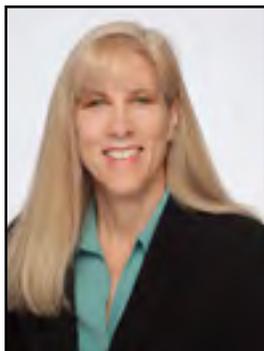


Status of Stormwater Regulation in California

By Melissa A. Thorme*

INTRODUCTION

Regulation of stormwater discharges in California is carried out under state law and the federal Clean Water Act, through joint Waste Discharge Requirements (“WDRs”) and National Pollutant Discharge Elimination System (“NPDES”) permits issued by the State under delegated authority from the United States Environmental Protection Agency (“EPA”). Reported case law on stormwater regulation is sparse since these discharges have been regulated for a shorter period of time than other point source discharges under the Clean Water Act. However, the absence of case law does not equate to an absence of either controversy or litigation. Indeed, within the last few years, one municipal stormwater case has gone to the United States Supreme Court twice. In addition, numerous citizen suits and enforcement actions have been brought against industrial and construction stormwater discharges. This article provides the regulatory history in general and particularly in California, and a prediction on future regulatory changes.



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STORMWATER DEFINED

“Stormwater” is defined by federal regulation as “stormwater runoff, snow melt runoff, and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13) (2014).

To manage stormwater drainage and prevent flooding in developed areas (*i.e.*, residential neighborhoods and commercial and industrial areas), municipalities typically construct and operate a storm drain system (*i.e.*, a Municipal Separate Storm Sewer System (hereinafter “MS4”). Stormwater flows into the MS4 and is thereafter discharged from one or many outfalls into surface waters.

Some MS4s are small and others are very large. For example, in Los Angeles County, the MS4 serves a geographic area greater than 4,000 square miles and includes more than 85 overlapping local governmental jurisdictions, establishing a vast network of catchments, gutters, channels, and pipes designed for drainage and flood control purposes to collect urban runoff and storm flows throughout the County.¹

As rain water or snow melt moves over the land, that water picks up natural and man-made pollutants and sends them through the MS4. Since weather is the source of stormwater, flows into MS4s, unlike those from traditional industrial and municipal wastewater point sources, are intermittent and often unpredictable in their duration and volume. Therefore, the municipality has no control over the quantity of the stormwater flow and also has little to no control of the nature and amounts of the pollutants picked up by the overland runoff.

Stormwater also runs across industrial and construction sites. Discharges from these sites may contain pollutants or excess sediment if not controlled. While the area making up industrial and construction sites may be smaller than the area composing a municipality’s jurisdictional area, these operators also lack the ability to predict the exact volume and timing of flow, and for construction sites, the site itself is not a permanent location.

BRIEF HISTORY OF FEDERAL STORMWATER REGULATION

Since its amendment in 1972, the Federal Water Pollution Control Act (more commonly known as the “Clean Water Act” or “CWA”), 33 U.S.C. §§ 1251-1387 (2014), has prohibited the discharge of any pollutant to waters of the United States from a point source unless authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit. See 33 U.S.C. §§ 1311(a), 1342(a) (CWA §§ 301, 402(a) (2014)).

Initially, the NPDES permit program focused on the reduction of pollutants in discharges from industrial point sources and from publicly owned treatment works (“POTWs”).² As a result, the EPA initially determined that all stormwater discharges were exempt from the requirements of the CWA.

However, in 1977, the Court of Appeals for the District of Columbia ruled that EPA could not exempt stormwater discharges from the NPDES permitting program under CWA section 402 because stormwater discharges constituted a discharge of pollutants from a point source.³ A “point source” is defined under the CWA as “any discernible confined, and discrete conveyance, including, but not limited to, any pipe, ditch, channel, . . . from which pollutants are or may be discharged.” See 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2.

Following this 1977 decision, EPA issued a series of proposed and final rules to regulate stormwater

discharges, all of which were successfully challenged at the administrative level and in the courts. In response, Congress amended the CWA in 1987 to specifically authorize the regulation of stormwater discharges, creating separate and distinct regulatory programs for controlling pollutants in stormwater. See 33 U.S.C. § 1342(p) (CWA § 402(p)).

