No. 11-460

IN THE

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al*.,
Respondents.

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

AMICI CURIAE BRIEF OF NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND U.S. CONFERENCE OF MAYORS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

The *amici curiae* are as follows:

The National Governors Association ("NGA"), founded in 1908, is the collective voice of the nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths and territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* brief to this Court in cases, like this one, that raise issues of vital state concern.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating

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[1] The parties have consented to the filing of this *amici curiae* brief, and their letters of consent are on file with the Clerk. (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amici* made a monetary contribution to its preparation (Rule 37.6).

and developing the professional management of local governments throughout the world.

The Council of State Governments ("CSG") is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The *amici* represent various state and local government organizations that have an interest in the proper administration, implementation, and enforcement of the Clean Water Act ("CWA"). The CWA establishes the National Pollutant Discharge Elimination System ("NPDES"), which authorizes the U.S. Environmental Protection Agency ("EPA")—or the states that have been authorized to administer their own NPDES programs—to exercise permit authority over discharges of pollutants from point sources into the waters of the United States. The Ninth Circuit's decision holds that municipal separate storm sewer systems ("MS4s"), which local governments generally operate, are subject to the same discharge prohibitions and requirements of the NPDES that apply to other NPDES-regulated dischargers. On the contrary, the same statutory prohibitions and requirements do not apply to MS4s. Rather than prohibiting MS4s from discharging pollutants except to the ex-

tent authorized by the NPDES, as in the case of other NPDES-regulated dischargers, the CWA instead provides that MS4s must meet best management practices by establishing "controls" and other management practices and techniques to "reduce" discharge of pollutants to the "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B). The Ninth Circuit decision, by requiring MS4s to actually prevent the discharge of pollutants into waterways in the same manner as other NPDES-regulated dischargers, has misconstrued the CWA and imposed an obligation on MS4s that the CWA does not impose. Thus, the Ninth Circuit's decision significantly affects state and local governments, and the *amici* have an interest in this case.

SUMMARY OF ARGUMENT

This *amici* brief makes the following arguments:

1. The Clean Water Act ("CWA") prohibits the "discharge of a pollutant," except as authorized by the CWA, and authorizes such a discharge pursuant to a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. §§ 1311(a), 1342(a). Although NPDES permit requirements apply to municipal separate storm sewer systems ("MS4s") in discharging polluted stormwater, the same prohibitions and requirements of the NPDES that apply to other NPDES-regulated dischargers do not apply to MS4s. Instead, the CWA provides that NPDES permits for MS4s shall establish "controls," including "management practices" and other techniques to "reduce" the discharge of pollutants "to the maximum extent practicable." *Id.* at § 1342(p)(3)(B). Thus, while other NPDES-regulated dischargers are prohibiting from discharging pollu-

tants that fail to meet effluent limitations established in the NPDES permit, MS4 operators are instead required to adopt best management practices to "reduce" pollution "to the maximum extent practicable." The Ninth Circuit erred in holding that the Los Angeles County Flood Control District's ("District") MS4 is subject to the same statutory prohibitions and requirements that apply to other point source discharges, and that the District's MS4 violated the CWA by discharging pollutants into waterways. The Ninth Circuit's decision adversely affects the states that administer their own NPDES programs and local governments that operate MS4s by requiring MS4s to comply with the same statutory prohibitions and requirements that apply to other dischargers.

2. Even assuming *arguendo* that the CWA imposes the same statutory prohibitions and requirements against MS4s as against other NPDES-regulated dischargers, the Ninth Circuit still misapplied the CWA. The CWA prohibits an unauthorized "discharge of a pollutant," 33 U.S.C. § 1311(a), which is defined as an "addition" of pollutants to "the waters of the United States" from a "point source," *id*. at §§ 1362(7), -(12). The Ninth Circuit held that the District's MS4 caused an "addition" of pollutants to the Los Angeles and San Gabriel Rivers because the District's mass emissions monitoring stations "detected" stormwater pollutants in the rivers, and the District's downstream "outfalls" "again discharged" the pollutants into the rivers. In fact, the monitoring stations and downstream "outfalls"—both of which are located in the rivers—have not caused an "addition" of pollutants to the rivers because the pollutants were already in the rivers before they reached these facilities. The Ninth Circuit decision adversely affects local governments that operate

MS4s by subjecting them to potential liability for "discharging" pollutants into waterways even though the pollutants were already in the waterways before they were ostensibly "discharged."

3. Further, the District's MS4 has not caused an "addition" of a pollutant to "the waters of the United States" under this Court's decision in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004). There, this Court held that a discharge of a pollutant from one water body into another water body does not constitute an "addition" of the pollutant to "the waters of the United States" if the two water bodies are not "meaningfully distinct." Although the Ninth Circuit held that the District's MS4 discharged pollutants from the monitoring stations and downstream "outfalls" into the Los Angeles and San Gabriel Rivers, the segments of the rivers above and below these facilities are not "meaningfully distinct," and thus there has been no "addition" of a pollutant to the "waters of the United States." Hence, the Ninth Circuit's decision conflicts with this Court's decision in *Miccosukee Tribe*. The Ninth Circuit's decision adversely affects state and local governments by subjecting them to liability under the CWA for discharging pollutants from and into water bodies that are not "meaningfully distinct," contrary to *Miccosukee Tribe*.

