

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

**BRIEF FOR
WESTERN COALITION OF ARID STATES
("WESTCAS") AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

LAWRENCE S. BAZEL

Counsel of Record

BRISCOE IVESTER & BAZEL LLP

155 Sansome Street

Seventh Floor

San Francisco, California 94104

(415) 402-2700

lbazel@briscoelaw.net

TABLE OF CONTENTS

	Page
CONSENT OF THE PARTIES	1
INTEREST OF THE AMICUS.....	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	
I. THE NINTH CIRCUIT INCORRECTLY HELD THAT THE DISTRICT IS LIABLE FOR DISCHARGES FROM OTHER ENTITIES	6
A. EPA Regulations Apply Clean Water Act Requirements To Discharges <i>Through</i> Storm Sewers	6
B. The Ninth Circuit Implicitly Invalidated EPA Regulations ..	10
C. Municipalities Should Not Be Held Liable For Discharges Through Their Storm Sewers ..	15
II. MUNICIPALITIES SHOULD NOT BE REQUIRED TO ATTAIN IMPOSSIBLE GOALS.....	20
CONCLUSION.....	28

TABLE OF AUTHORITIES

	Page
Cases	
<i>Building Industry Association of San Diego County v. State Water Resources Control Board</i> , 124 Cal.App.4th 866 (2004).....	26, 27
<i>Defenders of Wildlife v. Browner</i> , 191 F.3d 1159 (9th Cir. 1999).....	20
<i>Herminghaus v. Southern California Edison Co.</i> , 200 Cal. 81 (1926)	24
<i>National Audubon Society v. Superior Court</i> , 33 Cal.3d 419 (1983).....	24
<i>NRDC v. Los Angeles County Flood Control District</i> , 673 F.3d 880 (9th Cir. 2011)	<i>passim</i>
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006).....	13, 14
<i>South Florida Water Management District v. Miccosukee Tribe of Indians</i> , 541 U.S. 95 (2004).....	4, 6, 10, 11
<i>Waterkeeper Alliance, Inc. v. EPA</i> , 399 F.3d 486 (2d Cir. 2005)	12

Statutes

33 U.S.C. § 1311(a)	10, 11, 14
33 U.S.C. § 1342(p)(3)(A)	19
33 U.S.C. § 1342(p)(3)(B)(iii)	20, 21
33 U.S.C. § 1342(p)(4)	17
33 U.S.C. § 1362(12)	10, 11

Regulations

40 C.F.R. § 122.2	12
40 C.F.R. § 122.21	12
40 C.F.R. § 122.26(a)(3)(ii)	7
40 C.F.R. § 122.26(a)(3)(iii)(A)	7
40 C.F.R. § 122.26(a)(3)(iii)(B)	7
40 C.F.R. § 122.26(a)(3)(vi)	7
40 C.F.R. § 122.26(a)(4)	12
40 C.F.R. § 122.26(b)(1)	7
40 C.F.R. § 122.26(c)	12
40 C.F.R. § 122.33(b)(3)	7
40 C.F.R. § 122.34(b)	20

Other Authorities

California State Water Resources Control Board, General Industrial Stormwater Permit (1997).....	19
EPA, Guidelines for Deriving Numerical National Water Quality Criteria for the Protection Of Aquatic Organisms and Their Uses (1985, electronic version 2010)	26
EPA, National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed.Reg. 47990 (November 16, 1990)	21
EPA, Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination Minimum Control Measure (January 2000, revised December 2005) (fact sheet).	17
EPA Region 1, Questions and Answers (undated)	24
EPA, Water Quality Standards Handbook (2d ed. 2012)	26
Tetra Tech, Using Microbial Source Tracking to Support TMDL Development and Implementation (April 2011)	23

CONSENT OF THE PARTIES

Having obtained the consent of all parties, whose letters have been filed with the Clerk, the Western Coalition of Arid States respectfully submits this brief as amicus curiae supporting reversal of the judgment below.¹

INTEREST OF THE AMICUS

Members of the Western Coalition of Arid States (“WESTCAS”) include more than one hundred municipal entities in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, and Texas. WESTCAS is dedicated to encouraging the development of water programs and requirements that assure adequate supplies of high quality water for those living in the arid regions, while protecting the environment.

