 33 U.S.C. 1362(11). NPDES permits use effluent limitations in two complementary ways. First, technology-based limitations generally reflect the level of pollution control that can be achieved by point sources using various levels of pollution-control technology. 33 U.S.C. 1311, 1314; see *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 126-136 (1977). Second, more stringent water-quality based limitations must be imposed when necessary to ensure that the receiving waters meet applicable water-quality standards. 33 U.S.C. 1311(b)(1)(C); 40

C.F.R. 122.44(d)(1); see *Arkansas* v. *Oklahoma*, 503 U.S. 91, 104-105 (1992).

In 1987, Congress amended the Act to require the Environmental Protection Agency (EPA) to implement a comprehensive national program for addressing stormwater discharges. Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 69 (codified at 33 U.S.C. 1342(p)). Stormwater, which collects on impermeable surfaces like parking lots, driveways, and roads, often picks up pollutants like heavy metals, pathogens, and toxins from those surfaces. Pet. App. 6. To prevent flooding, most municipalities have built infrastructure, such as an ms4, to collect stormwater and carry it away from homes, businesses, and roads. Federal regulations implementing the CWA define an ms4 as a publicly owned or operated "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" that discharges to waters of the United States. 40 C.F.R. 122.26(b)(8), (18) and (19). An ms4 generally has numerous "outfall[s]," which are "point source[s]" where the ms4 discharges into waters of the United States. 40 C.F.R. 122.26(b)(9).

Pursuant to Section 402(p)(2) and its implementing rules, discharges from ms4s serving populations of 100,000 or more are subject to NPDES permits. 33 U.S.C. 1342(p)(2)(C) and (D); 40 C.F.R. 122.26. Those permits have several features tailored to the operation of an ms4. Because ms4s do not typically employ end-of-the-pipe wastewater treatment, the Act and implementing regulations require controls to reduce what enters the system through a stormwater management program established as part of the NPDES permit. 33 U.S.C. 1342(p)(3)(B)(iii); 40 C.F.R. 122.26(d)(2)(iv).

Such controls therefore may contain measures that reduce stormwater discharges in the first instance, such as floodplain management controls, wetland-protection measures, best management practices for new subdivisions, and emergency spill-response programs. 40 C.F.R. 122.26(d)(1)(v). Permit writers for an ms4 may also choose to "require strict compliance with state water-quality standards." *Defenders of Wildlife* v. *Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999).

Under the CWA, stormwater permits may be issued on a system-wide or jurisdiction-wide basis. 33 U.S.C. 1342(p)(3)(B)(i) and (iii); 40 C.F.R. 122.26(a)(3)(ii). Thus, several local governments may jointly apply for a single permit that governs interconnected systems discharging into the same waters of the United States. 40 C.F.R. 122.26(a)(3)(ii)-(iv) and (d). Under such a permit, a co-permittee "is only responsible for permit conditions relating to the discharge for which it is operator." 40 C.F.R. 122.26(b)(1). Co-permittees may propose, for example, that the permit contain separate stormwater management programs that place different obligations on each permittee to implement best management practices. 40 C.F.R. 122.26(d)(2)(iv).

Like other NPDES permits, those ms4 permits also establish monitoring protocols to assess compliance. An ms4 may have hundreds or even thousands of outfalls that discharge to "waters of the United States." An applicant for an ms4 permit is required to propose a "monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment." 40

C.F.R. 122.26(d)(2)(iii)(D). Accordingly, subject to the permitting authority's approval, a permit applicant may choose a monitoring scheme that samples at outfalls, one that samples from instream locations, or some combination of the two.