4. The District's MS4 also has not caused an "addition" of a pollutant to "the waters of the United States" under a recent regulation adopted by the U.S. Environmental Protection Agency ("EPA"). The regulation provides that the transfer of a pollutant from one water body to another water body does not constitute an "addition" of the pollutant to "the waters of the United States" within the meaning of

the CWA if both water bodies are classified as "the waters of the United States." 40 C.F.R. § 122.3(i). The Los Angeles and San Gabriel rivers are classified as "the waters of the United States" both above and below the monitoring stations and downstream "outfalls" where, according to the Ninth Circuit, the pollutants were "detected" and "again discharged" into the rivers. Thus, the Ninth Circuit decision conflicts with the EPA's regulation. It also adversely affects state and local governments by subjecting them to liability under the CWA for discharging pollutants from and into water bodies that are both classified as "the waters of the United States," contrary to the EPA regulation.

5. In enacting the CWA, Congress established the dual goals of (1) restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, and (2) recognizing the states' "primary responsibilities and rights" to prevent and reduce water pollution and to "plan the development of land and water resources." 33 U.S.C. §§ 1251(a), -(b). The CWA thus is a partnership between the federal government and state and local governments in controlling water pollution. Most NPDES programs are administered by the states rather than the federal government. Currently 46 states have been authorized to administer their own NPDES programs. Under the CWA, the states are authorized not only to regulate point sources of pollution under the NPDES but also to regulate nonpoint sources of pollution under their own laws. Therefore, state and local governments have ample authority to regulate MS4s both under the NPDES and under their own laws. Regardless of the extent to which MS4s are subject to regulation under the CWA, MS4s are

subject to significant regulation under state and local laws.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT IMPOSE THE SAME PROHIBITIONS AND REQUIREMENTS AGAINST MUNICIPAL SEPARATE STORM SEWER SYSTEMS THAT IT IMPOSES AGAINST OTHER REGULATED DISCHARGERS.

The Ninth Circuit held that the Los Angeles County Flood Control District ("District"), in operating its municipal separate storm sewer system ("MS4"),[2] violated the Clean Water Act ("CWA") because the MS4 discharged stormwater pollutants that "exceeded" water quality standards into the Los Angeles and San Gabriel Rivers, thus "allowing untreated and heavily-polluted stormwater to flow unabated from the MS4 into the Watershed Rivers . . . ." *NRDC v. County of Los Angeles*, 673 F.3d 880, 885, 889-90, 891-92 (9th Cir. 2011) (hereinafter "*NRDC*"). The Ninth Circuit stated that an MS4 is not treated "differently" under the CWA from other sources of pollution, *id*. at 895, and is not subject to a "less rigorous or enforceable regulatory scheme," *id*. at 894. The Ninth Circuit thus held that MS4s are subject to the same statutory prohibitions and re-

[2] A "[m]unicipal separate storm sewer" is "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" that is owned or operated by a state or local agency and "[d]esigned or used for collecting or conveying storm water," other than a publicly owned treatment work. 40 C.F.R. § 122.26(b)(8). Thus, an MS4 is a "system" of such sewers that collect or convey stormwater.

quirements that apply to others whose discharges are regulated by the CWA. On the contrary, the same statutory prohibitions and requirements do not apply to MS4s.

Section 301(a) of the CWA prohibits "the discharge of any pollutant" except as authorized by the CWA. 33 U.S.C. § 1311(a). One of the provisions for which an exception is provided is section 402, which establishes the National Pollutant Discharge Elimination System ("NPDES"). Under the NPDES, the U.S. Environmental Protection Agency ("EPA") is authorized to issue a permit for the "discharge of a pollutant." *Id*. at § 1342(a). An NPDES permit typically establishes "effluent limitations" for discharges of pollutants. 33 U.S.C. §§ 1311(e), 1342(a)(1); *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-29 (9th Cir. 2002). Thus, section 301 prohibits an unauthorized discharge of a pollutant, and section 402 authorizes such a discharge pursuant to an NPDES permit, which typically establishes effluent limitations.

States are authorized to issue NPDES permits in lieu of the EPA if the state adopts an NPDES program that meets federal standards and is approved by the EPA. 33 U.S.C. § 1342(b); *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). To date, 46 states have been authorized to administer their own NPDES programs.[3] Thus, the states rather than the EPA primarily administer the NPDES nationwide.

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[3] All states except Idaho, Massachusetts, New Hampshire, and New Mexico have EPA-approved NPDES programs. *State Program Status*, ENVIRONMENTAL PROTECTION AGENCY, http://cfpub.epa.gov/npdes/statestats.cfm (last visited Aug. 15, 2012).

The phrase "discharge of a pollutant," as used in sections 301(a) and 402(a) and elsewhere in the CWA, is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The word "addition" is not defined in the CWA. The term "navigable waters" is defined as "the waters of the United States," *id*. at § 1362(7), but the latter term is not defined. *Rapanos v. United States*, 547 U.S. 715, 723-29 (2006) (plurality opinion).[4] Thus, the Act prohibits an unauthorized "addition" of a pollutant to "the waters of the United States" from a point source, however the quoted terms are defined.

The Water Quality Act of 1987 provides that NPDES permit requirements apply to industrial and municipal discharges of stormwater. 33 U.S.C. § 1342(p). The 1987 Act, however, establishes different NPDES standards for industrial stormwater discharges and MS4 stormwater discharges. The 1987 Act provides that permits for industrial stormwater discharges "shall meet all applicable provisions of this section [section 402] and section [301] of this title." *Id.* at § 1342(p)(3)(A). On the other hand, the Act provides that permits for MS4 discharges "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 deter-

[4] The *Rapanos* plurality opinion stated that the phrase "the waters of the United States" includes only "relatively permanent, standing or flowing bodies of water." *Rapanos*, 547 U.S. at 732 (plurality opinion). Justice Kennedy's concurring opinion argues that the phrase also includes non-navigable wetlands that have a "significant nexus" to navigable waters. *Id.* at 760-61, 779 (Kennedy, J., concurring).

mines appropriate for the control of such pollutants." *Id*. at § 1342(p)(3)(B)(iii) (emphasis added).