WESTCAS members operate storm sewers and other municipal flood-control facilities. WESTCAS

¹ No counsel for any party authored any part of this brief and no one other than amicus curiae made any monetary contribution to the preparation and submission of this brief. No person other than amicus curiae, its members, or its counsel made any monetary contribution to its preparation or submission.

members are concerned that the Ninth Circuit's decision could hold them responsible for the discharges from other entities, and could impose on them requirements that cannot reasonably be attained.

SUMMARY OF THE ARGUMENT

This brief makes two points that the Court should be aware of when considering the question presented in this case. First, the Ninth Circuit made a serious error on an issue of great significance to every municipality: It held (contrary to Clean Water Act regulations) that the municipal owner of a storm sewer is responsible for *everything* that flows out of that storm sewer, including the stormwater and wastewater that industries and other municipal entities discharge through the storm sewer. Second, the Ninth Circuit imposed (contrary to Congressional intent) a requirement that appears impossible to attain, owing to natural conditions and other causes beyond the control of municipalities.

1. Clean Water Act regulations make the entities that discharge *through* municipal storm sewers responsible for their own discharges. The

regulations specify that when a permit (like the permit at issue here) covers multiple “co-permittees” who discharge through the same storm-sewer system, each co-permittee is responsible only for its own discharge. The Ninth Circuit did not consider the validity of these regulations. But by holding that the Los Angeles County Flood Control District (the “District”) is responsible for the discharges of its co-permittees and all other entities that discharge through its storm sewers, the Ninth Circuit implicitly invalidated these regulations.

Municipalities should not be liable for the discharges sent through their sewers by other entities that are required by the Clean Water Act to obtain their own discharge permits. Congress could not possibly have intended to transfer the responsibility for industrial wastewater treatment, for example, from a discharging industry to a municipal owner of storm sewers. The industry created the industrial wastewater, and has the knowledge and facilities to provide appropriate treatment. The municipality did not create the wastewater, and does not have the knowledge or ability to provide treatment. Plainly, the

responsibility should stay with the industry, and nothing in the Clean Water Act suggests otherwise.

The Ninth Circuit's holding may arise from a misunderstanding of the *Miccosukee* case, in which this Court ruled that the Clean Water Act regulates "point sources that do not themselves generate pollutants." (*South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).) In *Miccosukee*, there was no question about *who* was discharging through the point source (if indeed there was a discharge), because only one entity was sending water through the pipe. In this case, there were as many as 84 cities, one county, thousands of regulated industries, and several sewage-treatment plants discharging their stormwater and dry-weather wastewater through the District's system. The Ninth Circuit should have concluded, consistent with the regulations, that each of these regulated entities was responsible for its own discharge.

2. The Ninth Circuit created another serious problem for municipalities. It strictly enforced a prohibition against causing exceedances of the standards that apply to ambient waters (i.e. the

“water-quality standards”). Municipalities are unlikely to be able to comply with this prohibition because of natural conditions (such as the bacteria in bird droppings, and the naturally muddy condition of many waters during wet weather) and other conditions beyond their control. When Congress specified that municipalities must implement stormwater controls to the “maximum extent practicable”, it surely did not intend to impose requirements that could not reasonably be attained. Courts should be careful not to impose unattainable requirements on municipalities.

The Ninth Circuit, in short, improperly held that the owner of a storm sewer is responsible for everything that flows through that sewer, implicitly invalidated Clean Water Act regulations, and strictly enforced a prohibition that probably cannot be attained. These errors should be noted, and corrected.

ARGUMENT

I. THE NINTH CIRCUIT INCORRECTLY HELD THAT THE DISTRICT IS LIABLE FOR DISCHARGES FROM OTHER ENTITIES

A. EPA Regulations Apply Clean Water Act Requirements To Discharges *Through* Storm Sewers

In the *Miccosukee* case, this Court held that the Clean Water Act regulates “point sources that do not themselves generate pollutants.” (*South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).) *Miccosukee* involved a single entity pumping water through a single pipe. (*Id.* at 98-99.) This Court did not consider the question relevant to municipal storm sewers: Can there be more than one discharge when more than one entity sends stormwater or wastewater through the same pipe? The answer that is consistent with Clean Water Act regulations, and that best implements Congressional intent, is: Yes.