b. Under CWA Section 402(b), States may seek EPA authorization to administer the NPDES permitting program. 33 U.S.C. 1342(b). EPA has authorized the State Water Resources Control Board (State Board) to administer the NPDES program in California. The State Board, in turn, has delegated that authority to nine Regional Water Quality Control Boards, including the Los Angeles Regional Water Quality Control Board (Regional Board). See *City of Arcadia* v. *State Water Res. Control Bd.*, 119 Cal. Rptr. 3d 232, 240-241 (Cal. App. 2010). Under California law, a permittee may seek State Board review of any provision of an NPDES permit issued by a Regional Board. Cal. Water Code § 13320. The permittee may appeal the State Board's decision to the California state courts. *Id.* at § 13321; see *County of Los Angeles* v. *California State Water Res. Control Bd.*, 50 Cal. Rptr. 3d 619, 621-622, 627 (Cal. App. 2006).

c. Under the CWA's citizen-suit provision, "any citizen may commence a civil action on his own behalf against any person * * * who is alleged to be in violation of [] an effluent standard or limitation under this chapter." 33 U.S.C. 1365(a). An "effluent standard or limitation" includes any term or condition of an approved NPDES permit. 33 U.S.C. 1365(f)(6); see *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987) ("In the absence of federal or state enforcement, private citizens may commence civil actions against any person 'alleged to be in violation of' the conditions of either a federal or state

NPDES permit.") (quoting 33 U.S.C. 1365(a)(1)). A successful enforcement action may result in injunctive relief and monetary penalties. 33 U.S.C. 1365(a).

2. a. Petitioner, along with Los Angeles County (County) and 84 cities, obtained an NPDES permit from the Regional Board for an ms4 comprised of thousands of miles of storm drains, hundreds of miles of open channels, and hundreds of thousands of connections over a large area of Southern California. Pet. App. 106. Petitioner owns, operates, and maintains approximately 500 miles of open channels and 2800 miles of storm drains—more than all the other co-permittees combined. *Ibid.* The MS4 collects stormwater runoff from across Los Angeles County and channels it into the region's rivers, including the Los Angeles and San Gabriel Rivers. *Id.* at 8.

The permit at issue requires strict compliance with state water-quality standards, prohibiting "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." C.A. E.R. 202; see Pet. App. 15. The permit contemplates compliance with those standards through, *inter alia*, implementation of the control measures outlined in the permit's stormwater quality management program. *Ibid.* The permit also establishes a monitoring and reporting program, as proposed by petitioner and its co-permitees in their application, to ensure compliance with its terms. C.A. E.R. 186-187, 258, 263; see 40 C.F.R. 122.26(d)(2)(iii)(D). Petitioner, as the Principal Permittee (C.A. E.R. 204), is responsible for monitoring the instream mass-emissions stations and submitting a report identifying the possible sources of any exceedances. *Id.* at 260-261, 263.

b. When the permit was issued, petitioner, along with other co-permittees, challenged it in California state court on several grounds. See *County of Los Angeles*, 50 Cal. Rptr. 3d at 621-622. Petitioner did not challenge the permit's monitoring program, however, or claim that the program would unfairly hold it responsible for violations of the water-quality standards that petitioner did not cause or contribute to. The trial court upheld the permit, and the state appeals court affirmed. *Ibid*.

3. Respondents commenced this action under the CWA's citizen-suit provision. They alleged, *inter alia*, that petitioner and the County were in violation of the MS4 permit by causing or contributing to exceedances of water-quality standards in the Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek watersheds. The parties filed cross-motions for summary judgment on the Los Angeles River and San Gabriel River claims. Pet. App. 103-105. The following facts were not disputed: (1) mass-emissions monitoring data repeatedly showed exceedances for a number of pollutants, *id.* at 108; (2) stormwater conveyed in petitioner's portion of the MS4 included those pollutants, *id.* at 117; (3) the mass-emissions monitoring stations were downstream from where petitioner's and others' storm drains joined the relevant water bodies, *id.* at 116; and (4) mass-emissions monitoring stations for the Los Angeles and San Gabriel Rivers are located in petitioner's section of the MS4, *id.* at 107-108.

After initially denying both sides' motions for summary judgment on the watershed claims (Pet. App. 114-123), and after receiving supplemental briefing, the district court ultimately granted summary judgment for petitioner on all four watershed claims. *Id.* at 98-102.