Under CWA section 402(p), Congress established two different standards for the regulation of stormwater discharges—one for discharges of stormwater from areas of industrial activity, including construction activity, and one for municipal stormwater discharges from MS4s. Stormwater discharges associated with industrial activity are required to comply with NPDES permits containing the technology-based effluent limitations or more stringent water quality based effluent limitations set forth in CWA section 301. See 33 U.S.C. § 1342(p)(3)(A) (CWA §402(p)(3)(A)); 33 U.S.C. § 1311(b)(1)(A), (C)(requiring Best Practicable control Technology (“BPT”) *or* “any more stringent limitation, including those necessary to meet water quality standards” by July 1, 1977); 33 U.S.C. § 1311(b)(2) (CWA § 301(b)(2)) (requiring Best Available Technology economically achievable (“BAT”) for toxic pollutants and Best Conventional pollutant control Technology (“BCT”) for conventional pollutants by March 31, 1989).

In non-stormwater and industrial stormwater NPDES permits, discharges must ensure compliance with applicable water quality standards.⁴ The CWA assigns primacy to the States for the adoption of water quality standards (the “uses” and the “criteria”) and requires that water quality criteria be adopted by the States in accordance with federal and State laws. See 33 U.S.C. § 1313 (CWA § 303); *see also* Cal. Water Code § 13241 (2014) (requiring the State to adopt water quality “objectives,” the State equivalent of “criteria” to protect beneficial uses). This requirement ensures that the States engage in the analytical processes mandated by State law so that the criteria adopted by the States are tailored to each State’s own particular geographic and climatic conditions and legal requirements. A State-adopted water quality standard becomes the “applicable water quality standard” for purposes of regulation under the CWA, including for use in setting permit requirements, only after such standards are approved by the EPA. See 33 U.S.C. § 1313(c)(3) (CWA § 303(c)(3)).⁵

In contrast to having to meet the BAT/BCT and water quality standards-based requirements, municipal stormwater discharges from MS4s are regulated by NPDES permits that:

“(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 State determines appropriate for the control of such pollutants.”

33 U.S.C. § 1342(p)(3)(B)(i)-(iii)(CWA § 402(p)(3)(B)(i)-(iii))(emphasis added).

The “Maximum Extent Practicable” language contained in section 402(p)(3)(B)(iii) is more commonly known as the “MEP” standard. MEP represents a different technology-based standard, requiring municipalities to pursue sound pollutant control techniques that are technically and economically feasible.

Importantly, the CWA does not prescribe water quality-based requirements for municipal stormwater. Water quality-based requirements differ from technology-based requirements, in that water quality-based requirements are set based on the ambient water quality of and the applicable water quality standards for a particular water body, while technology-based standards focus upon the water quality achievable by particular pollution control measures or technologies. This partial exemption for municipal stormwater is not unusual as the CWA also *totally exempts* some types of discharges from the permitting requirements of the Act. See 33 U.S.C. § 1342(l)(1)-(2)(CWA § 402(l)(1)-(2))(exempting agricultural return flows from irrigated agriculture and discharges of stormwater from mining operations or oil and gas production from the requirement to obtain an NPDES permit).

To comply with the MEP standard set forth under CWA section 402(p), the CWA has been interpreted to envision an iterative process whereby successive rounds of Best Management Practices (“BMPs”) are implemented by municipalities to the MEP. See 40 C.F.R. § 122.44(k)(2). “Best Management Practices” are defined as “schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce the pollution of waters of the United States. BMPs include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” 40 C.F.R. § 122.2. The legislative history of the MEP language indicates that the relevant factors in determining whether MEP is met include technical feasibility, cost, and state and public acceptance. See Conf. Rep. on H.R. 2005, Superfund

Amendments and Reauthorization Act of 1986, 132 Cong. Rec. H 9561 (Oct. 8, 1986) (“In determining whether these technologies are practicable, the Administrator may take into account technical feasibility, cost, State, and public acceptance of the remedy, and other appropriate criteria. Where these remedies are not practicable or cost effective, another remedy which meets the requirements of this section must be selected.”). Because the Clean Water Act legislative history does not provide a clear definition of MEP, this reference to other definitions from other federal environmental laws is warranted.

HISTORY OF STORMWATER REGULATION IN CALIFORNIA

In 1991, California’s State Water Resources Control Board (“State Water Board” or “SWRCB”) ruled on a first-round MS4 permit for the Santa Clara Valley’s MS4.⁶ Based on guidance from EPA (which would later be found to be erroneous as explained below), the State Water Board ruled that Sections 301 and 402 of the Clean Water Act require MS4s to meet MEP and to also achieve compliance with water quality standards.⁷

In 1993, the State Water Board issued a memo on the meaning of MEP.⁸ This memo at page 3 stated that “if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard.”