When several municipalities discharge stormwater through a single system of storm sewers, regulations issued by the U.S. Environmental Protection Agency (“EPA”) allow for (but do not require) a system-wide permit covering all the

discharges. (40 C.F.R. § 122.26(a)(3)(ii).)

A municipality can choose to apply for an individual permit covering only those “discharges . . . for which the operator is responsible”, or it may join other municipal entities and apply as a “co-permittee” for a permit covering more than one entity. (40 C.F.R. § 122.26(a)(3)(iii)(B), (A).) A co-permittee is *not* held jointly and severally liable for the discharges of the other co-permittees. On the contrary, a co-permittee is responsible only for its own discharge. (40 C.F.R. § 122.26(a)(3)(vi) (“[c]o-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators”).)² Here, a single Clean Water Act discharge permit (known as an “NPDES” permit) was issued to the Los Angeles County Flood Control District (the “District”), the county, and 84 municipalities. (*NRDC v. Los Angeles County Flood*

² See also 40 C.F.R. § 122.26(b)(1) (co-permittee defined as “a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator”); 40 C.F.R. § 122.33(b)(3) (“[a]s a limited co-permittee, you [i.e. a small municipality discharging through a medium or large municipal system] will be responsible for compliance with the permit’s conditions applicable to your jurisdiction”).

Control District, 673 F.3d 880, 886 (9th Cir. 2011) (“*NRDC*”).)

The Ninth Circuit recognized that the permit at issue applied to many co-permittees, and it even quoted the definition of co-permittee. (*NRDC* at 886.) It also quoted a permit provision implying that each entity was *not* responsible for the discharges of other entities. (*See id.* at 892 (permit specifies that “[d]ischarges . . ., for which a Permittee is responsible for [sic], shall not cause or contribute to a condition of nuisance”, emphasis added).)

The District argued, consistent with these regulations and permit provisions, that each of the co-permittees was not responsible for the discharge of any other co-permittee. (*See id.* at 899 (“Defendants contend that by measuring mass-emissions downstream from where the pollutants entered the sewer system, it is not possible to pinpoint which entity, if any, is responsible for adding them to the rivers”).)

The Ninth Circuit rejected this argument. Notwithstanding the fact that the District merely “conveys the collective discharges of the numerous ‘up-sewer’ municipalities”, the Ninth Circuit held

that the District was responsible for the discharges of the up-sewer municipalities, and for everything else that comes out of the District's pipes:

Because the mass-emission stations . . . are located in a section of the MS4 [i.e. the municipal separate storm sewer system] owned and operated by the District, when pollutants were detected they had not yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that was again discharged to the rivers—in both cases, the District.

(*Id.* at 899, comma omitted.) Our concern here is not with the factual location of the monitoring stations (which the District and Solicitor General agree are actually in the river, not in the sewers), but rather with the legal conclusion that the entity who controls the pipe is the discharger of everything that comes out of that pipe.

The Ninth Circuit was wrong.

B. The Ninth Circuit Implicitly Invalidated EPA Regulations

The Clean Water Act regulates the “discharge of a pollutant”, which is defined to include “any *addition* of any pollutant to navigable waters from any *point source*”. (33 U.S.C. § 1311(a), § 1362(12), *emphasis added*.) *Miccosukee* focused on the meaning of “point source”, and concluded that “a point source . . . need only convey the pollutant to . . . ‘the waters of the United States’”. (*Miccosukee* at 105.) *Miccosukee* did not consider *who* is responsible for the addition of the pollutant through a point source, especially when there is more than one candidate.

The Ninth Circuit seems to have confused the holding in *Miccosukee*—that a point source can be a mere conveyance—with the quite different concept that the Clean Water Act applies to persons “who convey what is added by others”:

[T]he Clean Water Act does not distinguish between those who add and those *who convey what is added by others*—the Act is indifferent to the originator of water pollution.

(*NRDC* at 900, emphasis added.) This assertion is wrong. The Clean Water Act regulates the *addition* of a pollutant, not the conveyance of pollutants added by others.³ In *Miccosukee* there was no question about who might be responsible for the addition (if indeed there was an addition) because there was only one entity sending water through the pipe at issue. (*Id.* at 98.) Here, however, there are as many as 84 cities, one county, thousands of industries, and several sewage-treatment plants discharging through the District’s storm sewers. (See section I.C below.)