The court rejected petitioner's arguments that (1) flow from their MS4 outlets does not constitute a discharge of pollutants because petitioner does not generate the pollutants; (2) the permit provides a safe harbor for violations of effluent limits if the permittee is complying with the iterative process to remedy violations; (3) the presence of pollutants from other sources absolves petitioner of responsibility for permit violations; and (4) data collected at the mass-emissions station cannot be the basis for determining a permit violation. *Id.* at 114-117, 122. The court also held that it was not necessary to pinpoint the source of the pollutants in order for the permit to be violated because the "Permittees, collectively, are violating the permit if 'discharges from the MS4' are 'caus[ing] or contribut[ing] to the violation of Water Quality Standards or water quality objectives.'" *Id.* at 117 (quoting C.A. E.R. 202 (Los Angeles County, et al., NPDES Permit (Permit) Part 2.1 at 23)).[2]

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[2] The district court agreed with the proposition that "because the mass emissions monitoring stations for [the Los Angeles and San Gabriel Rivers] are located in the portion of the MS4 owned and operated by [petitioner], [petitioner] is responsible for the pollutants in the MS4 at this point." Pet. App. 118. The court suggested, however, that this did not necessarily mean that petitioner had discharged polluted stormwater, because the monitoring station itself was not a point source and the court could not determine from the record where the MS4 ended and the rivers began. *Id.* at 119. The court acknowledged evidence that petitioner had released runoff through outfalls upstream of the mass-emissions stations, and it held that these outlets are "discharges" within the meaning of the CWA. *Id.* at 115, 120-21. The court nevertheless concluded that, in order to establish petitioner's liability, "[respondents] would need to present some evidence (monitoring data or an admission) that some amount of a standards-exceeding pollutant is being discharged through at least one [of petitioner's] outlet[s]." *Id.* at 121.

The district court concluded, however, that "although the mass emissions station data may be the appropriate way to determine whether the MS4 in its entirety is in compliance with the Permit or not, that data is not sufficient to enable the Court to determine that [petitioner] is responsible for 'discharges from the MS4 that cause or contribute to the violation' of standards under Part 2.1 of the Permit, since a co-permittee is responsible 'only for a *discharge* for which it is the operator.'" Pet. App. 121 (quoting C.A. E.R. 199 (Permit ¶ G.4 at 20); emphasis added by the district court). The court also determined that monitoring data from sampling in storm drains operated by petitioner, which discharged into the Los Angeles River upstream of the mass-emissions monitoring stations, was insufficient because there was no clear indication that the samples were collected at or near an "outflow," rather than in the storm drain or watercourse. *Id.* at 100-101. The court held that petitioner could be held liable for violating Part 2.1 of the permit only if it had discharged pollutants from a point source at or near the mass-emissions station at the time the exceedances were measured. *Id.* at 101-102.

The district court directed entry of a partial final judgment under Federal Rule of Civil Procedure 54(b), stating that "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." Pet. App. 24 (brackets in original).

4. a. The court of appeals reversed in relevant part. Pet. App. 1-50.[3]

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[3] The court of appeals affirmed the district court's grant of summary judgment in petitioner's favor with respect to respondents' claims of

The court of appeals stated that resolution of respondents' claims against petitioner and the County "requires us to examine whether an exceedance at a mass-emission monitoring station is a Permit violation, and, if so, whether it is beyond dispute that Defendants discharged pollutants that caused or contributed to water-quality exceedances." Pet. App. 25. With respect to the first inquiry, the court of appeals agreed with the district court that, under the terms of the MS4 permit, "an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers." *Id.* at 40; see *id.* at 27-40.

