No. 11-460

In The
Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR RESPONDENTS

RICHARD J. LAZARUS
1545 Massachusetts Ave.
Cambridge, MA 02138

DANIEL COOPER
LAWYERS FOR CLEAN WATER
1004A O'Reilly Ave.
San Francisco, CA 94129

AARON COLANGELO
Counsel of Record
MITCHELL S. BERNARD
CATHERINE MARLANTES RAHM
STEVEN FLEISCHLI
NATURAL RESOURCES DEFENSE COUNCIL
1152 15th St. NW, Suite 300
Washington, DC 20005
(202) 289-2376
acolangelo@nrdc.org

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Court granted certiorari limited to Question 2 presented by the petition (Pet. i):

> When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

In defense of the judgment below, respondents also address the following question:

> Whether a discharger can escape liability for violations of a Clean Water Act permit that covers multiple dischargers on the ground that the permit's monitoring requirements do not pinpoint the precise contribution of each discharger to the documented permit violations, when the Act requires all permits to include monitoring sufficient to establish a permittee's compliance with permit limits and this permit's monitoring was expressly designated for that purpose and requested by petitioner itself.

RULE 29.6 STATEMENT

The disclosures in respondents' brief in opposition to the petition for writ of certiorari remain accurate.

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INTRODUCTION

Respondents agree with petitioner and the United States on the answer to the question presented by the petition: the transfer of water through a concrete channel within a single river does not constitute a discharge of pollutants from a point source under the Clean Water Act. As respondents explained in opposing certiorari, to the extent the court of appeals' opinion suggests otherwise, it is incorrect. The answer to the question petitioner presents, however, has no bearing on petitioner's liability and does not resolve this case, because petitioner does not simply transfer water within a single river.

Petitioner concedes that it is properly regulated by a Clean Water Act permit because it discharges pollutants from storm sewer outfalls into waters of the United States. That permit prohibits any stormwater discharges that contribute to violations of water quality standards. In accordance with the Clean Water Act and implementing regulations, the permit also requires petitioner to monitor its compliance with permit limits and report the results.

The undisputed results of petitioner's compliance monitoring demonstrate persistent violations of water quality standards, thus establishing petitioner's liability as a matter of law. The permit's monitoring program was proposed by petitioner itself, and petitioner's attempt to evade liability by contesting the sufficiency of its compliance monitoring is an improper

collateral attack on the permit – a permit the state courts have already reviewed and upheld.

The Court should therefore affirm the judgment of the court of appeals.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are reprinted in the appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

I. Background

A. Stormwater Pollution In Los Angeles County

Urban stormwater runoff is surface water generated by rainstorms that flows over parking lots, streets, commercial sites, and other developed land in urban areas. Pet. App. 6. As it moves across impervious surfaces, this runoff picks up toxic metals, fecal bacteria, and other pollutants. Pet. App. 6; 64 Fed. Reg. 68,722, 68,725 (Dec. 8, 1999). Municipal storm sewer systems collect and channel the polluted stormwater into drains and sewer pipes that ultimately discharge the runoff without treatment into receiving waters such as lakes, rivers, and the ocean. Pet. App. 7-8.

Stormwater runoff is a major cause of water quality impairment nationwide, 64 Fed. Reg. at 68,726, and is now the principal source of water pollution in California. Pet. App. 6; JA 432. The Los Angeles area "faces the largest concentration of such pollution" in the state. C.A. ER 302 (State Water Res. Control Bd. Resolution No. 2003-0013). Toxic plumes from stormwater runoff persist for days and are detected miles off the coast of Los Angeles County in the open ocean. JA 361.

Fecal bacteria and other pathogens in stormwater runoff harm human health. Illness rates increase significantly among those who swim at beaches near stormwater discharge points. 64 Fed. Reg. at 68,727. In Los Angeles County, people swimming at beaches near storm drain outfalls face a one in twelve chance of developing "significant respiratory disease."[1] By some estimates, more than a million people become sick each year because of stormwater pollution in southern California. C.A. ER 344.

Stormwater discharges in Los Angeles County also impose substantial economic costs. JA 362. Increased health care costs from runoff-induced human illness cause annual economic losses of tens of millions of dollars to the region. C.A. ER 344-350.

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[1] U.S. General Accounting Office, GAO-01-679, *Water Quality: Better Data and Evaluation of Urban Runoff Programs Needed to Assess Effectiveness* 24 (2001), *available at* http://www.gao.gov/new.items/d01679.pdf.

Polluted runoff results in regular beach closures that impair the region's multi-billion dollar coastal tourism economy. JA 362. This pollution also causes ecological harm to inland rivers that serve as wildlife habitat and provide recreational opportunities for Los Angeles communities, including at riverside urban parks. *See* JA 362.

B. The District's Municipal Separate Storm Sewer System

A municipal separate storm sewer system, referred to as an MS4, is a publicly-owned collection of storm drains, pipes, outfalls, and other infrastructure that collects stormwater runoff and discharges it to navigable waters without treatment. 40 C.F.R. § 122.26(b)(8). Petitioner the Los Angeles County Flood Control District (petitioner, or the District) operates an MS4 with thousands of discharge points, known as outfalls, that discharge the pollutants that collect in stormwater, including fecal bacteria, arsenic, cyanide, mercury, copper, lead, and zinc. Pet. App. 6-8, 17. The MS4 discharges literally tons of these pollutants to rivers and to the Pacific Ocean every year through pipes, drains, outfalls, and other discrete conveyances. JA 360.

The District's MS4 is an "incredibly complex" system. JA 333. The District has referred to the welter of interconnected storm sewer pipes and drains in its MS4 as "spaghetti." JA 293. The District's maps depict the "complicated web" of storm

drains that discharge into rivers within the County, including the Los Angeles River and San Gabriel River. Pet. App. 106.[2]

Los Angeles County and 84 cities within the County operate additional municipal storm drains that connect to the District's MS4. Pet. App. 6-8. This combined system is "highly interconnected because the District allows each municipality to connect its storm drains to the District's extensive flood-control and storm-sewer infrastructure (the MS4)." Pet. App. 8 (internal quotation omitted). This interconnected MS4 commingles stormwater from many dischargers to a "massive[ ]" extent, JA 333, and "the number and location of storm drains are too numerous to catalogue." Pet. App. 8. The District alone owns and operates approximately 2,800 miles of storm drains and 500 miles of open channels – more of the MS4 infrastructure than all of the other entities combined. Pet. App. 106.

In addition to the gutters, underground pipes, and outfalls that discharge into the Los Angeles and San Gabriel Rivers, the MS4 also makes use of stretches of each river to convey stormwater to the

[2] The District's partial storm drain maps are public documents and are attached to this brief for ease of reference. *See* App. 17a-18a (Cal. Reg'l Water Quality Control Bd., Los Angeles Region, Tentative Order No. R4-2012-XXXX, Att. C, Figs. C-4 & C-5, *available at* http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/Attachment%20C%20-%206-6-12.pdf).

ocean. The complete length of the Los Angeles River has been channelized for flood control purposes.[3] This includes portions that are entirely lined in concrete, portions with concrete banks and an unlined river bottom, and portions with improved earthen banks and an unlined river bottom. The San Gabriel River has also been channelized and parts of the river lined with concrete, although not to the same extent.[4]

C. Stormwater Regulation Under The Clean Water Act

1. The NPDES Permit Program

The Clean Water Act's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The law forbids any person to discharge any pollutant from a point source into navigable waters, unless expressly authorized. *Id*. §§ 1311(a), 1342, 1362(12). A person who seeks to discharge any pollutant into navigable waters must apply for and comply with the terms and limits of a National Pollutant Discharge

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[3] EPA Region IX, *Special Case Evaluation Regarding Status of the Los Angeles River, California, as a Traditional Navigable Water* 8-9 (July 1, 2010), *available at* http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf.

[4] *See* County of L.A. Dep't of Public Works, *San Gabriel River Corridor Master Plan* 2-30 (June 2006), *available at* http://dpw.lacounty.gov/wmd/watershed/sg/mp/docs/SGR_MP-Chapter2-3.pdf.

Elimination System (NPDES) permit. *Id*. §§ 1311(a), 1342(a)(1); *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976).

The term "point source" is defined to mean "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). That definition includes "point sources that do not themselves generate pollutants." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (the definition "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters' ").

The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). It includes the addition of pollutants from "surface runoff which is collected or channelled by man" and "discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works." 40 C.F.R. § 122.2.

A violation of an NPDES permit is a violation of the Clean Water Act. *Id*. § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action."). The statute imposes strict liability: a discharger's intent, good faith, or lack of knowledge is irrelevant to establishing civil liability for permit violations. *Am. Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 540

(4th Cir. 2005) ("[T]he CWA creates a regime of strict liability for violations of its standards.").

2. Regulation Of Municipal Storm-water Discharges

Congress amended the Clean Water Act in 1987 to require regulation of MS4s through the NPDES program. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 7, 69-71 (1987). EPA originally promulgated regulations in 1973 to exempt MS4 discharges from that program. 38 Fed. Reg. 18,000, 18,003 (July 5, 1973); *see Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977). At the time, EPA argued that requiring NPDES permits for stormwater discharges from MS4s would be administratively infeasible. *Costle*, 568 F.2d at 1377, 1380. The D.C. Circuit invalidated the rule and held that, under the Clean Water Act, EPA lacked discretion to exempt entire categories of point sources from the NPDES permitting requirements. *Id*. at 1377. EPA published regulations pertaining to municipal storm-water discharges on four subsequent occasions, but none was successfully implemented. *See* 56 Fed. Reg. 56,548, 56,548 (Nov. 5, 1991). Congress enacted the Water Quality Act of 1987 to regulate stormwater discharges from MS4s "after continued nonfeasance by the EPA." Pet. App. 29.

As amended, the statute directs that discharges from an MS4 serving a population of 100,000 people or more require NPDES permits. 33 U.S.C.

§ 1342(p)(2)(C)-(D). Discharges from smaller MS4s require a permit only if "the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," *id*. § 1342(p)(2)(E), and as otherwise directed by EPA through regulation, *id*. § 1342(p)(6). The statute phased in these permit requirements for MS4s over a period of several years. *Id*. § 1342(p)(4). The amendments focused the application of the NPDES program on the most harmful sources of stormwater pollution.

Congress imposed the NPDES permitting requirement for urban stormwater runoff at the municipal level, *id*. § 1342(p)(2)(C)-(D), rather than directing EPA to regulate "individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential 'nightmare')," Pet. App. 31 (citation omitted). Congress further provided that permits for discharges from an MS4 "may be issued on a system- or jurisdiction-wide basis" when a number of entities operate an interconnected storm sewer system. 33 U.S.C. § 1342(p)(3)(B)(i); *see* 40 C.F.R. § 122.26(d). System-wide permitting eliminates the need to regulate each MS4 outfall with a separate permit, and jurisdiction-wide permitting allows several local governments to apply for a single permit to govern an interconnected MS4 discharging to the same waters of the United States. 53 Fed. Reg. 49,416, 49,451 (Dec. 7, 1988).