According to the Ninth Circuit, Congress did not intend to regulate the “individual sources of runoff” that send pollutants to the storm sewers; instead, Congress “put the NPDES permitting requirement at the municipal level”. (*NRDC* at 894; see discussion in section I.C below.) This conclusion is inconsistent with EPA regulations, which specify that the Clean Water Act regulates

³ 33 U.S.C. § 1311(a) (regulating discharges of pollutants), § 1362(12) (defining “discharge of a pollutant” to include “any addition” of a pollutant, but not the conveyance of pollutants added by others); see *Miccosukee* at 106 (“the Act requires NPDES permits only when there is an addition of a pollutant to navigable waters”, quotation marks omitted).

“discharges *through* pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works.” (See 40 C.F.R. § 122.2 (defining “[d]ischarge of a pollutant”), emphasis added.)⁴ If the Ninth Circuit is right—if the Clean Water Act really is indifferent to the industries that send their pollutants through the storm sewers—then EPA is wrong, and these regulations are invalid. (See *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504-505 (2d Cir. 2005) (invalidating EPA regulations attempting to impose requirements on point sources that did not discharge).)⁵ By refusing to hold the co-permittees and contributing industries liable for their discharges, the Ninth Circuit implicitly invalidated EPA regulations that impose requirements on

⁴ See also 40 C.F.R. § 122.21 (imposing duty on dischargers of pollutants to apply for permit); § 122.26(a)(4) (requiring industries discharging through storm sewers to submit notification to municipality in addition to complying with §122.26(c)); §122.26(c) (requiring dischargers of industrial stormwater to apply for permit).

⁵ “[U]nless there is a ‘discharge of any pollutant,’ there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit”.

co-permittees and other entities that discharge *through* storm sewers.

This Court has recognized that there is a difference between regulating discharges through conveyances, and regulating the conveyances themselves. In the *Rapanos* case, the plurality noted that the Clean Water Act

does not forbid the “addition of any pollutant *directly* to navigable waters from any point source,” but rather the “addition of any pollutant to navigable waters”

and that

lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit “directly into” covered waters, but pass “through conveyances” in between.

(*Rapanos v. United States*, 547 U.S. 715, 743 (2006), emphasis in original.) The plurality also noted, however, that conveyances have been treated as point sources, and that “[s]ome courts have even adopted both the ‘indirect discharge’ rationale and

the ‘point source’ rationale in the alternative, applied to the same facts.” (*Id.* at 744.)

The best way to resolve this issue is to accept the concept that more than one person can discharge—that is, add pollutants to the waters of the United States—through a single pipe or other conveyance. This concept fits the language of the Clean Water Act, which regulates persons, not pipes. (33 U.S.C. § 1311(a) (“the discharge of any pollutant *by any person* shall be unlawful”, emphasis added).) This concept is consistent with the result in *Miccosukee* (the sole operator of a pipe is responsible for any discharge) and with its reasoning (the Clean Water Act regulates those persons that *add* pollutants to the waters of the United States, not necessarily those persons who generate the pollutants).

This concept—that more than one person can discharge through a single pipe—is inherent in EPA regulations, which specify that NPDES permits can be issued to co-permittees, each of which is responsible only for the discharges “for which they are operators”. (See fn. 2 and accompanying text above.)

Finally, the concept is consistent with the common-sense conclusion that when an industry discharges through a storm sewer, the person doing the discharging is the industry, not the municipality that owns the sewer. A municipal storm sewer, like a public street, is a conveyance anyone can use. A municipality should no more be held liable for industrial discharges through its storm sewers than it should be held liable for industrial vehicles driven on its streets.

C. Municipalities Should Not Be Held Liable For Discharges Through Their Storm Sewers

The Ninth Circuit offered two rationales for its conclusion that the District was liable for everything flowing out of its storm sewers. Neither rationale justifies the conclusion.

The Ninth Circuit first asserted that Congress intended to make municipalities responsible “to ease the burden of administering the program”:

Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential “nightmare”) . . . , Congress put the NPDES permitting requirement at the

municipal level to ease the burden of administering the program.

(*NRDC* at 894, footnote omitted.) But the discharges at issue were not from “churches, schools and residential property”; they were from as many as 84 cities, one county, thousands of industries, and several sewage-treatment plants—each of which had already gone through the administrative permitting process. (*See id.* at 889-890 (identifying *permitted* entities discharging into “Watershed Rivers”).)⁶ Because these entities had already received permits, the Ninth Circuit’s holding could not ease the administrative burden of issuing permits to them.