Thus, while the 1987 Act provides that industrial stormwater dischargers "shall meet all applicable requirements" of sections 301 and 402—which as noted above collectively prohibit the "discharge of a pollutant" except as authorized by an NPDES permit—the 1987 Act does not provide that MS4 stormwater dischargers must meet the same requirements. Instead, it provides that MS4s must establish "controls," including "management practices" and other "techniques" and "methods," to "reduce" the discharge of pollutants "to the maximum extent practicable." In effect, Congress imposed statutory prohibitions against industrial stormwater discharges that do not meet water quality standards but did not impose the same statutory prohibitions against MS4s. Congress required only that MS4s meet statutorily-defined best management practices in discharging stormwater pollutants. Since Congress imposed specific statutory prohibitions against industrial stormwater discharges but not against MS4 stormwater discharges, Congress made clear that MS4 discharges are not subject to the same statutory prohibitions that apply to industrial stormwater discharges and other NPDES-regulated discharges. When Congress enacts a statute that imposes an obligation on one category of persons but not against another category of persons, Congress presumptively does not intend that the obligation apply to the latter category. *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) (applying *expressio unis est exclusio alterius* principle in construing statute); *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979) (same).

MS4s are still subject to regulation under the NPDES. The EPA has described several best management practices that MS4s should utilize in "reduc[ing]" discharges of polluted stormwater "to the maximum extent practicable." These management practices provide the basis for conditions in NPDES permits for MS4 stormwater discharges. The EPA described several such management practices in adopting regulations to implement the 1987 Act. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,052 (Nov. 16, 1990) (hereinafter "55 Fed. Reg."). These management practices include, for example, measures to reduce pollutants in runoff from commercial and residential areas, *id*. at 48,054; measures to prevent illicit discharges (i.e., non-stormwater discharges entering the MS4s), *id.* at 48,055; measures to reduce discharges from municipal landfills and other areas, *id.* at 48,056; measures to reduce runoff from construction sites, *id*. at 48,058; and measures to assess the controls, *id.*

In addition, the EPA has adopted a "National Menu of Stormwater Best Management Practices," which describes best management practices for six categories of Stormwater Phase II: public education, public involvement, illicit discharge detection and elimination, construction, post-construction, and pollution prevention/good housekeeping. *National Menu of Stormwater Best Management Practices*, ENVIRONMENTAL PROTECTION AGENCY, http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm (last visited Aug. 15, 2012).[5] Thus, the EPA has ensured that

[5] To provide a concrete example of one such best management practice, the management practice for construction sites "dis-

MS4s are subject to extensive regulation under the NPDES, by describing several best management practices that MS4s should meet as a condition for their NPDES permits.

The Ninth Circuit's view that MS4 stormwater discharges are subject to the same statutory prohibitions and requirements that apply to industrial stormwater discharges and other NPDES-regulated discharges is incorrect. Rather than *prohibiting* MS4 stormwater discharges unless they comply with sections 301 and 402, as in the case of industrial stormwater discharges and other NPDES-regulated discharges, the CWA instead requires MS4 operators to apply best management practices to "reduce" stormwater pollution "to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B). If an MS4 operator applies such best management practices, it is in compliance with the CWA, regardless of whether the MS4 actually discharges stormwater pollutants into waterways. Nothing in the 1987 Act prohibits, or can be construed as prohibiting, an MS4 from discharging stormwater pollutants into waters. Therefore, the Ninth Circuit's conclusion that the District violated the CWA because its MS4 "allow[ed] untreated and heavily-polluted stormwater to flow unabated from

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turbing one or more acres" must include development of "[r]equirements to implement erosion and sediment control best management practices (BMPs), [r]equirements to control other waste at the construction site, [p]rocedures for reviewing construction site plans, [p]rocedures to receive and consider information submitted by the public, and [p]rocedures for inspections and enforcement of stormwater requirements at construction sites." *Construction Site Stormwater Runoff Control*, ENVIRONMENTAL PROTECTION AGENCY, http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action+min_measure&min_measure_id=4 (bullets deleted) (last visited Aug. 15, 2012).

the MS4 into the Watershed Rivers," *NRDC*, 673 F.3d at 885, misconceives the CWA. The Ninth Circuit imposed an obligation on the District's MS4 that the CWA itself does not impose, and that is inconsistent with the CWA.

By not imposing the same prohibitions and requirements against MS4 stormwater discharges that it imposed against other NPDES-regulated discharges, Congress recognized that the entities responsible for the latter discharges generally are able to prevent the discharge of pollutants into waterways, but that MS4 operators generally have more difficulty doing so. An industrial discharger, for example, can decide whether to discharge its untreated industrial waste into a waterway, or instead treat the waste before discharging it. By contrast, local governments operating MS4s generally do not have the same control over discharges of stormwater pollutants into waterways. Stormwater is caused by high precipitation events over which the local government has no control, and typically accumulates on property, such as parking lots and shopping malls, which the local government does not own or control. The stormwater typically picks up pollutants, such as oil, toxic chemicals, and heavy metals. The MS4 prevents the flooding of property by collecting and channeling the stormwater through drains, culverts, and other conduits into downstream waterways. Although the MS4 may substantially reduce the pollutants in the stormwater, it often cannot eliminate the pollutants altogether, simply because of the large volume of stormwater entering the MS4 during high precipitation events occurring over short periods of time. In essence, a local government operating an MS4 performs a public service by collecting and channeling the stormwater and preventing local flooding.