Issuing MS4 permits "on a system-wide or jurisdiction-wide basis" provides "an important mechanism for developing the comprehensive storm water management programs envisioned by the Act." 55 Fed. Reg. 47,990, 48,043 (Nov. 16, 1990). Where multiple entities seek to be regulated through a single permit, each must have adequate legal authority to "[c]ontrol through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system." 40 C.F.R. § 122.26(d)(2)(i)(D).

Each MS4 outfall (or discharge point) is a point source under the Clean Water Act. 33 U.S.C. §§ 1342(p), 1362(14); 40 C.F.R. § 122.26(b)(9) (defining outfall). Federal regulations interpret the term "discharge of a pollutant" to exclude a "water transfer," which is defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening" use. 40 C.F.R. § 122.3(i). Stormwater discharges from an MS4 outfall are not "water transfers" excluded from regulation; they are explicitly subject to the NPDES permit program. 33 U.S.C. § 1342(p); 73 Fed. Reg. 33,697, 33,705 (June 13, 2008).

3. Monitoring And Reporting To Assess Permit Compliance

To obtain an MS4 permit, a municipality must submit an application that establishes its ability to

"[c]arry out all . . . monitoring procedures necessary to determine compliance and noncompliance with permit conditions." 40 C.F.R. § 122.26(d)(2)(i)(F). The applicant must include a proposed monitoring program "for representative data collection" that describes the sampling location and explains "why the location is representative." *Id*. § 122.26(d)(2)(iii)(D). This representative sampling may be conducted at "instream stations" instead of at MS4 outfalls. *Id*.

Every NPDES permit must require the discharger to conduct monitoring sufficient to assure compliance with its permit limits. *Id*. § 122.44(i)(1) (every permit "shall include" monitoring "[t]o assure compliance with permit limitations"); *see also* 33 U.S.C. § 1342(a)(2) ("The Administrator shall prescribe conditions for such permits to assure compliance with the requirements" of the statute). This monitoring must be "representative" of the discharges being regulated: "All permits shall specify . . . [r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity." 40 C.F.R. § 122.48(b). "Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." *Id*. § 122.41(j)(1).

In addition to monitoring requirements, the statute and EPA regulations also impose comprehensive reporting obligations on all permit holders. Dischargers must file reports with the permitting authority disclosing the results of any monitoring. *Id*. §§ 122.41(*l*)(4), 122.48(c). These self-monitoring reports

must be publicly available. 33 U.S.C. § 1318(b). Every discharger is required to certify its results under threat of criminal sanction for submitting false or incomplete information. *Id*. § 1319(c)(4). Dischargers must report at least annually all instances of non-compliance with permit limits. 40 C.F.R. § 122.44(i)(5).

The statute's mandated self-monitoring and reporting facilitates permit enforcement. EPA concluded that "Congress intended that prosecution for permit violations be swift and simple." 44 Fed. Reg. 32,854, 32,863 (June 7, 1979). The self-monitoring and reporting provisions were designed "to avoid the necessity of lengthy fact finding [and] investigations . . . at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." S. Rep. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730; *see also* H.R. Rep. No. 92-911, at 113-14 (1972) ("This section requires the owner or operator of any point source to monitor his own discharges accurately and to provide information to show whether or not he is in compliance with effluent limitations and other requirements under this Act.").

4. State Court Review Of State-Issued NPDES Permits

Congress empowered state agencies to implement the NPDES permitting program, and EPA has delegated

that authority to the State of California. 33 U.S.C. § 1342(b); 54 Fed. Reg. 40,664, 40,664 (Oct. 3, 1989). For Los Angeles County, California law further assigns that responsibility to the Regional Water Quality Control Board for the Los Angeles Region (Regional Board). Cal. Water Code §§ 13200(d), 13225, 13263.

Every state-issued NPDES permit must contain limits that are at least as stringent as those required by federal law. 33 U.S.C. §§ 1311(b)(1)(C), 1342(b); 40 C.F.R. §§ 123.1(i)(1), 123.25(a). All state permits must also include the monitoring and reporting requirements described above. 33 U.S.C. § 1342(b)(2)(B); 40 C.F.R. § 123.25(a).

State-issued permits can be challenged in state court upon their adoption. 40 C.F.R. § 123.30. Under California law, any permit challenge must be brought within thirty days through an administrative appeal to the State Water Board, with subsequent judicial review in state court. Cal. Water Code §§ 13320, 13330.

The Clean Water Act bars any collateral attack on permit terms; the validity of an NPDES permit cannot be challenged during an enforcement proceeding. 33 U.S.C. § 1369(b)(2) (prohibiting "judicial review in any civil or criminal proceeding for enforcement" of "[a]ction[s] of the Administrator with respect to which review could have been obtained under" section 1369(b)(1), which includes "issuing or denying any [NPDES] permit"). This prohibition extends to permits

issued by states. *Gen. Motors Corp. v. EPA*, 168 F.3d 1377, 1381-83 (D.C. Cir. 1999).

5. Incorporation Of State Water Quality Standards Into NPDES Permits

The Clean Water Act requires each state to adopt and submit for federal approval water quality standards for all waters within its boundaries. 33 U.S.C. § 1313(a)(3)(A), (c). State water quality standards consist of designated uses for particular water bodies and corresponding maximum pollutant levels set to achieve and protect those uses. *Id*. § 1313(c)(2)(A); 40 C.F.R. § 130.2(d). These standards are intended to protect public health and enhance water quality. 33 U.S.C. § 1313(c)(2)(A). Water quality standards establish the desired condition of a water body and create a uniform basis for regulating all point sources discharging to that water body. *See 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 enforcing water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992) (citation omitted).

The Regional Board adopted water quality standards for southern California through what is referred to as the Basin Plan.[5] *See* Cal. Water Code

[5] Cal. Reg'l Water Quality Control Bd., *Los Angeles Region Water Quality Control Plan* 2-1 to 3-23 (1995), *available at*

(Continued on following page)

§§ 13240, 13241. In response to a challenge filed by municipal stormwater dischargers, the California Court of Appeal upheld the Basin Plan and affirmed that the water quality standards it prescribes can be used to regulate stormwater discharges from MS4s. *City of Arcadia v. State Water Res. Control Bd.*, 119 Cal. Rptr. 3d 232, 249-52 (Cal. Ct. App. 2010).

EPA separately published the California Toxics Rule, which establishes additional water quality standards for toxic pollutants in inland waters in California.[6] 40 C.F.R. § 131.38. The Basin Plan and the California Toxics Rule together establish the governing water quality standards for pollutants in Los Angeles County's rivers, including the Los Angeles and San Gabriel Rivers.

D. The District's MS4 Permit

1. Permit Terms And History

The Regional Board issued the District's current NPDES permit in 2001. JA 52-254. The permit regulates the interconnected MS4 owned by the District,

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http://water.epa.gov/scitech/swguidance/standards/upload/2001_04_05_standards_wqslibrary_ca_ca_9_los_angeles.pdf.

[6] "Toxic pollutants" are defined as those pollutants known to cause "death, disease, behavioral abnormalities, cancer, genetic mutations, . . . or physical deformations" in living organisms. 33 U.S.C. § 1362(13). A number of pollutants at issue in this case are toxic, including copper, cyanide, lead, mercury, and zinc. 65 Fed. Reg. 31,682, 31,712 (May 18, 2000).

Los Angeles County, and 84 cities within the County. JA 55-56.

The permit first sets forth the Regional Board's findings of fact, including that the District and its co-permittees discharge stormwater from the MS4 into waters of the United States. JA 55-56. Each permit holder is responsible for the discharges from the parts of the MS4 "for which it is the operator." JA 93; 40 C.F.R. § 122.26(b)(1).

The permit prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards." JA 97. These standards limit the MS4's discharges of fecal bacteria, arsenic, cyanide, mercury, copper, zinc, and other pollutants. Pet. App. 14, 19; JA 370. Attainment of water quality standards must be satisfied "through timely implementation of control measures and other actions to reduce pollutants" in discharges. JA 98. To limit the introduction of pollutants into the MS4, the permit also requires each permittee to "hold dischargers to its MS4 accountable for their contributions of pollutants and flows." JA 109.

As it must under the Clean Water Act and federal regulations, the permit mandates that the permittees "shall" have adequate legal authority to carry out all "monitoring procedures necessary to determine compliance and non-compliance with permit conditions." JA 109. The permit's monitoring program was designed and proposed by the District and its co-permittees and approved by the Regional Board.

JA 65, 418, 454. Under this program, sampling is conducted 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 District must collect samples at least five times per year at each mass emission monitoring location. JA 219. The permit does not require monitoring of any of the MS4's thousands of individual outfalls. JA 218-221, 454.

The mass emission stations are small structures, similar in size to a garden shed, located along the banks of each river. At each location, a narrow-diameter pipe runs from the mass emission station into the river to collect the required water samples. The permit includes detailed specifications for how the mass emission sampling must be conducted and how the results must be analyzed. JA 219-221.

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. The mass emission monitoring in particular accomplishes the following objectives: "[e]stimate the mass emissions from the MS4; [a]ssess trends in the mass emissions over time; and [d]etermine if the MS4 is contributing to exceedances of Water Quality Standards by comparing results to applicable standards . . . and with emissions from other dischargers." JA 219.

The permit requires the permittees to implement a remedial program if the monitoring results show that discharges violate water quality standards. JA

98-99. Specifically, when violations are detected at the mass emission stations, the permittees "shall assure compliance" with water quality standards by preparing a compliance report that identifies the violations and adopts more stringent pollution control measures to eliminate them. JA 98. This compliance report "shall include" (1) a plan to comply with water quality standards, (2) revised pollution control measures to eliminate exceedances, (3) "[e]nhanced monitoring to demonstrate compliance," and (4) the results of implementation of these measures. JA 213. Each permittee must apply these steps to "discharges within its boundaries." JA 104.

The permit designates the District as the "Principal Permittee," which imposes on the District enhanced responsibilities. JA 103. As Principal Permittee, the District must "facilitate activities necessary to comply" with the permit by all other co-permittees and implement the self-monitoring program the permit requires. JA 103. The District must also submit an annual stormwater monitoring report to the Regional Board to identify and summarize all monitoring data collected under the permit. JA 214-216. This report must list all sampling results and highlight those that exceed water quality standards. JA 215.

2. The District's Unsuccessful State Court Challenge To The Permit

After the permit was adopted in 2001, the District unsuccessfully challenged it in state court. The

District argued in part that the permit should be read to include a "safe harbor" that would relieve it of responsibility for violating water quality standards. JA 259-264 (*In re L.A. Cnty. Mun. Storm Water Permit Litig.*, No. BS 080548 (L.A. Super. Ct. Mar. 24, 2005)); Pet. App. 115 n.8. The state trial and appeals courts rejected this argument and affirmed the permit. JA 264; *Cnty. of L.A. v. Cal. State Water Res. Control Bd.*, 50 Cal. Rptr. 3d 619, 622 (Cal. Ct. App. 2006).