Congress specifically required EPA to issue (or deny) permits for stormwater discharges “associated with industrial activity” and from municipalities with populations greater than 100,000. (33 U.S.C. § 1342(p)(4).) Nothing in the Clean Water Act

⁶ The Ninth Circuit seems to have believed that all of these “up-sewer” entities are discharging through the District’s storm-sewer system. Some of these entities may actually be discharging directly to waters of the United States. Nevertheless, at least some of the up-sewer entities must be discharging through the District’s storm sewers: Most industries send their stormwater to municipal storm-sewer *pipes* (as opposed to surface channels), and storm-sewer pipes cannot reasonably be classified as waters of the United States.

suggests that municipalities are responsible for stormwater discharges from these industrial discharges, or that one municipality is responsible for the discharge from another municipality. The Ninth Circuit should not have concluded otherwise.

Nor is there anything in the Clean Water Act to suggest that municipalities are responsible for *dry-weather* flows through their storm sewers. Here, there may be as many as six sewage-treatment plants, and an unspecified number of industries, discharging through the system during dry weather. (See *NRDC* at 889-890 (identifying discharges to Watershed Rivers).)⁷ The District, if it is a typical *flood-control* district, knows little or nothing about the treatment of sewage or industrial wastewater. It has little or no ability to treat anything that flows through its system; storm sewers are, after all, nothing more than pipes and surface channels. Yet the Ninth Circuit's decision makes the District

⁷ Municipal stormwater permits typically require the elimination of dry-weather flows, but "exceptions include discharges from NPDES-permitted industrial sources". (EPA, Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination Minimum Control Measure (January 2000, revised December 2005) (fact sheet) at 1, available at <http://www.epa.gov/npdes/pubs/fact2-5.pdf> (as of September 11, 2012).)

responsible for *everything* that flows out of its storm sewers, including the dry-weather flow from industries and sewage-treatment plants. Congress could not possibly have intended to transfer responsibility for sewage treatment and industrial-wastewater treatment from those who know how to provide treatment, and have the facilities to provide treatment, to municipalities that have neither the knowledge nor the ability.

The Ninth Circuit's second rationale was one of convenience, although it was couched as permit interpretation. The District's argument, according to the Ninth Circuit, would "emasculate the Permit". (*NRDC* at 895.) Why? Because there would be no way to determine compliance: "it is . . . *impossible* to identify the particular storm drains that had, for instance, some fecal bacteria which contributed to a water-quality violation". (*NRDC* at 899, emphasis added.) But although it might be *difficult* to monitor the separate discharges of 84 cities and one county, the Ninth Circuit presented nothing to suggest that the monitoring would be *impossible*. There are more than 1,600 industries discharging stormwater to the local rivers (*NRDC* at 889-890), and each is

monitoring its own discharge.⁸

In any case, convenience is no reason to hold one entity liable for the discharge from another entity. Taking and due-process principles, at the very least, should caution against the casual imposition of such unusual requirements.

Nor can the Ninth Circuit's decision be justified as an effort to promote the environmental goals of the Clean Water Act. If the goal is to reduce the discharge of pollutants associated with industrial activity (*see* 33 U.S.C. § 1342(p)(3)(A)), it makes sense to regulate the industries discharging those pollutants. It makes no sense to transfer that responsibility to flood-control districts and other municipal entities.

Municipalities, in short, should not be held liable for everything flowing out of their sewers.

⁸ Monitoring is required by California's general industrial stormwater permit. (California State Water Resources Control Board, General Industrial Stormwater Permit (1997) at 24-25, available at http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf (as of September 11, 2012).)

II. MUNICIPALITIES SHOULD NOT BE REQUIRED TO ATTAIN IMPOSSIBLE GOALS

The Clean Water Act requires municipalities to implement “controls to reduce the discharge of pollutants [from storm sewers] to the maximum extent practicable”. (33 U.S.C. § 1342 (p)(3)(B)(iii).) No one doubts that there are practicable controls, and EPA has required municipalities to implement them. (*See e.g.* 40 C.F.R. § 122.34(b) (identifying “minimum control measures”).) There is disagreement, however, about whether Congress intended that municipalities should *also* be subject to the prohibition on causing exceedances of water-quality standards. (*See NRDC* at 885-886 (explaining effluent limits and water-quality standards); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163-1167 (9th Cir. 1999) (holding that the prohibition on causing exceedances of water-quality standards does not apply to municipalities, but concluding in dictum that EPA has authority to impose that prohibition).)