On July 15, 1996, the Regional Water Quality Control Board for the Los Angeles Region (“Regional Board” or “RWQCB”) adopted an NPDES permit for the Los Angeles area MS4s. This permit contained requirements related to water quality standards, but included an explicit “safe harbor” protecting the permittees from enforcement if the permittees were in compliance with the requirements of the permit and implementing the related Storm Water Management Program. See excerpt of Regional Board Order No. 96-054 (“1996 MS4 Permit”) at 12, Part II (“Timely and complete implementation by a Permittee of the storm water management programs prescribed in this Order shall satisfy the requirements of this [RWL] section and constitute compliance with receiving water limitations.”)(emphasis added); see *also* Carson Harbor Village Ltd. v. Unocal Corp., 990 F. Supp. 1188, 1197 (C.D. Cal. 1997)(summary judgment denied to plaintiff in citizen suit alleging violation of the 1996 MS4 Permit, due in part to the existence of the “safe harbor” provision in permit). Importantly, this 1996 MS4 Permit was not vetoed by U.S. Environmental Protection Agency, Region IX (“EPA Region IX”).

Also in 1996, the State Water Board again ruled on the amended MS4 permit for the Santa Clara Valley.⁹ On

page 5 of this ruling, the State Water Board held that “. . .the permitting approach, wherein the discharger is required to implement a SWMP [Storm Water Management Plan] with BMPs, has been found by EPA to be the most effective way to ensure compliance with water quality standards. . . .” In addition, this decision noted that EPA Region IX sanctioned the MS4 permit for Orange County, which states that permittees would not be in violation of the permit if the permittee took actions to address receiving water limitation exceedances.

In 1998, the State Water Board confirmed in a precedential decision that the CWA and the California Water Code do not require strict compliance by MS4s with water quality standards.¹⁰ Specifically at issue in this decision was the Receiving Water Limitations section in a municipal NPDES stormwater permit for portions of Orange County, which prohibited MS4 discharges that did not meet water quality standards. However, the permit also included a “safe harbor” provision, clarifying that permittees were in compliance with the permit as long as they were in good faith implementing the permit’s iterative process of evaluating and improving BMPs where necessary to comply with water quality standards.¹¹ The State Water Board approved this construct, finding that “the use of BMPs to achieve both technology-based effluent limitations and water quality based effluent limits” complied with the CWA and the California Water Code.¹²

On March 17, 1998, EPA Region IX sent a letter to the State Water Board regarding SWRCB Order No. WQ 98-01. Despite the plain language of the CWA, EPA Region IX objected to the inclusion of “safe harbor” language in MS4 permits that protected municipalities implementing BMPs to the MEP from enforcement actions and citizen suits if the municipalities’ stormwater discharge exceeded a water quality standard. Interestingly, the language in the Vallejo and Riverside permits was substantially similar to the language in the 1996 MS4 Permit for Los Angeles, which was *not* vetoed by EPA Region IX despite the fact that the same CWA requirements applied.

Thereafter, EPA Region IX also objected to similar language that had been placed in MS4 permits issued to the Vallejo Sanitation and Flood Control District and to Riverside. Relying on CWA section 301(b)(1)(C), which pursuant to CWA section 402(p)(3)(B) does not apply to municipal stormwater discharges, EPA Region IX incorrectly interpreted the CWA to require that MS4s strictly comply with water quality standards.

As a result of EPA Region IX’s March 1998 letter, and subsequent objection by U.S. EPA Region IX to permits issued to the MS4s in Vallejo and Riverside, the State Water Board amended its earlier Order No. 98-01 to

reflect EPA Region IX's erroneous interpretation of the CWA.¹³ In this Order, the State Water Board removed the explicit "safe harbor" language from the iterative BMP approach language. SWRCB Order No. WQ 99-05 also formed the basis for the iterative approach language set forth in permits issued in the 2001 timeframe and later.

In September of 1999, the Ninth Circuit Court of Appeals explicitly held that the CWA does not require MS4s to strictly comply with water quality standards under Section 301 of the CWA, thereby rejecting the basis on which EPA Region IX had objected to the safe harbor language at issue in SWRCB Order No. WQ 98-01 and the permits for Vallejo and Riverside. The Court of Appeals held that the proper statutory requirements for a municipal MS4 Permit are set forth in CWA section 402(p) and the MEP standard, and that CWA section 301(b)(1)(C) does not apply. See *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999). The Court held that the provisions of CWA Section 402(p)(B)(3) for municipal stormwater permits replaced the requirements under CWA Section 301.¹⁴

Since the Ninth Circuit's opinion in *Defenders of Wildlife* was issued subsequent to U.S. EPA Region IX's March 1998 objection letter, both EPA Region IX's interpretation of the CWA, and SWRCB Order No. WQ 99-05 that was based on EPA Region IX's interpretation, should have been deemed invalid and not precedential. Accordingly, under CWA section 402(p)(3)(B), MS4s should be held to not be required to strictly comply with promulgated water quality standards. Instead, MS4s must be regulated by NPDES permits that reduce the discharge of pollutants in the stormwater to the MEP. See 33 U.S.C. § 1342(p)(3)(B)(iii) (CWA §402(p)(3)(B)(iii)); see also *Defenders of Wildlife*, 191 F.3d at 1165.