A local government operating an MS4—in adopting "controls" and "management practices" to "reduce" stormwater pollutants "to the maximum extent practicable"—typically selects the controls and practices that best serve the needs of the local community, taking into account such factors as the local infrastructure, the frequency of flooding, and the pollutants in the stormwater, among other factors. These local government practices often are highly effective in reducing pollutants in stormwater, even though they may not always eliminate the pollutants altogether. Under the Ninth Circuit's view, local governments operating MS4s potentially would be required to cease discharging pollutants from MS4s altogether, which is unrealistic, or required to seek different and additional kinds of NPDES permits, which would be burdensome to local governments and highly costly to them and, ultimately, local taxpayers. The states that administer their NPDES programs would, in turn, bear substantial additional costs and burdens in administering and enforcing expanded NPDES programs in the stormwater context. The CWA's more practical and limited goal is not to prohibit MS4s from discharging stormwater pollutants altogether but instead to encourage local governments to improve their MS4 facilities by best management practices and reduce stormwater pollution to the extent feasible.

The EPA recognized this limited congressional goal in adopting regulations implementing the 1987 Act, stating:

> When enacting this provision [section 402(p)], Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers solely through traditional end-of-pipe

> treatment and intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits for industrial process discharges or POTWs. The legislative history indicates, municipal storm sewer system "permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge." [Vol. 132, Cong. Rec. S16425 (daily ed. Oct. 16, 1986)].
>
> A shift towards comprehensive storm water quality management programs to reduce the discharge of pollutants from municipal separate storm sewer systems is appropriate for a number of reasons. First, discharges from municipal storm sewers are highly intermittent, and are usually characterized by very high flows occurring over relatively short time intervals . . . . Second, the nature and extent of pollutants in discharges from municipal systems will depend on the activities occurring on the lands which contribute runoff to the system. Municipal separate storm sewers tend to discharge runoff drained from lands used for a wide variety of activities. Given the material management problems associated with end-of-pipe controls, management programs that are directed at pollutant sources are often more practical than relying solely on end-of-pipe controls.

55 Fed. Reg. at 48,037-38.

The District's MS4 permit, read in light of the statutory language, does not support the Ninth Circuit's conclusion that the District's MS4 is violating the permit. The permit, as described by the Ninth

Circuit, provides that "[d]ischarges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited," and that "[d]ischarges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for [sic], shall not cause or contribute to a condition of nuisance." *NRDC*, 673 F.3d at 892. These provisions, properly interpreted, require only that the District not take action for which it is "responsible" that "cause[s] or contribute[s] to" water quality violations or conditions of nuisance. Thus, the District may be liable for a violation if, through some action of its own, it causes more pollutants to be in the stormwater than were already in the stormwater prior to its entry into the District's MS4. The District would *not* be liable for a violation, however, if the District does *not*, through its own action, cause more pollutants to be in the stormwater. In the latter instance, the District has not "cause[d] or contribute[d] to" water quality violations, and thus has not violated its permit. If the permit were construed otherwise—as subjecting the District to liability under the CWA even though the District has not caused additional pollutants to be included in the stormwater—the permit would be inconsistent with the CWA. As explained above, the CWA does not impose liability on an MS4 operator simply because the MS4 discharges stormwater pollutants into waterways.

II. THE DISTRICT'S MS4 HAS NOT CAUSED AN "ADDITION" OF POLLUTANTS TO WATERWAYS FROM A "POINT SOURCE."

We now assume *arguendo*—contrary to the express provision of CWA section 402(p)—that the same CWA prohibitions and requirements that apply to NPDES-

regulated discharges also apply to MS4 stormwater discharges. Under this assumption, the Ninth Circuit still misapplied the CWA because the District's MS4 has not caused an "addition" of pollutants to waterways from a "point source."

The Ninth Circuit held that the District's MS4 caused an "addition" of pollutants to the Los Angeles and San Gabriel Rivers because the District's mass emissions monitoring stations, which measure stormwater pollutants and are located in the rivers "detected" that stormwater pollutants were exceeding water quality standards, and, after the pollutants exited the monitoring stations, they were "again discharged" into the rivers through downstream "outfalls."[6] Since the District "controlled" the pollutants when they were measured at the monitoring stations and "again discharged" through the downstream "outfalls," the District "caused or contributed to" a violation of water quality standards. *NRDC*, 673 F.3d at 899-900. In short, the Ninth Circuit held that the District caused an "addition" because it had "control" of the pollutants when they were measured at the monitoring stations and later discharged from the "outfalls," both events occurring within the Los Angeles and San Gabriel Rivers.

The Ninth Circuit's analysis and conclusion were fundamentally wrong. The stormwater pollutants were already in the Los Angeles and San Gabriel

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[6] Although the Ninth Circuit extensively described the mass emissions monitoring stations, the Ninth Circuit did not describe the downstream "outfalls" through which the pollutants were "again discharged" into the watershed rivers. Since the pollutants were already in the rivers prior to their entry into the "outfalls," the "outfalls" presumably had no effect in regulating or controlling the pollutants.

Rivers when they entered the District's mass emissions monitoring stations and, later, when they entered and were "again discharged" by the downstream "outfalls." Thus, the monitoring stations and downstream "outfalls" did not cause the "addition" of pollutants or anything else to the rivers because any pollutants were already in the rivers before they reached these facilities. If any pollutants were "added" to the rivers, they were added at the District's *upstream* outfalls, where any pollutants were *initially* discharged from the District's MS4 into the rivers. Under the EPA's stormwater regulations, an "outfall" is a "point source," and is "the point where a municipal separate storm sewer discharges to waters of the United States." 40 C.F.R. § 122.26(b)(9). Therefore, while the District's *upstream* outfalls may have "added" pollutants to the rivers, assuming that pollutants were added, the District's monitoring stations and *downstream* "outfalls" did not "add" any pollutants to the rivers because the pollutants were already in the rivers before they reached these facilities. Under the Ninth Circuit decision, a local government operating an MS4 would be responsible for all upstream pollution even if it is not from an upstream point source.