In the same lawsuit, other co-permittees (not including the District) challenged the monitoring program set forth in the permit. The court found that the permittees were estopped from challenging the permit's monitoring program because "the challenged requirements are substantially similar to what the permittees proposed in their application for the Permit," and therefore "the doctrines of estoppel and waiver apply." JA 418 (*In re L.A. Cnty. Mun. Storm Water Permit Litig.*, No. BS 080548, at 19 (L.A. Super. Ct. Mar. 24, 2005)). The court also noted that federal regulations require permittees to "[c]arry out all inspections, surveillance and monitoring procedures necessary to determine compliance and noncompliance with Permit conditions." JA 418-419. The court upheld the permit's monitoring and reporting program because "federal authority mandates" that such a program be used to determine compliance. JA 419.

In a separate lawsuit filed after the permit was upheld, the District's co-permittees, supported by the District as *amicus*, challenged the state water quality standards with which the permit requires compliance

and argued that those standards could not be used to set limits for stormwater discharges from an MS4. *City of Arcadia*, 119 Cal. Rptr. 3d at 249-52. The state court of appeals rejected that argument and affirmed both the state water quality standards and their applicability to stormwater discharges. *Id*.

3. Pending Permit Renewal Proceedings

The District's permit is currently being rewritten. The Regional Board proposed a new permit in June 2012, which contains a revised monitoring program to determine compliance with permit limits. The Regional Board conducted hearings on the proposed permit on October 4 and 5, and has scheduled a vote on permit adoption for November 8.[7]

The new permit would require the permittees for the first time to conduct end-of-pipe outfall monitoring, in addition to the current instream monitoring, to "[d]etermine whether a Permittee's discharge contributes to or causes an exceedance of receiving water limitations." Cal. Reg'l Water Quality Control Bd., L.A. Region, Revised Tentative Order No.

[7] *See* L.A. Reg'l Water Quality Control Bd., *Notice of Opportunity for Public Comment and Notice of Adoption Meeting* 1-2 (Oct. 18, 2012) ("The Board is expected to take action on the Revised Draft Tentative Order on November 8, 2012."), *available at* http://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/Updated/Notice%20for%20LA%20MS4%2011-8-2012.pdf.pdf.

R4-2012-XXXX, NPDES Permit No. CAS004001, Att. E, E-4.[8] The outfalls to be monitored are selected by the District and each of the other permittees. *Id*. at E-22 – E-23. The tentative new permit also gives permittees the choice of conducting individualized monitoring or monitoring together in a coordinated program. *Id*. at E-3 – E-4, E-7 – E-8. The new monitoring program, when adopted, will supersede the current permit's compliance monitoring and apply to all future MS4 discharges and any enforcement actions.[9]

II. Proceedings Below

Respondents the Natural Resources Defense Council and Santa Monica Baykeeper filed this lawsuit to eliminate ongoing permit violations. The complaint alleged that the District's and Los Angeles

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[8] *Available at* http://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/Updated/Attachment%20E%20-%20MRP.pdf.

[9] Because the District's impending new permit and amended compliance monitoring will govern any future enforcement action, a decision on the merits here will apply to this case only. It would therefore be appropriate for the Court to dismiss the writ of certiorari as improvidently granted. *Quinn v. Muscare*, 425 U.S. 560, 563 (1976) (dismissing writ because challenged regulations were amended after certiorari was granted); *Taggart v. Weinacker's, Inc*., 397 U.S. 223, 224-25 (1970) (dismissing writ because changed circumstances minimized the continuing relevance of the controversy); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 76-77 (1955) (dismissing writ because an intervening change in state law gave the case "isolated significance").

County's polluted MS4 discharges contributed to violations of water quality standards in four rivers: the Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek. Pet. App. 22. The district court bifurcated the liability and remedy phases of the case, Dist. Ct. Dkt. No. 78, and the parties filed cross-motions for summary judgment on liability.

The District did not dispute that its monitoring reports show that MS4 discharges repeatedly violated water quality standards in the four rivers. Pet. App. 108, 117. However, the District argued that its self-monitoring results do not establish liability for permit violations, because the monitoring is not conducted at the precise point of discharge from one of its thousands of MS4 outfalls into a river. Pet. App. 115. Instead, the sampling is conducted in the rivers themselves, as the District requested, at instream locations downstream of the District's and its co-permittees' MS4 discharges.

The district court agreed with petitioner that instream monitoring was insufficient to establish liability, and ordered respondents to submit additional water sampling data showing discharges of a "standards-exceeding pollutant" from the District's "outflows" at or near the time of the documented violations. Pet. App. 122-123. The court subsequently held the supplemental evidence filed by respondents did not support liability because there was no clear indication that it was collected at or near a District "outflow." Pet. App. 100-101. The court granted summary

judgment for the District and entered final judgment on these claims.[10]

The court of appeals reversed in relevant part. The court first held that "the Permit's provisions plainly specify that the mass-emissions monitoring is intended to measure compliance," and "an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers." Pet. App. 40. However, the court of appeals rejected respondents' argument that this compliance monitoring established the District's liability for permit violations as a matter of law. Pet. App. 41-42. Instead, the court agreed with the District that, in order to demonstrate a permit violation, respondents were required to submit additional proof of the District's contribution to the permit violations, beyond the results of the permit's compliance monitoring. Pet. App. 44, 48-49.

Next, relying on an argument not advanced by respondents, the court of appeals found the District liable for violations in the Los Angeles and San Gabriel Rivers because the monitoring stations for each river are "located in a section of the MS4 owned and operated by the District." Pet. App. 44. Therefore, the court determined that violations were detected in

[10] Respondents prevailed on a separate claim regarding the District's discharge of waste from its MS4 into a protected coastal area. Pet. App. 125-128. That claim remains pending in district court; further proceedings to determine the appropriate remedy have been stayed.

water sampled *prior* to discharge from the District's MS4 into the rivers. The court concluded that "[t]he discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways." Pet. App. 45.

The District petitioned for rehearing and argued in part that the permit includes a "safe harbor" provision that shields the District from liability for good faith violations. The appeals court issued an amended opinion expressly rejecting the District's "safe harbor" argument, holding that "no such 'safe harbor' is present in this Permit," and noting that the California state courts and the district court below had all reached that same result. Pet. App. 37-38 & n.7.[11]

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[11] In opposing the petition for certiorari, both respondents and the United States argued that the court of appeals did not base its decision on either of the plainly incorrect legal conclusions now attributed to the court by petitioner. Resp. Supp. Br. in Opp. 1-3; U.S. Cert. Br. 11-12, 16-20. There is no basis to conclude that the court held, *sub silentio*, that the mere transfer of pollutants within a single water body constitutes a point source discharge under the Clean Water Act, contrary to *Miccosukee*, 541 U.S. at 109, or that the portions of the Los Angeles and San Gabriel Rivers lined with concrete are outside the jurisdiction of the Act, contrary to *Rapanos v. United States*, 547 U.S. 715 (2006).

SUMMARY OF ARGUMENT

1. The question presented by petitioner is whether a "discharge of pollutants" under the Clean Water Act occurs when water flows from one portion of a river through an engineered improvement within the river to a lower portion of the same river. The answer to that question is no. *Miccosukee* makes clear that transferring water between two parts of the same water body, without more, does not constitute a discharge of pollutants, and therefore no NPDES permit is required for that activity. 541 U.S. at 109, 112.

However, the answer to the question presented is not relevant to petitioner's liability, because petitioner does not simply transfer water between two parts of the same water body. Petitioner mischaracterizes the basic function and purpose of its MS4 by repeatedly suggesting that it "merely transfers" water within a single river. That suggestion is false. As petitioner elsewhere admits, it discharges stormwater from MS4 outfalls into navigable waters and is properly subject to an NPDES permit. Pet. Br. 44. The entire premise of petitioner's brief – that it is excused from liability under *Miccosukee* because it is "merely transferring" pollutants *within* navigable waters – is therefore invalid.

2. The judgment of the court of appeals should be affirmed because the results of the representative compliance monitoring required by the permit establish petitioner's violations of its discharge limits as a

matter of law. The Clean Water Act, EPA regulations, and petitioner's permit all compel this result.

a. Under the Clean Water Act, all NPDES permits must impose self-monitoring and reporting requirements sufficient to determine compliance with permit limits. EPA regulations provide that such monitoring can be conducted at a representative location, including an instream location that is not at the point of discharge. The permit at issue here conforms to these federal requirements: it mandates instream, representative monitoring to measure compliance with the permit's pollution discharge limits. JA 219.

The District's undisputed monitoring results reveal frequent violations of water quality standards for fecal bacteria, toxic metals, and other pollutants in the Los Angeles and San Gabriel Rivers, at levels that are orders of magnitude above the governing limits set by the state and incorporated into the District's permit. These discharges cause serious and documented harm to public health, the environment, and the regional economy. And they have continued, unabated, for years, because the District has refused to acknowledge that the permit's compliance monitoring results trigger its obligation to reduce the pollutants in its discharges.

b. In the District's view, the monitoring required by the permit could never establish its liability for discharge violations. As it openly admitted below, this would be true even if its discharges "were so

polluted with oil and grease that they were on fire as they came out of the system." JA 303; Pet. App. 43 n.8. The District's position defies the express language of the permit, which provides that petitioner "*shall*" have sufficient authority to carry out "*all*" monitoring necessary to demonstrate compliance or non-compliance with permit conditions. JA 109. Indeed, the District itself requested the monitoring regime set forth in its permit. Having taken advantage of the less burdensome nature of that monitoring, the District cannot now fairly claim that its monitoring scheme is inadequate.

c. The District's argument that it cannot be held accountable based on the self-reported results of its compliance monitoring is an improper collateral attack on the permit. 33 U.S.C. § 1369(b)(2). All technical questions regarding the sufficiency of any permit's compliance monitoring must be resolved during the permitting process by the expert state agency charged with writing and administering the permit. In California, any remaining dispute can be heard only in state court, after an administrative appeal. Cal. Water Code §§ 13320, 13330. Through five years of state court litigation, the District unsuccessfully challenged its permit. After this full and fair opportunity for review of the permit's terms, the District is barred from making a collateral attack on its permit in an enforcement proceeding.

d. The District's refusal to acknowledge the legal relevance of its compliance monitoring severely undermines NPDES permit enforcement. Compliance

monitoring is central to Clean Water Act implementation and is intended to make permit enforcement simple and straightforward. In contrast, the District would require citizen plaintiffs or any other enforcement authority to conduct additional, independent monitoring from the District's storm sewer outfalls to establish liability. Even assuming plaintiffs could lawfully (and safely) access the District's MS4 outfalls, such monitoring is well beyond what the permit requires and would introduce complicated fact disputes for courts to resolve in every enforcement case. Petitioner's position upends the simple and straightforward permit enforcement intended by Congress and mandated by EPA regulations.