Missing from the Ninth Circuit’s analysis of this issue is any consideration of whether

municipalities *can* comply with the prohibition. There is good reason to believe that they cannot. Yet Congress surely did not intend to impose impossible requirements on municipalities. Congress would not have specified that municipalities must implement controls only to the “maximum extent practicable” if Congress intended to impose impossible requirements.⁹

The Ninth Circuit acknowledged a preference for flexibility: “Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner” (*NRDC* at 895, quoting EPA at 55 Fed.Reg. 48,038.) The Ninth Circuit seems to have thought that the prohibition on causing exceedances of water-quality standards provided for flexibility: “water-quality standards may be preferable over more-difficult-to-enforce effluent limitations.” (*Id.*)

⁹ In *Defenders of Wildlife*, the Ninth Circuit noted that the “maximum extent practicable” provision also allows for “such other provisions as [EPA] or the State determines appropriate for the control of such pollutants.” (*Defenders of Wildlife* at 1166-1167, quoting 33 U.S.C. § 1342 (p)(3)(B)(iii).) But nothing suggests (and the Ninth Circuit did not hold) that this provision allows for requirements that municipalities cannot attain. Requirements that cannot reasonably be attained cannot be “appropriate”.

Actually, the prohibition on causing exceedances of water-quality standards could not be more rigid. It makes no allowance for anything.

For three reasons, municipalities are not likely to be able to comply with the prohibition: (1) natural conditions generate excessive amounts of pollutants, (2) municipalities generally cannot treat stormwater, and (3) water-quality standards are not designed for actual wet-weather conditions.

Stormwater washes the land. It washes, into the nearest stream, bear droppings from the woods, cow droppings from the fields, and dog droppings from the city streets. All these droppings contain fecal bacteria, and all the streams into which they are washed do too. When millions of bison grazed the Great Plains, enormous numbers of fecal bacteria must have been washed into the local streams. The bison may be gone, but there are millions of birds in most cities, birds that are often found near water and that generate immense amounts of droppings and fecal bacteria. Geese, for example, are renowned for the speed at which they produce excrement.

Scientific methods can be used to determine which animals provided the fecal bacteria in a water

sample. A recent report prepared for EPA reviewed the methods, applied them to waters in several states, and found that the main sources of fecal bacteria differed from place to place: birds, deer, raccoons, and rodents were most frequently identified in one study; ruminants and humans in a second; birds and dogs in a third; wildlife and livestock in a fourth; geese and sheep in a fifth; and sheep and horses in a sixth. (Tetra Tech, Using Microbial Source Tracking to Support TMDL Development and Implementation (April 2011) at 35, 39, 43, 47, 50, 58.)¹⁰

Fecal contamination is not the only natural pollutant. Natural waters are often muddy. Although water may run clear over rocks in the mountains, water picks up mud when it flows across the flats. The faster it flows, the more mud it picks up. During wet weather, rivers with easily eroded bottoms and banks (which sometimes have names like the Red River, the Yellow River, or the “Big Muddy”) are unlikely ever to be in compliance

¹⁰ Available at http://www.epa.gov/region10/pdf/tmdl/mst_for_tmdls_guide_04_22_11.pdf (as of September 5, 2012).

with water-quality standards calling for low levels of turbidity or “suspended solids”.¹¹

Of course, pollutants do not come only from natural sources. According to EPA, fecal contamination “can come from untreated sewer discharges (e.g. sewer overflows or sewage treatment plant malfunctions), failing septic systems, storm water, boat wastes, pets, wildlife (e.g. geese) and farm animals.”¹² Many of these—failing septic systems, boat wastes, wildlife, and farm animals—are beyond the control of most municipalities. Although municipalities may have some control over dog droppings (which might be susceptible to street sweeping and scoop-the-poop laws), and to discharges from their own sewage-treatment plants (which are

¹¹ This mud is not necessarily bad. In one of the most famous California water-rights cases, Amelia Herminghaus sued to prevent upstream dams from capturing the high river flows that dumped so much good, fertile mud on her land: “the augmented natural flow . . . flowed naturally out and over the plaintiffs’ said lands . . . and deposited thereon a very fertile silt which enriched said land and caused an abundant growth of grasses thereon”. (*Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 93 (1926).) She won, and the California Constitution was amended to override that decision. (*National Audubon Society v. Superior Court*, 33 Cal.3d 419, 442 (1983).)