The Ninth Circuit apparently concluded that the prohibited "discharge" of pollutants occurred at the *downstream* "outfalls" located in the rivers—rather than at the *upstream* outfalls where the pollutants, if any, were initially discharged into the rivers—because of the difficulty and inconvenience of establishing that the pollutants were actually discharged at the upstream outfalls. As the Ninth Circuit put it, the plaintiffs would face a "Sysyphean task" in trying to prove that water quality violations were occurring at the upstream outfalls, and, since there is

"no dispute" that the District's MS4 added polluted stormwater to the watershed rivers, the "precise location" of the District's outfalls is "irrelevant." *NRDC*, 673 F.3d at 899-900.

On the contrary, the "precise location" of an outfall is critical in determining whether an MS4 has caused an "addition" of pollutants to a waterway within the meaning of the CWA, because any such "addition" can only have occurred at the outfall where the pollutants were initially discharged into the waterway. If the pollutants were already in the waterway when they were ostensibly "discharged," the supposed discharge did not cause an "addition" of the pollutants to the waterway. Although the Ninth Circuit failed to appreciate this point, the district court fully understood it, stating that "[o]utflow" from the District's "upstream outlets would be considered discharges under the Permit and the Clean Water Act" but "there is no data showing that any of these upstream discharges by the District are causing or contributing to the violations of the Water Quality Standards." Pet. App. 120. Although it may be difficult and inconvenient to determine whether the District's MS4 discharged pollutants exceeding water quality standards at the upstream outfalls, the difficulty and inconvenience of this inquiry provides no basis for departing from statutory requirements.

Indeed, it is doubtful that the District's monitoring stations and downstream "outfalls" are even "point sources" within the meaning of the CWA, apart from the fact that they have not caused an "addition" of pollutants to the rivers. Under the CWA, a "point source" is "any discernible, confined and discrete conveyance," including a "pipe, ditch, channel, tunnel, conduit," among other facilities, "*from which* pollu-

tants are or may be *discharged*." 33 U.S.C. § 1362(14) (emphasis added). Thus, a point source is not merely a conveyance, but is a conveyance "from which" pollutants are "discharged." The "discharge" of a pollutant "from" a facility connotes that the facility must have *caused* the discharge of pollutants in some manner, rather than merely served as a conduit through which the pollutants pass without being regulated or controlled—just as, for example, a discharge from military service or employment connotes that the discharging agency must in some manner have caused the discharge.

If the conclusion were otherwise—that is, if a "point source" were any conveyance through which pollutants might pass without being regulated or controlled—an unregulated and unimpeded flow of polluted water through a series of pipes or conduits located in navigable waterways would require a separate NPDES permit for each pipe or conduit. Congress obviously did not intend such an absurd result, which would be costly and burdensome for state and local governments. Thus, the CWA requires an NPDES permit for the *initial* discharge of a pollutant into waters of the United States, 40 C.F.R. § 122.26(b)(9), but does not require a separate permit each time that the pollutant thereafter flows through a pipe or other conveyance. Since the District's monitoring stations and downstream "outfalls" did not regulate or control the flow of stormwater pollutants, these facilities cannot be properly considered "point sources" within the meaning of the CWA, apart from the fact that they did not cause an "addition" of pollutants to the rivers.

The Ninth Circuit also attached significance to this Court's decision in *South Florida Water Management*

District v. Miccosukee Tribe, 541 U.S. 95 (2004), which held that a point source may cause an "addition" of pollutants within the meaning of the CWA even though the point source is not the "original source" of the pollutants. *Miccosukee Tribe*, 541 U.S. at 105; *NRDC*, 673 F.3d at 900. The fact that a point source may cause an "addition" even though it is not the original source of the pollutants does not mean that anything that flows through a point source is an "addition." Rather, if the pollutants are already in the water body before they enter the point source and remain in the water body after they exit from the point source, the point source has not caused an "addition" of the pollutants to the water body, regardless of where the pollutants originated.

Although the Ninth Circuit held that the District's putative "control" of the stormwater at the monitoring stations and downstream "outfalls" demonstrated that the District was liable for violating the CWA, *NRDC*, 673 F.3d at 900-01, an MS4 operator does not have "control" over stormwater discharges in the same way that other dischargers have control over other types of discharges. A typical industrial or municipal discharger has control over the discharge of untreated waste into waterways because the discharger can decide whether to discharge the untreated waste or instead treat the waste before discharging it. An MS4 operator does not have the same kind of control over the discharge of polluted stormwater, even though the MS4 may be subject to local regulations as a condition of its NPDES permit. Stormwater is commonly generated by short interval, high precipitation events that are beyond the control of the MS4 operator, and the stormwater generally flows from lands the MS4 operator has no control over. The MS4 collects and channels the stormwater

in order to prevent local flooding, and, in compliance with best management practices, it removes as many pollutants as possible from the stormwater before discharging it into downstream waterways. In adopting its stormwater regulations, the EPA recognized that stormwater discharges cause many water quality impacts that are beyond the control of MS4 operators, stating:

> The water quality impacts of discharges from municipal separate storm sewer systems depend on a wide range of factors including: the magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of the land that is impervious to rainfall, land use activities, the presence of illicit connections, and the ratio of the storm water discharges to receiving water flow.

