

Supreme Court Rules No NPDES Permit Violation in L.A. County Stormwater Case

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On January 8, 2013, the United States Supreme Court reversed the Ninth Circuit Court of Appeals' ruling that the Los Angeles County Flood Control District violated the Federal Clean Water Act's Los Angeles County Municipal Separate Storm Sewer System ("MS4") NPDES Permit. Concluding there was no NPDES Permit violation, the Supreme Court issued a short and narrow opinion just one month after the hearing in *Los Angeles County Flood Control District v. NRDC*.

The MS4 Permit generally prevents a municipal permittee from allowing a "discharge" of pollutants from its MS4 system into the "navigable waters" of the United States, which include rivers, lakes, harbors, bays, estuaries and the Pacific Ocean, where that discharge causes or contributes to a violation of water quality standards in the navigable water.

The Ninth Circuit found that violations of water quality standards measured at in-stream "mass emission stations" inside the Los Angeles and San Gabriel Rivers violated the MS4 Permit. It reasoned that these in-stream stations existed in "concrete-lined" portions of the rivers that were "controlled" by the County Flood Control District and flowed into lower "natural" portions of the same rivers.

The Supreme Court found, under its prior decision in *South Florida Water Management District v. Miccosukee Tribe*, that a violation did not exist under these facts because water flowing through an in-stream mass emission station in a concrete-lined portion of a river into a lower portion of the same river is not a "discharge" under the Clean Water Act. This determination is based on the commonsense conclusion that one cannot "discharge" from a river into the same river. Without a "discharge" from the MS4 system into a river, there can be no NPDES Permit violation.

The Supreme Court's narrow opinion was based upon its determination that it had previously decided the question in the *Miccosukee* decision. The Court did not reach any larger questions of the exact scope of Clean Water Act jurisdiction in municipal stormwater discharge cases – those must wait for another day.

Public agencies should note that the new Los Angeles County MS4 Permit, effective December 28, 2012, requires both "in-stream" and "outfall" monitoring. The latter is measured at the precise points at which the MS4 drains into "navigable waters." The Supreme Court's ruling addresses problems in determining violations based only on "in-stream" monitoring. The ruling has no application to "outfall" monitoring, which will certainly be utilized to determine violations under the new MS4 Permit in the future.

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For more information on Los Angeles County Flood Control District v. NRDC or any NPDES matter, please contact Andrew J. Brady at abrady@rwglaw.com or any of the members of the Firm's Environmental Law Department.