¹² EPA Region 1, Questions And Answers (undated), available at <http://www.epa.gov/region1/eco/beaches/qa.html> (as of September 5, 2012).

separately permitted and regulated), these controls seem unlikely to ensure compliance with water-quality standards for bacteria, or to have much effect on wet-weather bacterial levels in the ambient waters.

When it comes to mud, however, there is no doubt. Nothing anyone can do will convert the Big Muddy into a clear mountain stream.

It may seem strange that municipalities can turn raw human sewage into high-quality effluent, and yet have little or no effect on stormwater. But municipalities generally cannot treat stormwater. Most cities have separate sewers, consisting of “sanitary” sewers that carry sewage and other wastewater to municipal sewage-treatment plants, and storm sewers that carry stormwater to nearby waters. (Older cities, like Washington DC and San Francisco, have combined sewers in which one set of pipes carries both sewage and stormwater.) Storm sewers are pipes and surface channels that are designed to prevent flooding. They do nothing other than convey stormwater.

Natural conditions and the lack of treatment facilities might not be insurmountable problems if

water-quality standards were derived from actual wet-weather data and realistic assessments of what can be attained. But they are not. Numeric standards (“criteria”) are generally developed from laboratory experiments using test organisms.¹³ “Narrative” standards are vague appeals for ambient waters to be free from undesirable qualities—for example, that waters “shall be free from substances attributable to wastewater discharges or other pollutant sources that: . . . Settle to form objectional [sic] deposits”.¹⁴

The Ninth Circuit was too quick to dismiss the District’s request to apply the prohibition (i.e. on causing exceedances of water-quality standards) with a light hand. (*NRDC* at 897, citing *Building Industry Association of San Diego County v. State*

¹³ See EPA, Guidelines for Deriving Numerical National Water Quality Criteria for the Protection Of Aquatic Organisms and Their Uses, at 11-14 (1985, electronic version 2010) (standards to protect fish and other aquatic organisms). (Available at <http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/upload/85guidelines.pdf> (as of September 11, 2012).) Bacterial criteria, which were developed from dry-weather bacterial levels, are an exception.

¹⁴ EPA, Water Quality Standards Handbook, § 3.5.2 (2d ed. 2012) (available at <http://water.epa.gov/scitech/swguidance/standards/handbook/chapter03.cfm#section5> (as of September 11, 2012)).

Water Resources Control Board, 124 Cal.App.4th 866 (2004).) In the *Building Industry Association* case, petitioner argued that it was impossible to comply with the prohibition, but the argument failed because there had been no factual showing before the agency. (*Building Industry Association* at 888.) The California court of appeal suggested that the impossibility arguments were “premature” (“we cannot determine with any degree of certainty whether this obligation [the prohibition on causing exceedances of water-quality standards] would ever be imposed, particularly if it later turns out that it is not possible for a Municipality to achieve that standard”) and that the petitioner’s “doomsday arguments” were overblown (“it is not at all clear that a citizen would have standing to compel a municipality to comply with a water quality standard despite an ongoing iterative process”). (*Id.* at 890-891.) Now that the citizen suits have begun, courts should allow municipalities to make the necessary factual showing, and should be careful to avoid imposing on municipalities requirements that cannot reasonably be attained.

CONCLUSION

The Ninth Circuit improperly held that the District is responsible for everything that flowed out of its system, implicitly invalidated EPA regulations, and strictly enforced a prohibition that probably cannot be attained. These errors should be noted, and corrected.

Respectfully submitted,

LAWRENCE S. BAZEL

Counsel of Record

BRISCOE IVESTER & BAZEL LLP

155 Sansome Street, Seventh Floor

San Francisco, California 94104

(415) 402-2700

lbazel@briscoelaw.net

Attorneys for Amicus Curiae

WESTERN COALITION OF ARID STATES

September 12, 2012