3. a. It is both appropriate and fair to hold the District to the strict terms of its permit, including the requirement that the permit's monitoring establishes the District's liability for permit violations. The District is correct that the mass emission monitoring measures the District's and its co-permittees' commingled stormwater discharges into each river. However, holding the District liable on the basis of that monitoring does not make it responsible for other parties' discharges. Under the express terms of the permit, the District must identify and remediate *only its share* of the commingled pollutant discharge; it is not required to clean up or eliminate any other party's discharge. JA 98-99, 104, 213. The permit's built-in remedial program requires gradual and targeted pollution control measures that each permittee must apply only to "discharges within its boundaries."

JA 104. And because the District owns and operates the vast majority of the MS4 – more than all other permittees combined – reducing the District's share of stormwater pollution will go a long way toward eliminating the problem entirely.

b. The District complains that if it is held liable for permit violations the required remedy will be burdensome and inconvenient. Any such burden was imposed by Congress when it amended the Clean Water Act to require effective regulation of stormwater discharges from MS4s, after fifteen years of failed attempts by EPA. Moreover, there are dozens of feasible remedial measures – far short of the dramatic burdens the District posits – that will minimize stormwater pollution and simultaneously lessen flood risk. In any event, the District's argument regarding potential burdens is premature because there have not yet been any remedy proceedings in this case. The district court will have equitable discretion to tailor injunctive relief to the circumstances here, taking into account the District's concerns about cost and feasibility.

The Court should therefore affirm the judgment below because the results of the District's compliance monitoring establish its liability for permit violations as a matter of law.

ARGUMENT

I. This Case Does Not Implicate *Miccosukee*

The question presented by petitioner is whether transferring water within a single river constitutes a discharge of pollutants under the Clean Water Act. The answer is no. *Miccosukee* establishes that there is no "discharge of pollutants" under the Act when water flows from one portion of a river through an engineered improvement in the river to a lower portion of the same river. 541 U.S. at 109.[12]

Petitioner asserts that the court of appeals found a discharge from the MS4 based solely on water flowing within the confines of the Los Angeles and San Gabriel Rivers. The court's opinion does not support that reading. Both respondents and the United States agree that the court of appeals did not misapply *Miccosukee*, Resp. Br. in Opp. 14-20, and that the court instead likely misunderstood the relative locations of the mass emission monitoring stations and the upstream MS4 outfalls. Resp. Supp. Br. in Opp. 3; U.S. Merits Br. 21-23. The court of

[12] In their briefs opposing certiorari, both respondents and the United States confirmed that all parties agree on this point. *See* Resp. Br. in Opp. 14 ("The [*Miccosukee*] Court held that transferring pollutants within a single water body would not require a permit."); Resp. Supp. Br. in Opp. 1 ("Should the Court grant the petition for certiorari, respondents would not argue that either of these illusory rulings is correct."); U.S. Cert. Br. 20 n.7 ("Respondents have not argued . . . 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.").

appeals' statements suggest it believed the monitoring stations sampled polluted stormwater from the District's MS4 before, not after, discharge to the Los Angeles and San Gabriel Rivers. *E.g.*, Pet. App. 44 ("[W]hen pollutants were detected, they had not yet exited the point source into navigable waters.").

Petitioner's brief repeatedly conveys the misimpression that its MS4 only moves water within the Los Angeles and San Gabriel Rivers, thereby precluding liability under *Miccosukee*. Pet. Br. 23 (it "merely transfers water from one part of a river to another"); *see also id*. 22 ("mere flow of water"), 24 ("mere passage of water"), 29 ("mere flow of water"), 31 ("[m]erely transferring water"), 32 ("mere transfer of water"), 34 ("mere transfer, or flow"), 40 ("mere transfer of water," "mere flow of water"), 44 ("simply transferring water"), 45 ("water simply flowing"), 46 ("simply moving water"), 50 ("mere flow of water," "mere transfer of water"). That refrain is untrue. As petitioner elsewhere concedes, *id.* 44, the District discharges pollutants from thousands of external point sources – its MS4 outfalls – *into* the Los Angeles and San Gabriel Rivers. *See* U.S. Merits Br. 25 ("Petitioner is unquestionably responsible for numerous pollutant discharges at the many outfalls under its control where stormwater is discharged into those rivers."). Indeed, the permit's first finding of fact is that the District "discharges"

stormwater from its MS4 into navigable waters. JA 55-56.[13]

Miccosukee therefore is not implicated by the underlying facts, because there is no dispute that the District discharges pollutants from MS4 outfalls into navigable waters and is currently subject to a valid NPDES permit. *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 381 (2006) (holding that *Miccosukee* was "concerned only with whether an 'addition' had been made," which would trigger the requirement for an NPDES permit). *Miccosukee* does not limit or address the Clean Water Act's regulation of discharges from MS4s.

Accordingly, this Court does not have to resolve the question whether the lower court's ruling is premised on an erroneous legal theory, as petitioner argues, or an error of fact, as respondents and the United States believe. As detailed below, the Court should affirm the lower court's judgment in either circumstance because the undisputed results of the District's compliance monitoring establish its liability for permit violations as a matter of law.

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[13] Petitioner's own *amici* acknowledge that petitioner's brief is misleading on this point: "The District asserts that it is merely transferring water within single bodies of water, i.e., the Los Angeles River and San Gabriel River. . . . The Court should not be misled by this mischaracterization of the District's MS4 storm water discharges." Br. of Western Urban Water Coalition, et al. 9.

II. The Compliance Monitoring Required By The District's Permit Establishes Its Permit Violations

The Clean Water Act prohibits (a) the discharge (b) of a pollutant (c) from a point source (d) to navigable waters (e) in excess of permit limits. 33 U.S.C. §§ 1311(a), 1362(12). The first four elements are not in dispute here. The District concedes that it discharges stormwater runoff from point sources into navigable waters, and that it is properly subject to an NPDES permit. The only remaining question, then, is how to measure the District's compliance with its permit limits. The permit's monitoring program answers that question.

The Clean Water Act requires every NPDES permit to impose self-monitoring and reporting procedures sufficient to determine compliance with the permit's terms. This is central to effective implementation and enforcement of the Act. Compliance monitoring must be conducted at representative locations, which may include particular discharge points *or* instream locations (or both). The District itself proposed the instream compliance monitoring in its permit, and the results of that monitoring show chronic and uncontested violations of permit limits for a range of pollutants, including fecal bacteria and toxic metals. The permit was challenged and upheld in state court, and the District is barred from making a collateral attack on its permit now, in an enforcement proceeding.

In finding the District liable, the court of appeals did not accept respondents' argument that the permit's compliance monitoring established the District's liability as a matter of law. Pet. App. 41. This argument, however, was raised and ruled on below and preserved in respondents' opposition to certiorari. Pet. App. 41, 121; Resp. Br. in Opp. 18-19; Resp. Supp. Br. in Opp. 4-5.[14]

A. All NPDES Permits Must Include Monitoring Sufficient To Determine Compliance

The Clean Water Act requires every NPDES permit to include monitoring sufficient to assure permit compliance. 33 U.S.C. §§ 1318(a)(A), 1342(a)(2); 40 C.F.R. §§ 122.44(i)(1) (every permit "shall include" monitoring "[t]o assure compliance with permit limitations"), 122.44(i)(5) (dischargers must report all instances of non-compliance with permit limits at least annually). The results must be reported in

[14] Because this alternative ground would sustain and not change the judgment, it need not have been presented by respondents in a cross petition. *See Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 364 (1994) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment."); *United States v. N.Y. Tel. Co*., 434 U.S. 159, 166 n.8 (1977) ("[T]he prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted.").

public documents filed with the state or EPA under penalty of perjury. 40 C.F.R. § 122.41(k).

Every discharger must propose in its permit application monitoring sufficient to demonstrate the permittee's compliance with permit limits. As a condition of receiving an MS4 permit, a municipality must submit an application containing a proposed monitoring program "for representative data collection" that identifies a sampling location and explains "why the location is representative." *Id*. § 122.26(d)(2)(iii)(D). This sampling may be conducted at "instream stations" instead of particular MS4 outfalls. *Id*. (the application must describe "the location of outfalls *or* field screening points to be sampled (*or* the location of instream stations)" (emphasis added)). In other words, the compliance monitoring may be conducted at a "representative" location that is not at the precise point of discharge. The monitoring results are used "to determine compliance and noncompliance with permit conditions." *Id*. § 122.26(d)(2)(i)(F).

Most large MS4s contain too many outfalls to monitor individually; dischargers often do not even know how many outfalls they have. 55 Fed. Reg. at 48,046. Federal regulations thus provide EPA, delegated states, and dischargers with flexibility to design a range of possible monitoring programs to assess compliance with permit limits. EPA guidance explains that "[a]ny comprehensive monitoring program should have clear monitoring objectives to help determine compliance and water quality impacts. Each monitoring program is unique and should be

customized to the specific waterbodies, impairments, and pollutant sources of the MS4." EPA, *MS4 Permit Improvement Guide* 95 (April 2010).[15]

The District incorrectly states that compliance with permit limits can be measured only at an "outfall." Pet. Br. 43 (arguing that "[t]he foundation of permit compliance is measurement at an 'outfall' "); Pet. Br. 15 n.4 (claiming that "'outfall' . . . is the regulatory term for the point at which compliance with an MS4 permit's terms is measured with respect to discharges into navigable waters"). To support this argument, the District relies on 40 C.F.R. sections 122.26(b)(9) and 122.45(a), but neither regulation addresses compliance monitoring at all. Instead, section 122.26(b)(9) defines the term outfall to mean "the point where a municipal separate storm sewer discharges to waters of the United States," and section 122.45(a) states that effluent limitations in a permit "shall be established for each outfall," where feasible.

The District ignores every regulation that does address compliance monitoring. Those regulations provide that monitoring may be conducted at "instream stations" and "shall be" representative of a permittee's discharge. 40 C.F.R. §§ 122.26(d)(2)(iii)(D), 122.26(d)(2)(i)(F), 122.41(j)(1), 122.44(i)(1), 122.48(b). EPA explains that "[t]he NPDES regulations do not

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[15] *Available at* http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf.

prescribe exact monitoring locations; rather, the permit writer is responsible for determining the most appropriate monitoring location(s) and indicating the location(s) in the permit." EPA, *NPDES Permit Writers' Manual* 8-2 (Sept. 2010);[16] *see also* U.S. Merits Br. 9 ("[S]ubject to the permitting authority's approval, a permit applicant may choose between a monitoring scheme that samples at outfalls, one that samples from instream locations, or some combination of the two."). Compliance monitoring need not be conducted solely at a discharge point. *See, e.g.*, *Texas Mun. Power Agency v. Adm'r of the U.S. EPA*, 836 F.2d 1482, 1489 (5th Cir. 1988) (affirming EPA's issuance of an NPDES permit that did not require outfall monitoring to measure compliance, noting that "end-of-pipe" monitoring "is sometimes impractical"). The District is plainly wrong that permit compliance can be measured only at an outfall.