The Industrial General Permit was adopted in 1997 by the State Water Board prior to several of these cases and was not objected to by EPA even though this permit contained an express safe harbor. Specifically, the permit stated that: "A facility operator will not be in violation of Receiving Water Limitations C.2¹⁵ as long as the facility has implemented BMPs that achieve BAT/BCT and [a specified] procedure is followed: . . ." State Water Board Order No. 97-03-DWQ at p. 4, ¶ C.3.

THE 2001 RECEIVING WATER LIMITATIONS LANGUAGE

Most NPDES Permits issued in California contain both effluent limitations and receiving water limitations to maintain certain water quality characteristics, even for pollutants not specifically controlled by effluent limitations. Municipal stormwater permits after 2001 contained numerous prescriptive controls and detailed regulatory requirements that presumably implement the MEP standard. In addition, despite the unambiguous

intent of Congress to exempt municipal stormwater from strict compliance with water quality standards and the clear language of the Court of Appeals in the *Defenders of Wildlife* case, these MS4 permits also contained a Receiving Water Limitations (Part 2.1) that prohibited, without exception, any discharges that cause or contribute to the violation of water quality standards or objectives. Another section of the Receiving Water Limitations (Part 2.2) also prohibited any discharges that cause or contribute to a condition of nuisance.

However, the permits then included language (in Part 2.3) that stated that the Permittees will comply with these prohibitions on exceeding standards or causing a nuisance by implementing control measures and other actions to reduce pollutants in the discharges and other actions to reduce pollutants in the discharges in accordance with the Stormwater Quality Management Program ("SQMP") and other requirements of the Permit, including any modifications. In turn, the SQMP and its components were to be designed to achieve compliance with receiving water limitations. If exceedances of standards persisted notwithstanding implementation of the SQMP and its components and other requirements of this permit, the Permittee was required to assure compliance with discharge prohibitions and receiving water limitations promptly notifying the Regional Board and thereafter submitting a Receiving Water Limitations Compliance Report that described BMPs currently being implemented and additional BMPs that will be implemented. The intent of this language in Part 2.3 was to create an iterative approach for dealing with exceedances of applicable water quality standards or the creation of a condition of nuisance. However, Part 2.3 did not contain *explicit* safe harbor language as was found in the previous 1996 Los Angeles County MS4 permit. Furthermore, despite the holding in the 1999 *Defenders of Wildlife* case, the Fact Sheet issued with the 2001 Los Angeles County MS4 Permit stated that the water quality-based requirements contained in the Receiving Water Limitations section were imposed based on CWA §301(b)(1)(C). See 2001 Los Angeles County MS4 Permit Fact Sheet at p. 7 (Dec. 13, 2001) ("MS4s are not exempted from compliance with Water Quality Standards. Section 301(b)(1)(C) of the CWA requiring that NPDES permits include limitations, including those necessary to meet water quality standards, applies. The intent of the permit conditions is to meet the statutory mandate of the CWA.").

On January 30, 2002, soon after adoption of the 2001 MS4 Permit, the Chair of the Regional Board issued a letter to all permittees setting forth the manner in which Part 2 of the MS4 Permit was to be interpreted. Among other things, this interpretation was that "[a] violation of the permit would occur when a municipality fails to engage in a good faith effort to implement the iterative

process to correct the harm. As long as the Permittee is engaged in a good faith effort, the specific language of the permit provides that the Permittee is in compliance.” Until fairly recently, no other interpretation was set forth by the Regional Board despite amendments to Part 2 of the 2001 MS4 Permit in 2006 and 2007 to incorporate requirements from Total Maximum Daily Loads (“TMDLs”).

IMPORTANCE OF THE RECEIVING WATER LIMITATIONS LANGUAGE

The goal of all NPDES stormwater dischargers is to legally dispose of stormwater and runoff in a manner that is cost-effective and protects the environment. Municipal stormwater dischargers operating MS4s are stewards of the urban environments within their jurisdictions and collectively have spent millions of dollars since the first permits were issued in the early 1990s on preparation, revision, and implementation of the stormwater management plans. To this day, MS4s continue to devote substantial effort and resources toward improving stormwater quality and improving the quality of the local surface waters, often with innovative control measures.