With respect to the second, "factual" inquiry, the court of appeals found sufficient evidence showing that petitioner had discharged stormwater that caused or contributed to the permit violations. Pet. App. 40-49. The court explained that the monitoring stations for the Los Angeles and San Gabriel River are located in a portion of the MS4 owned and operated by petitioner; that the monitoring stations had detected pollutants in excess of the amounts authorized by the permit; and that polluted stormwater was discharged from the MS4 into the rivers. *Id.* at 44-45, 49. "As a matter of law and fact," the court added, "the MS4 is distinct from the two navigable rivers." *Id.* at 44.

The court of appeals further explained that the MS4 is a "point source"; that the rivers are "navigable waters"; and that "[a]t least some outfalls for the MS4 were downstream from the mass-emissions stations." Pet. App. 45. The court stated that a "discharge from a point source occurred when the still-polluted stormwater

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CWA violations in the Santa Clara River and Malibu Creek. Pet. App. 5-6, 47-48. Because respondents have not sought review of that aspect of the court of appeals' decision, those claims are not before this Court.

flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways." *Id.* at 44-45. The court rejected petitioner's contention that "merely channeling" pollutants created by other permitees cannot create CWA liability. *Id.* at 45; see *id.* at 45-47. The court relied on, *inter alia*, this Court's statement that "the definition of 'discharge of a pollutant' contained in [33 U.S.C.] § 1362(12) . . . *includes* within its reach point sources that do not themselves generate pollutants." *Id.* at 46-47 (quoting *South Florida Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004)) (emphasis added by court of appeals).

b. Petitioner filed a petition for rehearing. Petitioner argued, *inter alia*, that the panel had made a factual error in assuming that the part of the MS4 infrastructure in which the mass-emissions monitoring stations are located is distinct from the Los Angeles and San Gabriel Rivers. See C.A. Pet. for Reh'g 3-4. The court of appeals denied the petition. Pet. App. 2.[4]

DISCUSSION

Contrary to petitioner's contention (Pet. i, 20-21), the court of appeals did not hold, in conflict with other circuits, that "navigable waters" are limited to "naturally occurring" bodies of water, or that man-made improvements to a river take it outside the protections of the CWA. Nor did the court of appeals hold, in contravention of *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (*Miccosukee*), that a transfer of water within a single water

[4] At that time, the panel amended its initial opinion, but only to address and reject an unrelated argument raised in the petition for rehearing. Pet. App. 37-38.

body constitutes a "discharge of any pollutant" under the CWA. See Pet. i, 21-22.

Rather, the court of appeals held only that petitioner was responsible for violations of the specific CWA permit at issue because, in the court's view, petitioner's pollutant discharges had caused or contributed to violations of the permit's water-quality standards. Petitioners' arguments that the court of appeals reached sweeping legal conclusions on "navigable waters" and water transfers, contrary to the precedents of both that court and this Court, are based on a single sentence in the opinion below. It is far more likely that the sentence reflects a mistaken understanding as to the structure of the MS4 and the location of the monitoring stations. Any such factual mistake, irrelevant to whether a permit violation had occurred and unaccompanied by any legal error likely to affect the disposition of future cases, does not warrant this Court's review.

A. The Court Of Appeals' Decision Is Based On Facts Specific To The MS4 Permit At Issue

The two questions before the court of appeals were (1) whether respondents had proved a violation of the NPDES permit at issue, and (2) if so, whether respondents had proved that petitioner was responsible for that violation. Pet. App. 25. Both of those inquiries turn on the specific terms of petitioner's MS4 permit and respondents' proffered evidence of petitioner's violation. With respect to respondents' claims regarding the Los Angeles and San Gabriel Rivers, the court of appeals concluded that violations of the MS4 permit had occurred and that petitioner's discharges had caused or contributed to those violations.

1. Respondents alleged that petitioner had violated the NPDES permit by causing or contributing to exceedances of water-quality standards in the Los Angeles and San Gabriel Rivers. Pet. App. 104. Part 2.1 of the MS4 permit requires adherence to the water-quality standards set for the receiving waters. C.A. E.R. 202. Under the terms of the permit, as proposed by petitioner and approved by the State, data from instream mass-emissions monitoring stations are used to determine whether an exceedance has occurred. *Id.* at 260-264; see p. 6, *supra*.