55 Fed. Reg. at 48,038. All of these factors, except possibly for the "presence of illicit connections," are beyond the control of MS4 operators. Thus, contrary to the Ninth Circuit decision, MS4 operators do not have the same "control" over stormwater discharges that other dischargers have over other types of discharges, and there is no basis for subjecting them to liability under the CWA because of their putative "control."

III. THE DISTRICT'S MS4 HAS NOT CAUSED AN "ADDITION" OF POLLUTANTS TO "THE WATERS OF THE UNITED STATES" BECAUSE THE SEGMENTS OF THE RIVERS ABOVE AND BELOW THE MONITORING STATIONS AND DOWNSTREAM "OUTFALLS" ARE NOT "MEANINGFULLY DISTINCT."

The Ninth Circuit erred not only in holding that the District's MS4 caused an "addition" of pollutants from a "point source," but also in holding that the pollutants caused an "addition" of pollutants to "the waters of the United States." The CWA prohibits an unauthorized discharge only if the discharge causes an "addition" of pollutants to "navigable waters," a term defined as "the waters of the United States." 33 U.S.C. §§ 1311(a), 1342(a), 1362(7), -(12).

The Ninth Circuit reasoned that the District's MS4 caused the "addition" of pollutants to the Los Angeles and San Gabriel Rivers because the District's mass emissions monitoring stations "detected" stormwater pollutants in the rivers, and the pollutants were thereafter "again discharged" into the rivers as they passed through the downstream "outfalls." *NRDC*, 673 F.3d at 899-900. The court failed to determine, however, whether the segments of the rivers above and below the monitoring stations and downstream "outfalls" were the same bodies of water or different bodies of water, and apparently attached no significance to the question. On the contrary, the question of whether these segments of the rivers were the same or different bodies of water is critical in determining whether the District's MS4 has caused an "addition" of the pollutants to "the waters of the United States."

In *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004), this Court held that the discharge of a pollutant from a point source does not cause an "addition" of the pollutant to "the waters of the United States" within the meaning of the CWA if the water body *into* which the pollutant is discharged is not "meaningfully distinct" from the water body *from* which the pollutant is discharged. *Miccosukee Tribe*, 541 U.S. at 112. As the Court put it, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id*. at 110, quoting *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001).

The Court did not decide whether the two water bodies in that case were "meaningfully distinct," and remanded that issue to the lower courts for further consideration. *Miccosukee Tribe*, 541 U.S. at 111. Nonetheless, the Court established the principle that a discharge does not cause an "addition" of a pollutant to "the waters of the United States" if the water bodies are not "meaningfully distinct." This Court and the Eleventh Circuit have so interpreted this Court's decision in *Miccosukee Tribe* in subsequent cases. *S.D. Warren v. Maine Board of Environmental Quality*, 547 U.S. 370, 381 (2006) (*Miccosukee Tribe* "accepted the shared view of the parties that if two identified volumes of water are 'simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants.'"); *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210, 1216 n.4 (11th Cir. 2009) ("The permitting requirement does

not apply unless the bodies of water are meaningfully distinct," citing *Miccosukee Tribe*, 541 U.S. at 112).

Miccosukee Tribe's holding that a discharge does not cause an "addition" of a pollutant if the water bodies are not "meaningfully distinct" is consistent with pre-*Miccosukee Tribe* federal circuit authority. Prior to *Miccosukee Tribe*, the First, Second, Sixth, and District of Columbia Circuits held that a facility does not cause an "addition" of a pollutant within the meaning of the CWA unless the pollutant is added from "the outside world," that is, from a different water body from the one to which the pollutant has been added. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165, 175 (D.C. Cir. 1982); *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001); *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1299 (1st Cir. 1996); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988). In *Gorsuch*, for example, the District of Columbia Circuit held that a dam—even though it is a "point source" that may generate pollutants that reach downstream waters—does not cause an "addition" of pollutants to the downstream waters because "the dam-caused pollution merely passes through the dam from one body of navigable water (the reservoir) into another (the downstream river)." *Gorsuch*, 693 F.2d at 165, 174-83. As the court put it, an "addition" from a point source occurs "only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175.

Thus, under *Miccosukee Tribe* and pre-*Miccosukee Tribe* federal circuit authority, a point source does not cause an "addition" of a pollutant to "the waters of the United States" if the pollutant is not conveyed

from the "outside world." A pollutant is conveyed from the "outside world" only if the water bodies from which and to which the pollutant is conveyed are "meaningfully distinct."

Here, the Los Angeles and San Gabriel Rivers above and below the District's monitoring stations and downstream "outfalls" are part of the same continuously flowing body of water, and are not "meaningfully distinct." These waterways are navigable, as the Ninth Circuit acknowledged, *NRDC*, 673 F.3d at 898, and their navigability does not change as they flow through these facilities. In the vernacular of *Gorsuch, Catskill*, *Dubois*, and *Consumers Power*, the District's MS4 has not "added" pollutants from the "outside world." So, applying the *Missosukee Tribe* analogy, the ladled soup has not been added to another pot. Therefore, the District's MS4 has not caused an "addition" of pollutants to "the waters of the United States."

Under the Ninth Circuit's decision, a local government that operates an MS4 would be required to obtain an NPDES permit for facilities in a waterway that simply measure pollutants passing through, even though the character of the waterway does not change as the pollutants pass through the facilities. *Miccosukee Tribe* plainly holds that the CWA does not require NPDES permits in such cases. The Ninth Circuit decision, in holding otherwise, is flatly inconsistent with *Miccosukee Tribe*.