B. Self-Reported Compliance Monitoring Results Establish Permit Violations And Enable Enforcement

The results of each permit's compliance monitoring provide the basis for government and citizen enforcement. A permit violation is established by comparing the discharge prohibitions in the permit to the self-monitoring data of the discharger. "In short,

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[16] *Available at* http://www.epa.gov/npdes/pubs/pwm_chapt_08.pdf.

the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations" under the Clean Water Act. *EPA v. California*, 426 U.S. at 205. According to EPA, "Congress intended that prosecution for permit violations be swift and simple." 44 Fed. Reg. at 32,863.[17]

Technical questions regarding the adequacy of monitoring are settled during the permitting process. Once those questions have been resolved, enforcement is a straightforward matter of comparing a discharger's reported monitoring results against the limits in its permit. This relieves courts of the obligation to adjudicate highly technical disputes in enforcement proceedings. It also provides certainty to dischargers, regulators, and citizens. Lower courts have consistently reinforced these points. *See, e.g.*, *Inland Empire Waterkeeper v. Uniweb, Inc.*, No. 07-CV-480 (DDP), 2008 WL 6098645, at *9 (C.D. Cal. Aug. 6, 2008) ("A monitoring report that shows a water sample with pollutant discharges in excess of permit limits is conclusive evidence of a violation."); *Save Our Bays & Beaches v. City & Cnty. of Honolulu*, 904 F. Supp. 1098, 1105 (D. Haw. 1994) ("A critical part of the regulatory scheme is a strict self-reporting

[17] *See also* EPA, *NPDES Permit Writers' Manual* 8-1 (Sept. 2010) ("Periodic monitoring and reporting establish an ongoing record of the permittee's compliance status and, where violations are detected, create a basis for any necessary enforcement actions."), *available at* http://www.epa.gov/npdes/pubs/pwm_chapt_08.pdf.

system requiring permittees to monitor carefully their permit compliance and to report their own permit violations . . . ."); *Student Pub. Interest Research Grp. of N.J. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1531 (D.N.J. 1984) ("[A] discharger must report its own permit violations should they occur.").

The congressional purpose behind this self-monitoring mechanism is to eliminate complicated factual disputes during enforcement proceedings, after violations have been reported. According to the Senate Report, "[o]ne purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." S. Rep. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730. "[T]he threat of sanction must be real, and enforcement provisions must be swift and direct." *Id*. at 65, *reprinted in* 1972 U.S.C.C.A.N. at 3731.

Because all dischargers must conduct their own compliance monitoring and report the results publicly, "the factual basis for enforcement of requirements would be available at the time enforcement is sought." *Id*. at 80, *reprinted in* 1972 U.S.C.C.A.N at 3746. This relieves enforcement authorities of the burden of investigating compliance with every NPDES permit and generating third party monitoring data to discover and prove violations of permit

limits. H.R. Rep. No. 92-911, at 113-14 (1972) ("[O]ne of the critical deficiencies in existing law is the lack of an effective system for obtaining information on pollutants discharged to surface or ground waters. . . . This section requires the owner or operator of any point source to monitor his own discharges accurately and to provide information to show whether or not he is in compliance with effluent limitations and other requirements under this Act.").

Congress could have exempted municipal stormwater discharges from the Clean Water Act entirely, as it has for other sources of water pollution. *See, e.g.*, 33 U.S.C. § 1342(*l*)(1) (exempting "discharges composed entirely of return flows from irrigated agriculture"). Instead, Congress amended the Act explicitly to require regulation of stormwater discharges from MS4s. It did so to address a serious pollution problem. *See, e.g.*, *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992) ("Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987[.]" (citations omitted)); *Bldg. Indus. Ass'n of San Diego Cnty. v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128, 141 (Cal. Ct. App. 2004) ("In 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." (citations omitted)).

The Act thus requires regulation of large MS4s like the District's through the NPDES program, which includes at its heart self-monitoring and self-reporting of violations and straightforward enforcement. The statute's monitoring and reporting scheme advances the core objective of the Act: to protect and restore the quality of the Nation's waters. 33 U.S.C. § 1251(a).

C. The Monitoring Required Under The Permit Shows Undisputed Violations Of Permit Limits

Petitioner's NPDES permit prohibits discharges from the MS4 that cause or contribute to exceedances of water quality standards. JA 97. It further includes a self-monitoring and reporting program, as required by law. The permit states that the permittees "shall" have adequate legal authority to "[c]arry out *all* inspection, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions." JA 109 (emphasis added). And the permit directs that compliance with water quality standards be measured through mass emission monitoring conducted at designated locations in the Los Angeles River and San Gabriel River, among other major rivers. JA 219 (stating that the District "shall monitor mass emissions" to "[d]etermine if the MS4 is contributing to exceedances of Water Quality Standards"). The "primary objectives" of this monitoring program include "[a]ssessing compliance with this [permit]." JA 218. This monitoring regime was

proposed and designed by the District and adopted by the Regional Board. JA 65, 418, 454.

The mass emission monitoring results for the Los Angeles River and San Gabriel River show more than 140 violations of water quality standards for ten different pollutants in those rivers during the time period covered by the complaint. C.A. ER 355-364 (table of reported monitoring results). These violations are undisputed and include measurements of aluminum twenty times the legal limit, cyanide fifty times the limit, and fecal coliform 60,000 times the limit. Pet. App. 108, 117; C.A. ER 358-363.

The permit's monitoring program does not require sampling of discharges from individual outfalls. JA 454. Instead, the permit evaluates the District's MS4 discharges from samples collected at instream stations, which is consistent with EPA's regulation allowing representative, instream sampling. 40 C.F.R. § 122.26(d)(2)(iii)(D). There are thousands of outfalls from the District's MS4 – "an enormous number that cannot all be sampled cost-effectively" – and the District has never provided a map showing their full extent. C.A. ER 155-156; Pet. App. 8. Requiring some type of representative sampling is the only workable monitoring regime.

Thus, the mass emission stations, even though not located directly at the District's discharge points, measure water samples that are "representative" of the District's discharges as a matter of law. 40 C.F.R. § 122.26(d)(2)(iii)(D). The results of that monitoring

prove the District's violations of its permit, which prohibits discharges that contribute to violations of water quality standards.[18]

D. The District Is Barred From Making A Collateral Attack On The Terms Of Its NPDES Permit

The District opposes use of the permit's compliance monitoring for its stated purpose: to determine compliance with permit terms. This is an improper collateral attack on the permit that the Court lacks jurisdiction to hear.

As the Regional Board explained, "the Permit incorporates the type of monitoring scheme that the *permittees expressly requested* in their permit application. That scheme determines compliance not at any city's individual outfalls, but in-stream at 'mass emissions stations'. . . ." JA 454 (emphasis added, citation omitted). Having taken full advantage of the

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[18] Petitioner's *amicus* the National Association of Flood and Stormwater Management Agencies (NAFSMA) suggests, in a footnote, that mass emission monitoring results cannot be used to determine permit violations without comparing the results with emissions from other dischargers. Br. of NAFSMA 30 n.16. To the extent such a comparison is required, the governing permit language imposes that burden on the District. JA 219 (ordering that "the *Principal Permittee* shall monitor mass emissions to . . . [d]etermine if the MS4 is contributing to exceedances of Water Quality Standards *by comparing* results to applicable standards . . . and with emissions from other dischargers" (emphasis added)).

less burdensome scheme it requested, the District cannot now fairly argue that the permit's compliance monitoring does not determine its compliance with the law.

Indeed, section 509(b)(2) of the Clean Water Act bars the District from raising such a collateral attack on the adequacy of its permit, including its monitoring requirements, in a federal enforcement proceeding. 33 U.S.C. § 1369(b)(2). Under the Act, "any interested person" may seek judicial review "of various particular actions by the Administrator, including . . . issuance of permits for discharge of pollutants. Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement." *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13-14 (1981) (quoting 33 U.S.C. § 1369(b)). California provides the exclusive mechanism for administrative and judicial review of state-issued permits in state court. Cal. Water Code §§ 13320, 13330; *Voices of the Wetlands v. State Water Res. Control Bd.*, 257 P.3d 81, 91-92 (Cal. 2011). Once finalized, the permit is the law, and violation of a permit term is a violation of the law. 40 C.F.R. § 122.41(a).

The District and its co-permittees mounted three separate attacks on this permit in state court. First, the District unsuccessfully challenged the permit when it was adopted, arguing that it could not be held liable for violations of water quality standards measured at the mass emission stations. JA 255-279;

Cnty. of L.A., 50 Cal. Rptr. 3d at 622. Second, the District's co-permittees contested the permit's monitoring and reporting program, but the court held both that they were estopped from doing so – having designed the monitoring program themselves – and that federal regulations required a monitoring program adequate to "determine compliance and non-compliance with permit conditions." JA 418-419 (citations omitted). Third, the District's co-permittees, supported by the District as *amicus*, unsuccessfully challenged the state water quality standards with which the permit requires them to comply. *City of Arcadia*, 119 Cal. Rptr. 3d at 249-52. The permit's validity – including the sufficiency of the compliance monitoring program – is therefore settled.

Having lost its facial challenge to the permit, the District now attempts to achieve the same result by opposing the adequacy of the compliance monitoring the permit requires. The District's argument rests on the untenable premise that the permit's compliance monitoring cannot be used to assess any permittee's compliance or non-compliance with the permit's discharge prohibitions. But every permit *must* include monitoring sufficient to determine such compliance, and this permit does, as the state court recognized. JA 418-419. The District cannot now oppose the use of its self-reported compliance monitoring data to demonstrate permit violations. *See United States v. Gulf States Steel, Inc.*, 54 F. Supp. 2d 1233, 1241-43 (N.D. Ala. 1999) (refusing to consider defendant's argument that it could not be held liable for reported

NPDES permit violations because its permit's compliance monitoring measured internal waste streams prior to discharge, not discharges from outfalls directly into waters of the United States).

This rule cuts both ways; a plaintiff may not attempt to impose through an enforcement suit more stringent standards than a permit requires. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 326 (1981) (rejecting a claim that federal common law can impose more stringent limits on a discharger than those in its permit, and holding that "[t]he statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process"). This promotes reliance and predictability. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (noting "the important goals of efficiency and predictability in the [NPDES] permit system"). Just as the violation of a permit is a violation of the law, compliance with the permit is deemed compliance with the law. 33 U.S.C. § 1342(k).