Here, undisputed monitoring evidence demonstrated that exceedances of water-quality standards were detected at the mass-emissions monitoring stations for the rivers. The district court and court of appeals agreed that the evidence established a violation of the permit at issue, specifically Part 2.1. See Pet. App. 27-40, 114-117. Petitioner does not appear to challenge that determination in this Court.

2. Both of the courts below believed that proof of pollutant exceedances at an MS4 monitoring station was not sufficient, in and of itself, to establish petitioner's liability for a permit violation. They believed that respondents were required in addition to connect the measured exceedances to petitioner's MS4 outfalls in order to show that petitioner had caused or contributed to the violation. Pet. App. 40, 121. In the course of holding that respondents had met their burden as to that factbound inquiry, the court of appeals stated: "As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction—not a naturally occurring Watershed River." *Id.* at 44.

Petitioner argues that this sentence makes broad, unprecedented pronouncements of law. Read in context, however, the sentence reflects the court's factual understanding regarding the structure of the MS4 and the location of the monitoring stations. The court was not addressing the legal questions now presented by petitioner: (1) whether man-made improvements to a water body alter its status as a water of the United States, and (2) whether transfers of polluted water within a single water body constitute pollutant discharges under the CWA. Indeed, the parties never disagreed below about the proper resolution of either of those questions.

The court of appeals' opinion indicates that it thought the monitoring stations at issue were located in a portion of the MS4 distinct from the rivers themselves. Pet. App. 44 ("the MS4 is distinct from the two navigable rivers"); see, *e.g.*, *id.* at 5 ("the monitoring stations for the Los Angeles and San Gabriel Rivers are located in a section of ms4 owned and operated by [petitioner], and, after stormwater known to contain standards-exceeding pollutants passes through these monitoring stations, this polluted stormwater is discharged into the two rivers"); *id.* at 18 ("The Los Angeles River and San Gabriel River Monitoring Stations are located in a channelized portion of the MS4 that is owned and operated by [petitioner]"); *id.* at 49 ("the Monitoring Stations for these two rivers are located in a portion of the MS4 owned and operated by [petitioner]"); see also C.A. Pet. for Reh'g 2 ("*[C]ontrary to the Court's conclusion*, [petitioner's] MS4 and the Los Angeles and San Gabriel Rivers downstream from each [mass-emissions monitoring station] are one and the same.") (emphasis added). As both petitioner and respondents point out (Pet. 26; Br. in Opp. 6), however, the portions of the MS4 that

contain the relevant monitoring stations actually lie within with the Los Angeles and San Gabriel Rivers.

The court of appeals was thus mistaken to the extent it determined that polluted stormwater flowing through the monitoring stations was *later* discharged from the MS4 into the rivers. Rather, the pollutants passing through the stations already had been discharged into the rivers from upstream MS4 outfalls. By itself, however, that sort of factual mistake does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings.").

3. Petitioner's amici suggest that the court of appeals' decision has broad ramifications for regulation of ms4s generally. See League of Cal. Cities & Cal. State Ass'n of Counties Br. 2-3. But the decision below is tied to the specific terms of petitioner's NPDES permit—in particular, its distinctive monitoring scheme—and to the unique structure of the MS4 in Los Angeles County. Amici have not argued that they are regulated by similarly worded permits with similar monitoring regimes in similar geographic settings. Amici also conflate the determination whether a permit is required—*i.e.*, whether an ms4 discharges pollutants to waters of the United States—with the determination whether an existing permit has been violated in particular factual circumstances. See *id.* at 4-5.

Moreover, the Regional Board is currently considering renewal of the MS4 permit at issue here. See Los Angeles Regional Water Quality Control Board, *Storm Water—Municipal Permits*, http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/index.shtml (last visited May 22, 2012). As part of that process, petitioner presumably will have an

opportunity to propose a different monitoring protocol or, if it chooses, to challenge the new permit's monitoring protocol in state court (see p. 5, *supra*). Accordingly, the permit terms giving rise to the violation in this case might well be amended in the near future. Because the question before the court of appeals concerned the evidentiary showing needed to establish a violation of a particular ms4 permit, the prospect of revisions to the governing permit further reduces the continuing importance of the court's decision.