Concern was raised initially about these restrictive municipal stormwater permitting decisions since the trend had moved away from the inclusion of an explicit safe harbor in the Receiving Water Limitations requirements. Many feared that the imposition of continually more stringent MS4 permit requirements, not based on explicit statutory or regulatory requirements, would ultimately require the expenditure of public funds for additional pollution control technologies or other programs that are extremely costly, beyond the contemplation of the MEP standard, and that might not make any substantial improvement in water quality.

MS4s were hesitant to accept any permit provisions that could not now or in the future be met as federal and state law provide harsh sanctions for non-compliance with provisions in a discharge permit. The CWA authorizes civil penalties of up to \$37,500 per day per violation of permit conditions and also criminal penalties, including the incarceration of public officials for knowing or even negligent permit violations. 33 U.S.C § 1319(d), (c); *see also* U.S. v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994) (convictions for permit violations). In addition to enforcement by administrative agencies, private parties can seek civil penalties and attorney’s fees pursuant to the “citizen suit” provisions of the CWA. *See* 33 U.S.C. § 1365.

Likewise, California’s Porter-Cologne Water Quality Act contains stiff penalties for violation of discharge permit requirements. *See* Cal. Water Code §§ 13385, 13387. This act authorizes a penalty of up to \$25,000 per day

per violation, with additional liability not to exceed \$25 per gallon if the discharge is to navigable waters of the United States and either is “not susceptible to cleanup or is not cleaned up.” Cal. Water Code § 13385(b)(1)-(2), (d). Porter-Cologne also establishes criminal liability for intentional or negligent violation of effluent limitations contained within a permit. Cal. Water Code § 13387(a)-(d).

MS4s were justifiably concerned that they may incur these types of penalties for failure to strictly comply with water quality standards, or that they might have to install extremely expensive treatment plants to treat stormwater to a level where water quality standards can consistently be met, which may have other unintended adverse environmental consequences (e.g., higher energy usage, highly concentrated treatment by-products, removal of storm flows from urban creeks, etc.).

Industrial and construction dischargers also have similar compliance concerns. Construction projects and industrial facilities are for-profit businesses, often ones that run with very narrow profit margins. Having to spend hundreds of thousands of dollars on complex structural BMPs, including treatment systems, may not be attainable. Although a determination of what is “economically achievable” is supposed to be part of the BAT analysis, this analysis is not part of water quality standards-based requirements. *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613, 626 (2005). Thus, industrial and construction permittees were equally concerned about their enforceable permit provisions.

THE RECENT STORMWATER LAWSUITS

A. The Los Angeles County and Other MS4 Cases

The concerns expressed by MS4s became real when several lawsuits were filed against MS4s for alleged failures to comply with water quality standards. In four separate notice of intent to sue letters sent pursuant to the CWA in 2007 and 2008, the Natural Resources Defense Council and Santa Monica Baykeeper notified the City of Malibu and the County of Los Angeles (but none of the other 83 cities or co-permittees covered by the Los Angeles County MS4 Permit) that they intended to sue for alleged violations of the CWA and the 2001 MS4 Permit, as amended. Although the case filed against Malibu was a separate legal action from the one filed against Los Angeles County (and ultimately against the Los Angeles County Flood Control District and the County supervisors in their official capacities), the notice letters and complaints included many of the same allegations.

In 2009, the City of Stockton and County of San Joaquin were sued over their stormwater discharges, including

allegations of receiving water limitations violations. Although another case was also threatened by another local environmental group, a federal complaint was filed by the Coalition for a Sustainable Delta and other water rights holders on the San Joaquin River that alleged violations of the CWA and Endangered Species Act, seemingly in an attempt to increase their leverage for additional water allocations. However, Stockton's bankruptcy severely impaired their ability to prosecute the case. The case has been stayed, and the parties remain in settlement talk five years later.

The Malibu case settled in 2012 on the eve of trial when the issues had been narrowed down to just bacteria. Bacteria are challenging pollutants to address since bacteria occurs naturally and grows and reproduces in a way that copper or total suspended solids do not. However, Malibu was in a good situation as it had proactively installed disinfection technologies to treat for bacteria for its discharges to Malibu Lagoon prior to the initiation of the lawsuit.

In its April 13, 2012 press release, Malibu stated the following:

"The City has embarked on an ambitious clean water program that has improved water quality in and around Malibu, including the award-winning Legacy Park and the three stormwater treatment facilities operating in the city limits. The settlement builds on the City's expansive and innovative water quality programs.