IV. THE DISTRICT'S MS4 HAS NOT CAUSED AN "ADDITION" OF POLLUTANTS TO "THE WATERS OF THE UNITED STATES" BECAUSE THE SEGMENTS OF THE RIVERS ABOVE AND BELOW THE MONITORING STATIONS AND DOWNSTREAM "OUTFALLS" ARE BOTH CLASSIFIED AS "THE WATERS OF THE UNITED STATES."

The Ninth Circuit not only failed to determine whether the Los Angeles and San Gabriel Rivers above and below the monitoring stations and downstream "outfalls" are "meaningfully distinct," as required by *Miccosukee Tribe*, but also failed to determine whether the rivers above and below these facilities are both classified as "the waters of the United States." This distinction is crucial because the EPA has adopted a regulation providing that a transfer of a pollutant from one water body to another does not constitute an "addition" of a pollutant to "the waters of the United States" if both water bodies are classified as "the waters of the United States." 40 C.F.R. § 122.3(i).

The EPA regulation, entitled the Water Transfers Rule, clarifies the meaning of the phrase—"addition" of a "pollutant" to "the waters of the United States" from a "point source"—that triggers the applicability of the NPDES. 33 U.S.C. § 1362(12); 73 Fed. Reg. 33,697 (June 13, 2008) (hereinafter "73 Fed. Reg."). The regulation provides that a transfer of water containing a pollutant from one part of "the waters of the United States" to another part of similarly-classified waters does not constitute an "addition" of a pollutant to "the waters of the United States" because the pollutant is merely being moved around

within "the waters of the United States" rather than being added to such waters. 40 C.F.R. § 122.3(i). Specifically, the EPA regulation provides:

> The following discharges do not require NPDES permits:
>
> . . . .
>
> (i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer itself to the water being transferred.

Id. Explaining the Rule, the EPA stated:

> [W]hen a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water is not diverted for an intervening use, the water never loses its status as "waters of the United States," and thus nothing is added to those waters from the outside world.
>
> The Agency has concluded that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress generally did not intend to subject water transfers to the NPDES program . . . . Instead, Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities.

73 Fed. Reg. at 33,701 (citation omitted).

Under the EPA regulation, if water containing a pollutant is transferred from one part of "the waters

of the United States" to another part of similarly-classified waters, and if there is no "intervening industrial, municipal, or commercial use," and if the water transfer does not "introduce[]" pollutants, the water transfer does not cause the "addition" of a pollutant to "the waters of the United States," and the NPDES permit requirements do not apply. The EPA regulation is entitled to deference under the *Chevron* doctrine, which requires deference to an agency's permissible interpretation of an ambiguous statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *Mayo Foundation v. United States*, 131 S.Ct. 704, 711 (2011). The Eleventh Circuit recently applied *Chevron* deference in upholding the EPA regulation in the context of water transfers in the Florida Everglades. *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210, 1218-28 (11th Cir. 2009).

The EPA regulation generally adopts the approach, advanced by the United States in other contexts, that all navigable water bodies in the nation are part of a "unitary water body," and that the movement of a pollutant within this "unitary water body" does not cause the "addition" of a pollutant because the pollutant is already in the water body. Indeed, the United States asserted its "unitary water body" approach before this Court in *Miccosukee Tribe*. Brief for the United States, *South Florida Water Management District v. Miccosukee Tribe*, 15-20, No. 02-626 (Sept. 2003). This Court declined to consider the argument because it had not been presented to or addressed by the lower courts, and the Court remanded this issue to the lower courts for further consideration. *Miccosukee Tribe*, 541 U.S. at 105-08, 112. The Court commented, however, that the United States' "uni-

tary waters" approach is not supported by "any administrative documents in which EPA has espoused that position," and that the United States' argument could "conflict with current NPDES regulations." *Miccosukee Tribe*, 541 U.S. at 107. Since the EPA has now adopted a regulation that adopts the "unitary water body" approach, the United States' approach is supported by EPA regulations and does not conflict with such regulations, and, as explained above, the EPA's regulation is entitled to deference under *Chevron*.

The EPA's Water Transfers Rule is relevant in light of the Ninth Circuit's construction of how the District's MS4 caused the "discharge of a pollutant." The Ninth Circuit held that the stormwater pollutants in the Los Angeles and San Gabriel Rivers, after entering and exiting the District's monitoring stations, were "again discharged" into the rivers by the downstream "outfalls." *NRDC*, 673 F.3d at 899. If, as the Ninth Circuit reasoned, the pollutants were "again discharged" by the downstream "outfalls," then these "outfalls" transferred the pollutants from the upper segment of the rivers to the lower segment of the same rivers—and hence the EPA's Water Transfers Rule applies. Since both rivers are the part of the same, continuously flowing waterway both above and below the facilities, and since the character of the rivers does not change as they pass through the facilities, the rivers above and below the facilities both consist of "the waters of the United States." Thus, the District's MS4 has not caused an "addition" of a pollutant to "the waters of the United States" under the EPA regulation.

Therefore, the Ninth Circuit's decision is not only inconsistent with *Miccosukee Tribe* because the Los

Angeles and San Gabriel Rivers above and below the monitoring stations and downstream "outfalls" are not "meaningfully distinct," but is also inconsistent with the EPA's Water Transfers Rule because the rivers both above and below these facilities are both classified as "the waters of the United States." The Ninth Circuit decision adversely affects the interests of state and local governments, by requiring that state governments that administer their own NPDES systems, and local governments that operate MS4s, must issue and obtain NPDES permits, respectively, for facilities in a continuously flowing waterway classified as "the waters of the United States," even though the character of the waterway does not change as it flows through the facilities.