B. No Conflict Exists Between The Decision Below And Decisions Holding That Man-made Water Bodies Can Be Waters Of The United States

1. Petitioner asserts (Pet. 19-21, 27-38) that, under the court of appeals' decision, only "naturally occurring" waters can be "waters of the United States" within the meaning of the CWA. On that reading of the court's opinion, man-made improvements deprive a water body (or the altered portion of it) of its status as part of the "waters of the United States," so that pollutants can be discharged into the improved water body without potential liability under the CWA. Petitioner further asserts that review by this Court is warranted to resolve a conflict between the ruling below and prior decisions recognizing that "waters of the United States" may include man-made or improved waters.[5] The alleged conflict is

[5] See Pet. 32-38 (citing, *e.g.*, *Rapanos* v. *United States*, 547 U.S. 715 (2006); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172-173 (1979); *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940); *United States* v. *Eidson*, 108 F.3d 1336 (11th Cir.), cert. denied, 522 U.S. 899 and 522 U.S. 1004 (1997), overruled on other grounds, *United States* v. *Robison*, 505 F.3d 1208, 1215 (11th Cir. 2007), cert. denied, 555 U.S. 1045 (2008); *Headwaters* v. *Talent Irrigation Dist.*, 243

illusory, however, because the court of appeals did not endorse the broad (and manifestly erroneous) proposition that petitioner attributes to it.

The court of appeals recognized that the Los Angeles and San Gabriel Rivers are waters of the United States in their entirety (Pet. App. 42), and none of the parties ever contended otherwise. Petitioner's reading of the court of appeals' opinion is based on the same single statement discussed above (see p. 13, *supra*): "As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction—not a naturally occurring Watershed River." Pet. App. 44. Contrary to petitioner's contention, that statement should not be read in isolation as embracing the sweeping proposition that improving or channelizing a portion of the watershed rivers deprives them of their status as navigable waters.

The MS4 as a whole is reasonably characterized as a "man-made construction," and substantial portions of it are located outside of any "naturally occurring Watershed River." Pet. App. 44; see *id.* at 106 (explaining that "[t]he MS4 is a complicated web, with thousands of miles of storm drains, hundreds of miles of open channels, and hundreds of thousands of connections"). To be sure, the MS4 also includes portions of the rivers into which the stormwater ultimately flows. Br. in Opp. 6. But, as explained above (pp. 13-15, *supra*), the court of appeals appears to have decided the case on the mistaken understanding that the relevant mass-emissions stations were located in the MS4 at a point *before* the MS4 became coextensive with the rivers. The statement on which

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F.3d 526 (9th Cir. 2001); *United States* v. *Moses*, 496 F.3d 984 (9th Cir. 2007), cert. denied, 554 U.S. 918 (2008)).

petitioner relies is more naturally read to reflect the complexity of the MS4 (a massive network neither wholly within nor wholly outside the preexisting rivers), coupled with the court's apparent mistake as to the precise locations of the relevant monitoring stations, rather than as a broad (and clearly wrong) legal holding that man-made or man-altered water bodies cannot be "waters of the United States."[6]

2. If the court of appeals had held that the CWA's coverage is limited to non-altered or "natural" waters, its decision would significantly curtail the government's regulatory authority and would conflict with agency interpretations of the Act. EPA and U.S. Army Corps of Engineers regulations defining "waters of the United States" do not distinguish between "natural" and "man-made" waters (except to exclude explicitly waste treatment systems designed to meet CWA requirements). 40 C.F.R. 122.2; 33 C.F.R. 328.3(a). And if a court of appeals ever relies on the decision below to hold that pollutant discharges into man-made or improved water bodies are not subject to the CWA's restrictions, its decision may warrant review by this Court. The decision below, however, does not clearly endorse that proposition; the opinion is readily susceptible of an alternative