Under the settlement, the City will allocate \$250,000 toward the City's Ocean Health Water Assessment project, to create water quality monitoring along the length of the Malibu shoreline. The City will install certain improvements to 17 drains citywide, employing principles of Low Impact Development to better manage all stormwater that travels through city-owned drains. The City will also work with Plaintiffs and facilitate pollution management practices to control discharges of animal waste from Serra Canyon to Malibu Creek and Lagoon. The settlement also requires the City to pay the Plaintiffs \$750,000."

The Los Angeles County and Los Angeles County Flood Control District case continues, having previously gone to the U.S. Supreme Court on the issue of whether flow from the upstream portions of the concrete-lined rivers to a downstream portion constituted a "discharge from a point source." In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 133

S. Ct. 710 (2013), the Supreme Court reversed the Ninth Circuit judgment imposing liability on petitioner Los Angeles County Flood Control District, holding that the Ninth Circuit erred in finding that polluted water passing through improved portions of the Los Angeles and San Gabriel Rivers constituted a discharge under the Act, noting that in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), the Court had found that movement of water within a single water body did not constitute such a discharge. The environmental groups tried to argue that, under the permit at issue, evidence of high readings from mass emission monitoring stations in the rivers above the applicable water quality standard established *ipso facto* the District's liability without proof of a discharge. However, the Supreme Court refused to address this monitoring station argument, which had been previously considered and rejected by the Ninth Circuit, because this issue fell outside the scope of the grant of certiorari.

On remand, the Ninth Circuit accepted the previously rejected *ipso facto* monitoring argument and imposed liability on the District. The Court even went so far as to bring Los Angeles County back into the case, even though the County had previously won on all issues. The Ninth Circuit held that because these permittees had agreed to accept the mass emissions stations as the points of compliance, they were liable for exceedances registered at these stations, even in the absence of direct evidence that their discharges had caused or contributed to the violations.

Because of the ramifications of the Ninth Circuit's new decision, the District and the County filed a petition for certiorari with the U.S. Supreme Court on January 14, 2014. The main issue raised this time was whether a multi-jurisdiction municipal stormwater permit issued under the Clean Water Act be construed to impose liability on a co-permittee without evidence that the co-permittee discharged pollutants in violation of the permit, where federal regulations provide that each co-permittee is only responsible for its own discharges and where the monitoring specified in the permit measures pollutants discharged by multiple upstream sources without any means to measure the contribution of any individual co-permittee.

The League of California Cities, along with the National League of Cities and the California State Association of Counties, filed an *amicus curiae* brief in support of the Supreme Court again hearing this case. Several other entities, including the National Association of Flood and Stormwater Management Agencies ("NAFSMA"), the Florida Stormwater Association and Southeast Stormwater Association, and the International Municipal Lawyers Association ("IMLA"), also filed *amicus* briefs requesting the case be heard. The resounding theme

of these briefs was that if this case is not heard, then co-permittees may be held liable for the discharges of others. Unfortunately, the Justices failed to accept the case. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council*, 134 S. Ct. 2135 (2014).

Now, for at least the two Southern California rivers at issue (the Los Angeles and San Gabriel Rivers) and the water flowing from the headwaters to the ocean through channelized and un-channelized segments, the Ninth Circuit has held the Los Angeles Flood Control District and County liable for pollutants flowing from the upstream portions of the rivers to the downstream portions of the same rivers despite the lack of any evidence of an actual discharge of pollutants from any MS4 outfalls. The Supreme Court, by its failure to accept this case for review a second time has authorized the Ninth Circuit's strained and unsupported interpretation of the CWA to justify imposing liability for the quality of water in the Los Angeles and San Gabriel Rivers, by holding that the Permit *presumes* a co-permittee has discharged stormwater that caused or contributed to an exceedance of a water quality standard whenever such an exceedance is observed at the downstream mass-emissions station.

In order to make this unsupportable ruling, the Ninth Circuit took the unusual step of reversing itself, *sua sponte*, creating a split of authority with a closed and unappealed part of the very same case, and created new liability for a party, Los Angeles County, that the Ninth Circuit had affirmatively found *not liable* before. The Ninth Circuit's convoluted interpretation of the CWA could be used to allege that other cities and counties participating in system-wide NPDES permits may be deemed in perpetual violation of their permits due to no fault of their own and will have no clear pathway to compliance. The Ninth Circuit ignored the fact that a co-permittee has no jurisdiction to control the quality of the water in the river or pollutants from other permitted and unpermitted discharges (e.g., aerial deposition, natural background, up-welling groundwater) to the river, all of which are monitored by the same downstream monitoring stations.

Finally and most egregiously, the Ninth Circuit seemingly eliminated a plaintiff's burden of demonstrating causation, no longer requiring proof that a particular permittee's discharges caused or contributed to the exceedance of a water quality standard in the receiving water, and instead established a permittee's liability as a matter of law for activities and conduct over which the municipality has no reasonable control. A permittee could automatically be deemed in violation of the permit with no reasonable way to comply, whether or not its own MS4 discharges contained the pollutant at issue.