These twin principles benefit all parties. The permitting process is an open and often lengthy public proceeding before an expert agency. Complicated technical issues regarding appropriate permit terms are settled with the benefit of public hearings, workshops, inspections, expert testimony, and investigative reports. *See* JA 92-93 (describing the public process prior to issuance of the District's permit). The administrative record for the permit here, for example, is over 80,000 pages long, JA 259, and the permit

adoption hearing involved testimony from twenty-nine witnesses. The Regional Board held approximately fifty meetings with interested parties before issuing the permit. JA 259. At the conclusion of such a process, all parties – including the regulated community, enforcement authorities, and members of the public – are aware of exactly what the discharger's permit requires and how compliance will be assessed. To reopen permit terms upon enforcement unsettles parties' expectations, defeats finality, undermines the administrative process, and burdens the federal courts. More fundamentally, it allows persistent, dangerous pollution to go unchecked by complicating and prolonging enforcement proceedings. That is precisely what has happened here.

The District's collateral attack also raises a comity concern. Federal law allows EPA to delegate NPDES permitting authority to the states. California state courts affirmed both the permit and the relevant water quality standards against the permittees' challenges. The District is thus regulated by a state-issued permit that requires compliance with state-promulgated water quality standards, both of which were upheld by the state courts. To allow a collateral attack now in federal court would undermine the Clean Water Act's cooperative federalism scheme.[19]

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[19] The District's *amici* make an additional collateral attack and object to the permit's prohibition on discharges that contribute to violations of water quality standards. Br. of Nat'l Governors Ass'n 10; Br. of Western Coalition of Arid States 26;

(Continued on following page)

E. The District's Argument Would Severely Undermine Enforcement

Self-monitoring programs are central to effective permit enforcement, because they allow states, federal agencies, citizen plaintiffs, and the courts to compare a discharger's reported sampling results with the applicable permit limits and readily identify violations. *See* Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 1012 (6th ed. 2009) ("[E]nvironmental enforcement authorities rely heavily on self-monitoring and self-reporting requirements to detect violations."). The Regional Board stated that "[t]his system of self-reporting is critical to the NPDES program, which 'fundamentally relies' upon it. The data provided through accurate and

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Br. of League of Cal. Cities 7, 24 n.10. This permit provision has already been challenged and upheld and cannot be attacked again here. JA 260-262 (upholding the permit's requirement to comply with water quality standards); *see Bldg. Indus. Ass'n*, 22 Cal. Rptr. 3d at 137-38 (upholding an MS4 permit provision prohibiting dischargers from causing or contributing to violations of water quality standards). Moreover, petitioner's *amici* are wrong that an MS4 permit cannot require dischargers to do more than adopt "best management practices" to reduce pollution to the "maximum extent practicable." Br. of Nat'l Governors Ass'n 12. The Clean Water Act expressly states that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . *and* such other provisions as the Administrator or the State determines appropriate." 33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added); *see also Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999) (holding that MS4 permits may "require strict compliance with state water-quality standards").

complete monitoring reports serve as conclusive evidence as to whether permit violations exist." JA 446 (citations omitted).

In district court, petitioner's designated representative testified at deposition that "[y]ou can never do enough monitoring" to assess any permittee's compliance with the permit at issue here. JA 406-407. Petitioner now appears to assert that its compliance with permit limits can be measured, but only on the basis of outfall monitoring. Pet. Br. 43 (claiming that "[t]he foundation of permit compliance is measurement at an 'outfall'"). Of course, at petitioner's own request, its permit does not require outfall monitoring.

Imposing independent compliance monitoring obligations on government enforcers and citizen plaintiffs, different from what the permit itself requires, would reverse the burden Congress placed on dischargers. It would also introduce complicated fact disputes into every permit enforcement lawsuit, effectively precluding enforcement. When the District or any other discharger conducts monitoring required by its permit, it must follow established sampling protocols and certify the results as accurate. 33 U.S.C. § 1319(c)(4); 40 C.F.R. § 136.1(a)(1)-(2). The results are admissions of liability. *WaterKeepers N. Cal. v. State Water Res. Control Bd.*, 126 Cal. Rptr. 2d 389, 392 (Cal. Ct. App. 2002) (monitoring reports filed pursuant to state NPDES permits "are admissible in court as admissions of the discharger and thus play a

critical evidentiary role in enforcement actions for violations of permit terms").

In contrast, if plaintiffs must collect additional sampling data to establish liability beyond what the permit's monitoring requires, these additional data would be subject to factual disputes requiring additional discovery and expert testimony. Every element of the sample collection and analysis process could be contested, from the technical adequacy of the sampling equipment to the validity of the scientific test methods and the accuracy of the results. This would significantly increase the time and expense required to enforce permit prohibitions. The increased burden would apply not just to citizen plaintiffs but to any state or federal enforcement authority.[20]

Requiring the development of elaborate additional facts to identify and demonstrate permit violations

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[20] It may also be impossible as a practical matter for respondents to obtain the data demanded by petitioner. Obtaining private water samples during a rainstorm in the rivers at issue here would be both dangerous, because of the speed and power of high-water flows in the rivers, and potentially illegal, given restrictions on public access to certain areas of the rivers. *See* Joe Linton, *Down by the Los Angeles River* 10 (2005) (describing serious safety risks of L.A. River access on rainy days); Blake Gumprecht, *The Los Angeles River: Its Life, Death, and Possible Rebirth* 224 (2001) ("Storm-fed runoff in the Los Angeles River reaches speeds as high as forty-five miles an hour."); Cal. Reg'l Water Quality Control Bd., *Los Angeles Region Water Quality Control Plan* 2-7 note m, 2-14 note m (1995) (public access prohibited in "concrete-channelized areas" of the rivers).

defeats the statutory purpose of streamlining permit enforcement on the basis of self-reported monitoring data. It also contravenes this permit's requirements that: (a) "[t]he *Permittees* shall possess adequate legal authority to . . . [c]arry out *all* inspection, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions," JA 109 (emphasis added); (b) the District "shall monitor mass emissions" to "[d]etermine if the MS4 is contributing to exceedances of Water Quality Standards," JA 219; and (c) the District "shall" implement the monitoring required under the permit, JA 103. As the Regional Board correctly stated, to demand outfall monitoring data not generated by the permittees "undermines the enforceability of a system-wide-based Permit." JA 455. According to the Regional Board, "[s]uch a scheme would be inconsistent with the Clean Water Act's requirement for monitoring that is sufficient to determine compliance with water quality standards and its assumption that permittees will not hide from or turn a 'blind-eye' (whether willful or not) to violations." JA 448.

The District's proposed approach would impose a substantial burden on courts as well. The statute and regulations require NPDES permits to include clear limits and self-monitoring and reporting, which makes it easy to adjudge permit violations. The liability determination should be a simple matter of matching discharge reports with permit limits. The District's contrary position would require courts and juries to referee complicated technical disputes

regarding the adequacy of compliance monitoring, involving a mass of data and expert opinion in each enforcement case. This would improperly put district courts in the role of the state or federal permitting agencies and require the reconsideration of technical matters that were settled by the expert agency during the administrative process. *See City of Milwaukee*, 451 U.S. at 325 ("Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise," because of the technical complexity of water pollution control); *Conn. Fund for the Env't, Inc. v. Upjohn Co.*, 660 F. Supp. 1397, 1417 (D. Conn. 1987) ("Congress did not intend the courts to be the forums for determining the adequacy or inadequacy of scientific measurements" to establish permit violations). The result would be to undermine the straightforward enforcement that Congress sought to encourage.

Holding the District liable based on its compliance monitoring comports with the express purposes of the NPDES permit program: to define at the outset all of a discharger's obligations *and* the necessary means to monitor and enforce compliance with those obligations. This structure is especially important for regulating a complicated and massive system like the District's MS4, because it simplifies the otherwise overwhelming (or even impossible) task of amassing independent evidence of permit violations caused by an interconnected network of thousands of storm drains and outfalls.

The consequence of the District's argument is that its permit, in effect, could never be enforced against it, and the protections of the Clean Water Act would not apply to the most significant source of pollution into the Los Angeles and San Gabriel Rivers. The District openly admitted this result below, testifying that, under its theory, it could never be liable for violating the permit, even if discharges from its outfalls "were so polluted with oil and grease that they were on fire as they came out of the system." JA 303-304. Yet the statute established an enforcement-friendly permitting regime as an exception to a complete ban on *any* discharge of pollutants into navigable waters. The District's adherence to its legal position has caused the very result the permit and the Act mean to prevent: persistent violations of water quality standards with no meaningful action to fix the problem.

III. The Remedy For Permit Violations Is Apportioned According To Each Permittee's Contribution

There is nothing inequitable about holding the District liable based on the precise terms of its permit. The permit mandates remedial efforts to achieve water quality standards without compelling any individual discharger to do more than its fair share. In particular, when violations of water quality standards are detected, the permit requires each permittee to take initially modest steps to identify and root out polluted runoff only within its jurisdiction. This

remedy is accomplished through an iterative process of enhanced monitoring and progressively tighter pollution control measures proposed and implemented by each permittee for its section of the MS4 alone. JA 98-99, 213.

A. Each Permittee Is Responsible For Its Own Discharges

The mass emission stations measure the discharges of multiple co-permittees. Thirty-two co-permittee cities plus the District discharge to the Los Angeles River upstream of the monitoring station in that river, and twenty-eight co-permittee cities plus the District discharge to the San Gabriel River upstream of the monitoring station in that river. JA 207-208. The District owns and operates more of the MS4 than all other co-permittees combined. Pet. App. 106.

If the monitoring stations reveal violations of applicable water quality standards, the results establish the liability of each upstream co-permittee. That is both fair and rational, because the dischargers chose this liability scheme for themselves in advance, JA 65, 418, 454, and because the permit includes a built-in, logical program to apportion responsibility according to each party's share. The permit confines each permittee's responsibility to "discharge[s] for which it is the operator." JA 93. The permit does not require the District to remedy any other discharger's contribution of pollutants; each permittee is required

to take steps only within its own jurisdiction and to clean up only its share. JA 104, 213.[21]

To redress violations of water quality standards, the permit requires the permittees to engage in a remedial process that imposes limited initial obligations. When violations of water quality standards are detected at the monitoring stations, upstream dischargers, coordinated by the District in its role as Principal Permittee, must propose enhanced monitoring to identify the precise source of the violation, adopt improved pollution control measures, and submit compliance reports that outline a plan to meet standards. JA 98-99, 213. This process is repeated with progressively tighter pollution controls and more narrowly focused monitoring until the violations are resolved. JA 213.

Thus, the permittees may be found liable based on the mass emission monitoring designated in the permit, which samples their commingled stormwater discharges, and each is then required to identify and abate its contribution to the documented pollution. JA 93, 104. A permittee must implement this enhanced

[21] Respondents sued the District and not its co-permittee cities because the District controls the vast majority of the MS4 infrastructure that discharges polluted stormwater, and it makes sense to redress its contribution to permit violations first. Moreover, the District is in a unique position as the designated Principal Permittee, with the express responsibility to "[c]o-ordinate and facilitate activities necessary to comply" with the permit's requirements. JA 103.

pollution control only for "discharges within its boundaries." JA 104.