[6] Petitioner contends that the court of appeals must have understood that the monitoring stations sit in the rivers because the court cited a Los Angeles County Department of Public Works website (not in the record) that purportedly clarifies that fact. Pet. Reply Br. 2-3 (citing Pet. App. 18 n.4). But the opinion as a whole shows that the court of appeals struggled with understanding the "complicated drainage system" of the MS4. Pet. App. 47. Indeed, one of petitioner's amici appears to share the court's mistaken understanding that the mass-emissions stations were located not in the San Gabriel and Los Angeles Rivers, but in the MS4 *before* it discharged into the receiving waters. See Florida Stormwater Ass'n Br. 7-8.

reading; and the government views it as unlikely that the decision will be interpreted and applied in the broad manner petitioner suggests.

If the court of appeals *had* adopted a restrictive reading of the CWA term "waters of the United States," the natural effect of its holding would be to *reduce* the range of activities that are regulated under the Act. Petitioner's ultimate complaint in this case, however, is that the court of appeals found a CWA violation where (in petitioner's view) no violation actually occurred. Petitioner thus posits not simply an aberrant reading of the term "waters of the United States," but a convoluted chain of reasoning through which the Ninth Circuit's unduly narrow view of CWA coverage led the court to adopt an unduly broad view of petitioner's obligations under the MS4 permit. The anomalous nature of that argument provides a further reason for this Court to deny review.

C. No Conflict Exists Between The Decision Below And This Court's Decision In *Miccosuksee*

Petitioner also asserts (Pet. 38-42) that the court of appeals' decision conflicts with this Court's holding in *Miccosukee* that pumping water between two parts of the same water body does not constitute a discharge of pollutants under the CWA. See 541 U.S. at 109-110. Petitioner appears (*e.g.*, Pet. 15, 39) to base that argument on the court of appeals' statement that the relevant discharges occurred when polluted stormwater flowed out of "concrete channels" where the MS4 monitoring stations are located and into the Los Angeles and San Gabriel Rivers. See Pet. App. 45, 47. Because the parties agree that the monitoring stations were actually located within the rivers themselves (see p. 14, *supra*),

petitioner construes the court of appeals' opinion as holding, *sub silentio*, that a "discharge" of pollutants occurs when polluted water flows from a channelized portion of a river into a lower portion of the same river.

If the court of appeals had endorsed the proposition that petitioner attributes to it, the court's holding would conflict with *Miccosukee*. Essentially for the reasons set forth above (pp. 13-15, *supra*), however, the sounder inference is that the court of appeals believed that the part of the MS4 in which the monitoring stations sit is distinct from the rivers. If the court's decision was premised on that understanding of the relevant facts, its references to pollutant discharges from the MS4 to the Los Angeles and San Gabriel Rivers are fully consistent with *Miccosukee*.[7]

Unlike in *Miccosukee*, moreover, where the question was whether any discharge of a pollutant requiring an NPDES permit had occurred, petitioner undisputedly discharges pollutants into waters of the United States. Petitioner is an operator of an ms4 serving a population of more than 250,000 that discharges stormwater through hundreds of outfalls into the Los Angeles and San Gabriel Rivers. Pet. App. 106. The question here is not whether petitioner's activities required an NPDES

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[7] If this Court grants certiorari to consider the questions presented in the petition, it may wish to appoint an amicus curiae to defend the propositions of law that petitioner attributes to the court of appeals. Respondents have not argued that man-made or "improved" water bodies categorically fall outside the CWA's coverage, or that a transfer of polluted water between two parts of the same water body is a "discharge" of pollutants within the meaning of the Act; and there is no reason to suppose that respondents will advocate either of those positions in their merits brief if the Court grants certiorari.

permit, but whether petitioner was properly held liable for violations of the particular NPDES permit at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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