V. EVEN THOUGH THE CLEAN WATER ACT DOES NOT IMPOSE THE SAME PROHIBITIONS AND REQUIREMENTS AGAINST MS4 DISCHARGES THAT IT IMPOSES AGAINST OTHER DISCHARGES, MS4s ARE SUBJECT TO EXTENSIVE REGULATION UNDER STATE AND LOCAL LAWS.

This *amici* brief has argued that MS4 discharges are not subject to the same prohibitions and requirements of the CWA that apply to other NPDES-regulated discharges, and, moreover, that the District's MS4 has not caused an "addition" of pollutants from a "point source" or to "the waters of the United States" under the circumstances of this case. Nonetheless, MS4s, including the District's MS4, are subject to extensive regulation under state and local laws. Indeed, state and local regulation of MS4s is fully consistent with, and in fact effectuates, Congress' stated goals in enacting the CWA.

The CWA's primary goals are twofold: first, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and, second, to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "to plan the development . . . of land and water resources," *id.* at § 1251(b). Thus, the CWA not only provides for improvement of water quality but also provides that the states play an important role in achieving that goal and in regulating land and water use. The CWA does not establish unitary federal control over water pollution but instead implements principles of federalism in achieving such control. As mentioned in section IV, the EPA's Water Transfers Rule itself recognizes the important role that the states play, stating that "Congress intended to leave primary oversight over water transfers to state authorities in cooperation with Federal authorities." 73 Fed. Reg. at 33,701.

The CWA contains several provisions recognizing the essential role the states play in controlling water pollution and regulating land and water use. The CWA authorizes the states to administer their own NPDES programs, subject to the EPA's approval. 33 U.S.C. § 1342(b). Indeed, the nation's NPDES programs are primarily administered by the states rather than the EPA. To date, 46 states have been authorized to administer their NPDES programs.[7] The CWA also provides that the states are authorized under their own laws to regulate nonpoint sources of pollution, which are not regulated by the NPDES. 33 U.S.C. §§ 1288, 1314(f), 1319. The states' authority

[7] ENVIRONMENTAL PROTECTION AGENCY, *supra* note 3.

to regulate nonpoint sources of pollution ensures that pollution is still regulated even though it is not regulated by the NPDES. While the CWA authorizes regulation only of "navigable waters," *id*. at §§ 1362(12), 1311(a), which are nebulously defined as "the waters of the United States," *id*. at § 1362(7), the states are authorized to regulate all water bodies within their jurisdictions—both navigable and non-navigable—under their own laws. Although the U.S. Constitution's Commerce Clause, U.S. Const. art. I § 8, cl.3, authorizes the federal government only to regulate waters that are navigable—a power that this Court has broadly defined, *e.g., United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406 (1940); *United States v. Rio Grande Dam & Irrigation* Co., 174 U.S. 690 (1899)—the Commerce Clause limitation does not apply to the states. Thus, even though the CWA requires MS4s to apply best management practices and does not prohibit them from discharging pollutants into waterways, 33 U.S.C. § 1342(p)(3)(B)(iii), the states are free to adopt other regulations—including more stringent regulations—applicable to MS4s, based on local circumstances and conditions. The CWA specifically provides that the states may adopt "any standard or limitation respecting discharges of pollutants" that are not "less stringent" than federal standards and requirements. *Id*. at § 1370.

In addition, the CWA authorizes the states to adopt water quality standards for bodies of water, which are separate from NPDES-established effluent limitations for individual discharges into such waters. *Id*. at § 1313. Thus, the states can adopt ambient water quality standards for entire water bodies, and not just effluent limitations for individual discharges into the water bodies.

The CWA—beyond recognizing the states' "primary responsibilities and rights" to "plan" the development of "land and water resources," 33 U.S.C. § 1251(b)—specifically limits its intrusion into the states' traditional authority to regulate land use and water use. The CWA provides that the statute does not impair or affect "any right or jurisdiction of the States with respect to the waters . . . of such States," *id*. at § 1370, and does not supersede, abrogate, or impair "the authority of each State to allocate quantities of water within its jurisdiction," or "supersede or abrogate rights to quantities of water which have been established by any State," *id*. at § 1251(g).

Thus, the CWA effectuates a partnership between the federal government and the states in controlling water pollution, and recognizes the states' primary responsibilities for achieving that goal and for regulating land and water use. Regardless of the extent to which MS4s are subject to regulation under the CWA, MS4s are subject to significant regulation under state and local laws. Indeed, the District's MS4 is located in California, and California provides for extensive regulation of water quality both as part of its NPDES program and under its other laws.[8]

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[8] California is authorized to administer its own NPDES program, and was the first state to be granted such authority. CAL. WAT. CODE § 13370. Apart from California's NPDES authority, the California Legislature extensively regulates water quality. In 1969, the Legislature enacted the Porter-Cologne Water Quality Act, which in many ways served as a model for the later-enacted CWA. *Id*. at §§ 13000 *et seq*. This Act establishes regional water quality control boards that are authorized to regulate water quality of water bodies within their respective regions, subject to the oversight authority of the State Water Resources Control Board. *Id*. at § 13200. The regional boards are authorized to adopt water quality control plans, or "basin

The principles of federalism that are a cornerstone of the CWA are well served in this case.

CONCLUSION

For the foregoing reasons, the Ninth Circuit decision should be reversed and remanded.

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plans," for each water basin within their respective jurisdictions. *Id*. at § 13240. In administering the basin plans, the regional boards may issue "waste discharge requirements" ("WDRs") for individual discharges into waterways, subject to effluent limitations and other conditions to protect water quality. *Id*. at § 13263.6. Thus, the regional boards may issue NPDES permits for individual discharges under the federal CWA, or instead may issue WDRs for such discharges under the Porter-Cologne Act.