The permit does not impose "joint and several liability," as some of petitioner's *amici* claim, *see, e.g.*, Br. of Western Coalition of Arid States 7, because each permittee is responsible for remedying only its proportionate share of the harm. *Cf. Commonwealth v. Boston Edison Co.*, 828 N.E. 2d 16, 20 n.4 (Mass. 2005) ("Where joint and several liability applies, plaintiffs may recover their full damages from any liable party. . . . By contrast, under several liability, liable parties would pay according to their percentage of fault." (quotation omitted)). This is consistent with traditional tort principles. *See* Restatement (Second) of Torts § 433A(1)(b) & cmt. b (1965) (when multiple tortfeasors cause a single harm for which there is a reasonable basis for division of responsibility among the contributors, each is subject to liability only for the portion of the harm it caused); *id*. § 433B(2) (where the conduct of multiple actors "has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor"). Indeed, the circumstance in which several parties each discharge pollutants into a single water body is a classic hypothetical in tort law and a paradigmatic example of the imposition of several liability. *Id*. § 433B(2) cmt. c ("A typical case is the pollution of a stream by a number of factories which discharge impurities into it.").

The permit's requirement for collective monitoring and an iterative process for stormwater control makes particular sense with a jurisdiction-wide MS4 permit. The Clean Water Act allows MS4 permits to be issued on a jurisdiction-wide basis when a number of entities operate an interconnected system. 33 U.S.C. § 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(a)(3)(ii). Congress sought to provide a more efficient, streamlined permitting program, while also ensuring that stormwater discharges would not escape regulation and the Act's water quality objectives would not be frustrated. When more than one entity applies for a joint permit, as the District and its co-permittees did here, they agree to accept the responsibilities necessary to ensure effective coordination. 40 C.F.R. § 122.26(d)(2)(vii). This alleviates the administrative difficulty of writing a permit for each of the 86 municipal dischargers individually. And the District and its co-permittees benefit from jurisdiction-wide permitting, because it allows them to reduce the administrative burden and share program responsibilities, including saving on the up-front costs of individual monitoring.

Under petitioner's view, it has no legal responsibility despite widespread and undisputed water quality violations to which municipal stormwater discharges undeniably contribute. This thwarts a core purpose of the NPDES program and this MS4 permit, which is to ensure accountability for unlawful pollution.

B. Holding The District Liable Would Not Make It Responsible For The Contributions Of Other Dischargers

The District claims that other dischargers, including upstream industrial facilities and construction sites, may contribute additional pollution to the Los Angeles and San Gabriel Rivers. Pet. Br. 10 (referring to other entities that "may" discharge to rivers within Los Angeles County), 47 (referencing upstream industrial and construction sources). This argument is "irrelevant to liability under the permit." Pet. App. 116 n.9. The permit prohibits MS4 discharges that cause "or contribute to" exceedances of water quality standards. JA 97. The existence of upstream dischargers that may *also* contribute pollutants to these rivers thus has no bearing on the District's liability.

The District also complains that other parties add pollutants into the District's MS4 prior to discharge, but the permit obligates the District to limit and manage those additions into its MS4. *See, e.g.*, JA 109 (permittees must have sufficient authority to hold all dischargers to the MS4 within their jurisdiction "accountable for their contributions of pollutants and flows"), JA 120-122 (permittees must identify and track critical sources of pollutants in stormwater), JA 166-167 (permittees must identify and eliminate illicit connections to the MS4). This is exactly the sort of regime Congress intended to establish when it imposed the permitting burden for controlling urban stormwater runoff at the municipal level, rather than

requiring individual regulation of countless parking lots, homes, schools, and other potential contributing sources within every city. It is therefore no excuse to say that third parties connecting to the District's MS4 may be generating the pollutants that the District ultimately discharges. *Miccosukee*, 541 U.S. at 105 (holding that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters' ").

C. The District's Arguments Regarding Potential Future Remedies Are Both Incorrect And Premature

The District dramatically overstates the likely scope of any future remedy by claiming that a finding of liability would require it to "incur the substantial cost of building and operating water treatment facilities." Pet. Br. 49. The permit imposes a far more measured approach, under which the discovery of a violation triggers additional factfinding designed to discern the scope and extent of each permittee's contribution, followed by targeted pollution control measures proposed and implemented by each permittee. JA 213. The permit does not compel the draconian result depicted in petitioner's brief.

Respondents have never asked that the District build treatment plants for stormwater, and such a remedy would be unnecessary even if it were possible. There are dozens of practical steps the District can take to abate stormwater pollution, including

installing infiltration basins, porous pavement, and grass swales to lessen runoff entering the MS4, and intensifying street cleaning, debris removal, facility inspections, and public education campaigns to minimize stormwater pollutants at their source. 55 Fed. Reg. at 48,054-55; *see generally* Br. of Heal the Bay.[22]

Furthermore, the district court has equitable discretion to design appropriate injunctive relief for permit violations, and injunctive relief does not follow automatically from a finding of liability. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12, 317-18 (1982); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."). The district court would therefore be required to take into account the District's arguments about cost and feasibility. *Weinberger*, 456 U.S. at 312.

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[22] The District is wrong that it can "effectively exercise no control" over its discharges of pollution. Pet. Br. 26. MS4 operators exercise substantial control over the introduction of pollutants into storm sewers and the subsequent discharge of those pollutants into the nation's waters; that is the premise underlying Congress's regulation of stormwater discharges from MS4s rather than the innumerable individual sources that add pollution into each MS4. Standard stormwater management programs and landscape architecture strategies referred to as green infrastructure can successfully minimize runoff pollution, restore urban rivers, provide economic benefits, and increase quality of life for local communities. *See generally* Br. of Heal the Bay.

To the extent that achieving permit compliance imposes pollution control burdens on the District, those burdens are mandated by the Clean Water Act. Congress amended the statute in 1987 to redress urban stormwater pollution in a balanced way, in light of the recognized health and environmental risks, the practical challenges of regulation, and EPA's failure to implement any workable solution for fifteen years. Congress chose not to regulate every individual source of stormwater pollution within a city, and instead to require regulation at the municipal level. The statute is explicit that discharges from large MS4s must be subject to NPDES permits, and the District's complaints about the difficulty of complying with such a permit should be directed to Congress, not this Court.

The District's argument against a hypothetical future remedy is also premature. Because there have not yet been any remedy proceedings in this case, there has been no apportionment of the District's responsibility or any analysis of appropriate injunctive relief. Nor has there been discovery into the range of options available to the District to eliminate its pollutant contributions, and at what cost. The District is free to argue in those future proceedings that a particular remedy is unwarranted or unduly burdensome.

Finally, the District suggests that requiring it to control stormwater pollution could undermine its flood control efforts, endangering lives and property. Pet. Br. 25. This is not true. First, the District has

multiple obligations under the state law that created and governs it, including minimizing flood risk *and* preventing harm from stormwater pollution. Cal. Water Code App. § 28-2 (L.A. County Flood Control Act). Second, the same solutions that would ameliorate permit violations would make the region less, not more, susceptible to flooding, by promoting natural filtration of stormwater that would diminish discharges from the District's MS4. *See* 53 Fed. Reg. at 49,458 ("A well-developed storm water management program can reduce the amount of pollutants in storm water discharges as well as benefit flood control objectives."). The Regional Board, when it adopted the permit, found that the benefits of permit implementation would include *reduced* flood damage, fewer illnesses from swimming in contaminated water, improved aesthetic value, and better drinking water quality. C.A. ER 309-310 (Regional Board Fact Sheet and Staff Report). Permit compliance will therefore strengthen, not compromise, the District's flood control efforts.

IV. The District Raises A Series Of Legal Issues That Are Not Properly Before The Court Or Are Irrelevant To Its Liability

A. Man-Made Improvements To A Navigable Water Do Not Affect Clean Water Act Jurisdiction

Petitioner devotes a substantial portion of its brief to arguing an additional question presented in its petition for certiorari that the Court declined to

review: whether man-made improvements to a waterbody alter its status as a navigable water under the Clean Water Act. Eleven pages of argument in the District's merits brief are copied verbatim from the argument in support of the first (and rejected) question presented in the petition for certiorari. *Compare* Pet. Br. 35-43 & 51-52 *with* Pet. for Cert. 27-31 & 34-38.

The District's argument is based on an obvious misreading of the court of appeals' opinion. The court explicitly held that the Los Angeles River and San Gabriel River are navigable waters, Pet. App. 42, even though parts of each river have been lined with concrete. *See* U.S. Cert. Br. 17 ("[T]he court of appeals did not endorse the broad (and manifestly erroneous) proposition that petitioner attributes to it."). Moreover, there is no dispute between the parties on this question. Resp. Br. in Opp. 10. Whether a body of water is man-made or improved is irrelevant to whether it is a navigable water subject to the protections of the Clean Water Act.

B. The District's Argument That "Point Sources" And "Navigable Waters" Are Mutually Exclusive Was Never Presented Below And Does Not Affect Its Liability

Citing the plurality opinion in *Rapanos*, 547 U.S. at 735, the District argues for the first time that the terms "point source" and "navigable waters" are

mutually exclusive, and therefore the portions of the rivers that have been channelized to convey storm-water are solely navigable waters and not part of its MS4. Pet. Br. 40-44. This new argument is the opposite of the position the District took in the court of appeals, in which it argued that the rivers and the MS4 were "one and the same." C.A. Reh'g Pet. 2 ("Because the MS4 and each river are not distinct water bodies but rather one and the same, there could be no 'discharge' as a matter of law."); *id*. 4 ("The MS4 and each of the rivers are not separate and distinct bodies of water.").

There is no need for the Court to decide whether, or under what circumstances, a body of water can be both a "point source" and a "navigable water" under the Clean Water Act. *See* U.S. Merits Br. 13 & n.5 ("The proper disposition of this case does not turn on the choice between those characterizations."). The District is plainly subject to NPDES permit requirements because it discharges from an MS4 – including from thousands of classic point source pipes, drains, and outfalls – into the Los Angeles and San Gabriel Rivers, both of which are unquestionably navigable waters. Pet. App. 42; U.S. Merits Br. 13 ("[T]he salient point is that the channelized portions of the rivers are 'waters of the United States,' whether or not they are *also* part of the MS4.").

C. EPA's Water Transfer Rule Does Not Apply To Discharges From An MS4

The District also relies on EPA's 2008 water transfer rule, 40 C.F.R. § 122.3(i), to argue that it should not be liable for violating its permit. Pet. Br. 33. In promulgating that rule, however, EPA twice explained that it does not apply to discharges from MS4s. 73 Fed. Reg. at 33,702 n.7, 33,705.