This illogical result was not dictated by the plain language of the CWA, its implementing regulations, or the Permit. The Ninth Circuit's ruling directly conflicts with Article III standing requirements, established Supreme Court precedent interpreting these requirements, and prior Ninth Circuit precedent. Article III standing requires plaintiffs prove their injuries are "fairly traceable" to the conduct of the specific defendant that plaintiffs sued, and that plaintiffs' harm could be remedied by a favorable decision. The Ninth Circuit's Opinion conflicts with these requirements by creating circumstances wherein citizen plaintiffs can potentially sue an MS4 permittee in federal court without showing that the defendant actually caused or contributed to the plaintiffs' alleged harm, or that the defendant is capable of remedying the harm. Article III, established Supreme Court precedent, and prior Ninth Circuit precedent, all dictate the opposite result – if the defendant is not responsible for the harm complained of (in this case, a receiving water quality exceedance caused by a discharge in violation of a permit provision), the plaintiff does not have standing to sue the defendant for that injury and the federal court lacks jurisdiction to decide the dispute. The Ninth Circuit's opinion, holding that a defendant who is not responsible for a discharge can nevertheless be liable for the receiving water exceedance, cannot be squared with this Court's Article III jurisprudence and should have been overturned.

On remand, the District Court will have to accept the Ninth Circuit's ruling, but may consider other arguments, such as mootness, since as explained below the 2001 permit has been reissued and the monitoring and compliance determinations sections have been modified.

B. Other Stormwater Cases

In addition to municipal stormwater cases, there have been dozens of citizen suits filed in California over industrial stormwater discharges, and many enforcement actions brought by Regional Water Quality Control Boards for construction stormwater discharges. The industrial stormwater cases allege that the permittee is violating the general industrial stormwater permit because discharge levels exceed EPA's industrial stormwater benchmarks even though those levels are not incorporated, even by reference, into the currently applicable general NPDES permit. The allegations claim that discharges above these benchmarks may demonstrate that the site is not meeting the BAT/BCT standard.¹⁶ The vast majority of these cases settle for payment of attorneys' fees and often upgraded BMPs, including in some cases the installation of new treatment systems. Many businesses have closed up shop and others have moved out of state or to other facilities that are inside a building to avoid triggering stormwater permit coverage.

LIKELY NEXT STEPS IN STORMWATER REGULATION

The fate of the Receiving Water Limitations language in MS4 permits is currently in the hands of the State Water Board, which is reviewing the language as part of an appeal of the most recent LA MS4 Permit. A ruling is expected sometime in late 2014 or 2015. Until that time, MS4 permits remain as a patchwork of differing receiving water limitations requirements that may be exposing municipalities to liability for actions that they cannot control. For instance, pesticide use is regulated by federal and other state agencies, but the legal use of pesticides can cause stormwater to become contaminated. The Water Boards are wrestling with how to deal with issues such as these to avoid placing liability on cities that have no jurisdiction to regulate the use of legal pesticides.

Despite scores of citizen lawsuits in the municipal and industrial stormwater arenas, the State Water Board seems unwilling to provide protection for dischargers that are conducting the needed stormwater management programs and is instead forcing even very small cities, like Malibu, and “Mom and Pop” industries to have to settle with citizen plaintiffs, pay thousands in attorneys’ fees, and install hundreds of thousands of dollars of treatment systems that may not have any measureable effect on ambient water quality.

Meanwhile, new permits are being adopted, including one for Los Angeles County municipalities, containing new Receiving Water Limitation provisions. Those provisions have yet to be fully implemented so no enforcement actions or citizen suits have yet been brought. The permit’s new watershed-based regulatory program may avoid the type of liability dished out under the previous permit. Even though the permit under which liability was imposed has been rescinded and superseded, the remedy phase of the remanded *NRDC v. Los Angeles County* case is proceeding. The presumption is that the environmental groups will try to extract promises to implement substantial Low Impact Development (“LID”) projects, along with millions of dollars in attorneys’ fees for the prevailing in the case.

In 2014, the State Water Board adopted a new industrial stormwater permit with many new requirements. This new permit becomes effective on July 1, 2015, so there is still time before these provisions become binding. A petition for writ of mandate filed by environmental groups was filed in Superior Court challenging portions of the new permit, including the alleged lack of adequate monitoring. Based on this case, and perhaps for other reasons, it would not be surprising to see additional changes made to the industrial general permit prior to its effective date.