The water transfer rule provides that water transfers between navigable waters that are not subject to intervening industrial, municipal, or commercial use do not require a permit. 73 Fed. Reg. at 33,697. EPA expressly clarified that this rule does not apply to MS4s, stating that "[m]unicipal separate storm sewer systems . . . are clearly subject to regulation under the Act. CWA section 402(p)." *Id*. at 33,702 n.7. EPA explained: "The Clean Water Act also clearly imposes permitting requirements on . . . large and medium municipal separate storm sewer systems. . . . [T]his interpretation regarding water transfers does not affect EPA's longstanding regulation of such discharges." *Id*. at 33,705.

Accordingly, the District's argument has no basis. The water transfer rule does not implicate regulation of MS4s, let alone enforcement of an existing MS4 permit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD J. LAZARUS
1545 Massachusetts Ave.
Cambridge, MA 02138

DANIEL COOPER
LAWYERS FOR CLEAN WATER
1004A O'Reilly Ave.
San Francisco, CA 94129

AARON COLANGELO
Counsel of Record
MITCHELL S. BERNARD
CATHERINE MARLANTES RAHM
STEVEN FLEISCHLI
NATURAL RESOURCES
DEFENSE COUNCIL
1152 15th St. NW, Suite 300
Washington, DC 20005
(202) 289-2376
acolangelo@nrdc.org

33 U.S.C. § 1318. Records and reports; inspections

(a) Maintenance; monitoring equipment; entry; access to information

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), 1345, and 1364 of this title –

> (A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

* * *

33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

* * *

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of –

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on

the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

* * *

33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) 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. § 1369. Administrative procedure and judicial review

* * *

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under

paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

* * *

40 C.F.R. § 122.2 Definitions.

* * *

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

* * *

40 C.F.R. § 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25)

* * *

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

* * *

(2) Part 2. Part 2 of the application shall consist of:

(i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

* * *

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with

permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

* * *

(iii) Characterization data. * * * The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

* * *

(D) A proposed 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.

* * *

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40 C.F.R. § 122.41 Conditions applicable to all permits (applicable to state programs, see § 123.25)

The following conditions apply to all NPDES permits. Additional conditions applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

(a) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

* * *

(j) Monitoring and records.

(1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR Part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

(3) Records of monitoring information shall include:

(i) The date, exact place, and time of sampling or measurements;

(ii) The individual(s) who performed the sampling or measurements;

(iii) The date(s) analyses were performed;

(iv) The individual(s) who performed the analyses;

(v) The analytical techniques or methods used; and

(vi) The results of such analyses.

(4) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136 unless another method is required under 40 CFR subchapters N or O.

(5) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

* * *

40 C.F.R. § 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25)

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

* * *

(i) Monitoring requirements. In addition to § 122.48, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

* * *

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under § 122.41(*l*) (1), (4), (5), and (6) at least annually.

* * *

40 C.F.R. § 122.45 Calculating NPDES permit conditions (applicable to State NPDES programs, see § 123.25)

(a) Outfalls and discharge points. All permit effluent limitations, standards and prohibitions shall be established for each outfall or discharge point of the permitted facility, except as otherwise provided under § 122.44(k) (BMPs where limitations are infeasible) and paragraph (i) of this section (limitations on internal waste streams).

* * *

---

40 C.F.R. § 122.48 Requirements for recording and reporting of monitoring results (applicable to State programs, see § 123.25)

All permits shall specify:

* * *

(b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;

* * *

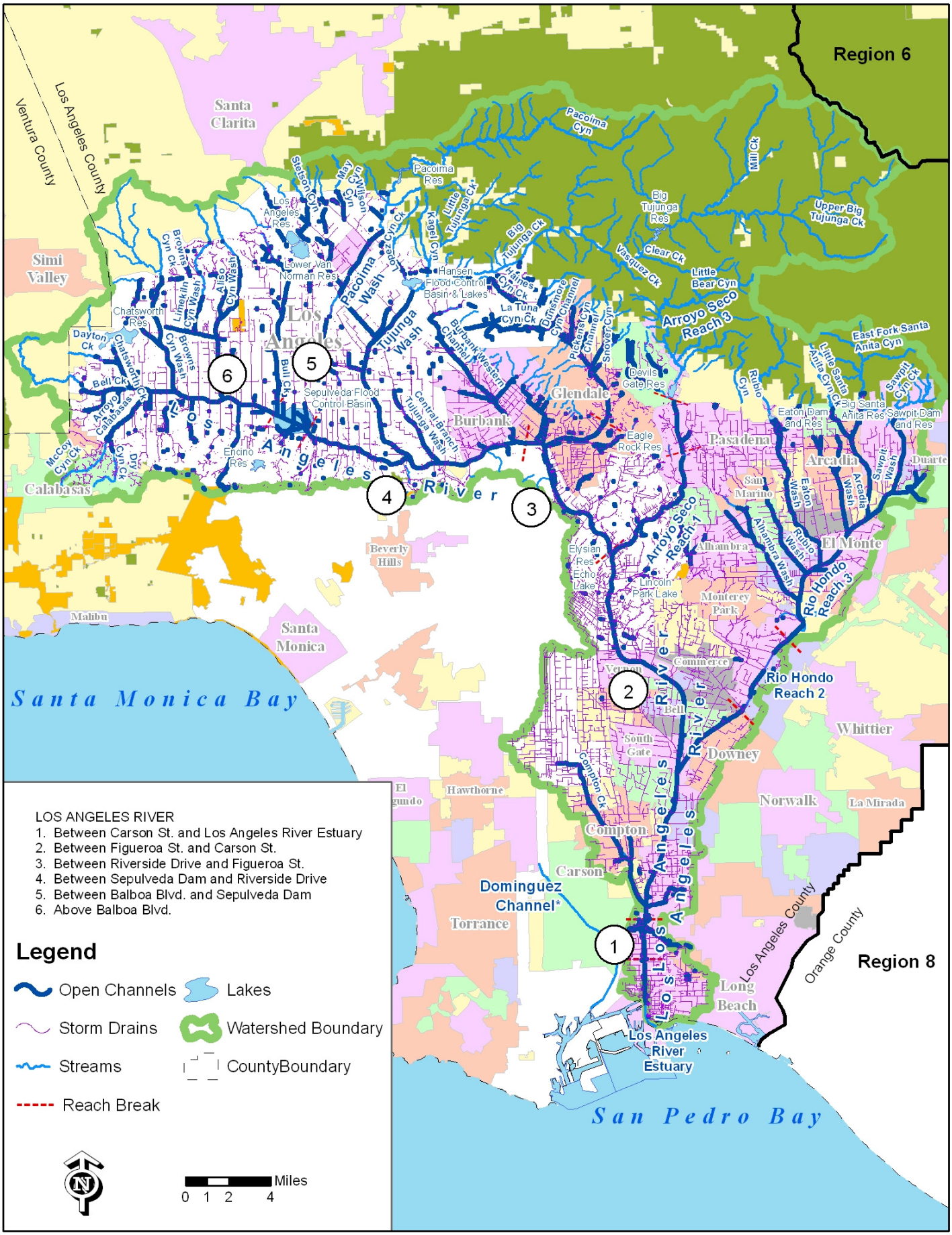

Figure C-4: Los Angeles River Watershed Management Area Flow Schematic.

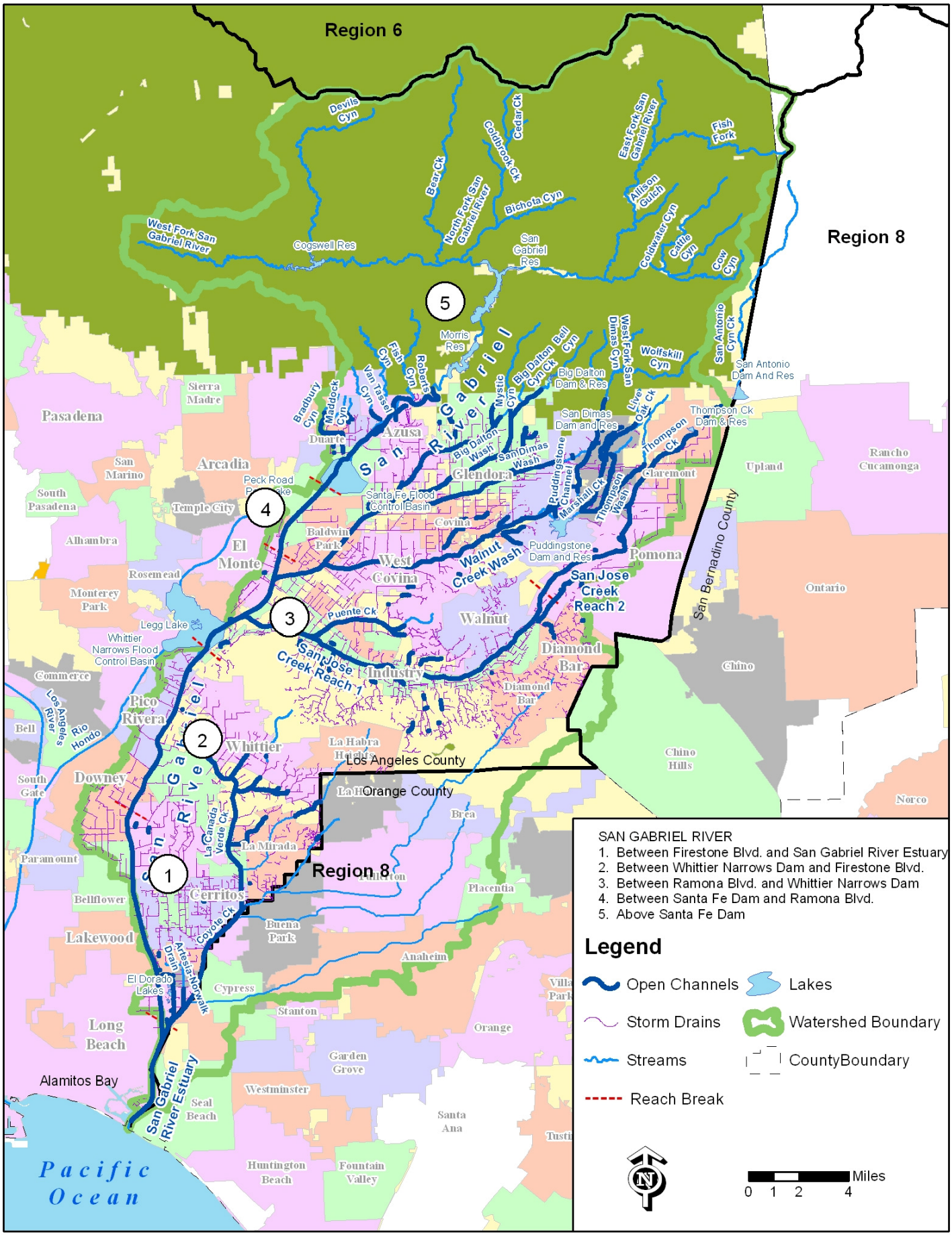

Figure C-5: San Gabriel River Watershed Management Area Flow Schematic.