The final pressing issue may be the recent regulatory proposal to expand the scope of what constitutes a “water of the United States.” Many MS4 channels and small ditches that accept industrial and construction stormwater flows are proposed to be included under the new definition. This converts channels formerly defined as “point sources,” which only had to meet requirements to protect downstream waterways, into “waters of the United States” that may now have to meet stringent water quality standards within the channel or ditch, even where there are no designated beneficial uses to be protected. This may also adversely affect the ability to clean out these channels or dredge excess sediments without the need to obtain a Clean Water Act section 404 dredge and fill permit.

The stormwater community, including municipal, construction, and industrial stormwater entities, need to stay informed and engaged on these important and pressing issues. A failure to do so could mean these entities will suffer the financial and legal consequences of having to install expensive structural treatment systems and/or enduring additional lawsuits and penalties.

ENDNOTES

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1. See *In the Matter of the Petition of Natural Resources Defense Council, Inc.*, SWRCB Order No. WQ 91-04, 1991 http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/1991/wq1991_04.pdf, WL 135461 at *4 (May 16, 1991).
 2. See 64 Fed. Reg. 68722, 68723 (Dec. 8, 1999); see also 33 U.S.C. § 1311(b)(1)(A)-(B) (CWA § 301(b)(1)(A)-(B)).
 3. See *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).
 4. Water quality standards consist of the “designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” See 33 U.S.C. § 1313(c)(2)(A) (CWA § 303(c)(2)(A)). Generally, “uses” are the types of activities for which the water can be used (e.g., recreation, aquatic life protection) and “criteria” (or the State equivalent term, “objectives”) are the numeric or narrative water quality levels necessary to support the water’s designated uses. Numeric criteria are expressed as specific concentrations of individual pollutants (e.g., no more than 5 mg/l of pollutant X). Narrative criteria (e.g., no toxics in toxic amounts) are the catch-all of water quality

- regulation, expressed as narrative statements describing desired, but numerically undefined, water quality goals.
5. CWA section 303(c)(1) requires States to review and, as appropriate, modify and adopt new standards at least every three years. See 33 U.S.C. § 1313(c)(1) (CWA § 303(c)(1)). CWA section 303(c)(2)(A) then requires States to submit new or revised state-adopted water quality standards to EPA for approval or disapproval. See 33 U.S.C. § 1313(c)(2)(A) (CWA § 303(c)(2)(A)).
 6. See *In the Matter of the Petition of Citizens for a Better Environment, et al*, SWRCB Order No. WQ 91-03, http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/1991/wq1991_03.pdf, 1991 WL 135460 (May 16, 1991).
 7. *Id.* at *16.
 8. See State Water Board Memorandum, “Definition of ‘Maximum Extent Practicable’” from Elizabeth Miller Jennings, Office of Chief Counsel (Feb. 11, 1993), accessible at the following website: <http://www.oregon.gov/deq/WQ/Documents/MS4/CSWCB1993MemoMEPDefined.pdf>.
 9. See *In the Matter of the Petition of Save San Francisco Bay Association, et al*, SWRCB Order No. WQ 96-13, http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/1996/wq1996_13.pdf, 1996 WL 549244 (Sept. 19, 1996).
 10. See *Own Motion Review of the Petition of Environmental Health Coalition*, SWRCB Order No. WQ 98-01, http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/1998/wq1998_01.pdf, 1998 WL 46162 (January 22, 1998).
 11. *Id.* at *4.
 12. *Ibid* citing earlier SWRCB Orders No. WQ 91-03 and No. 97-03-DWQ (Industrial Stormwater General Permit).
 13. See *Own Motion Review of the Petition for Environmental Health Coalition*, SWRCB Order No. WQ 99-05, http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/1999/wq1999_05.pdf, 1999 WL 458768 (June 19, 1999).
 14. *Id.* at 1165; see also *In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association*, SWRCB Order No. WQ 2001-15, 2001 WL 1651932, at *2 (Nov. 15, 2001), http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2001/wq2001_15.pdf.
 15. Paragraph C.2. stated that: “Storm water discharges and authorized non-storm water discharges shall not cause or contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Board’s Basin Plan.” Order No. 97-03-DWQ at p. 4, para. C.2.
 16. See *Santa Monica Baykeeper v. Kramer Metals, Inc.*, 619 F. Supp. 2d 914 (C.D. Cal. 2009) (“the Court agrees that sampling orders of magnitude in excess of the benchmark levels is evidence supporting Baykeeper’s contention that Kramer did not have BMPs that achieve BAT/BCT. As discussed above, however, this evidence in and of itself does not establish a violation of Effluent Limitation B(3).”).