No. 13-901

In The
Supreme Court of the United States

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT, *ET AL.*,
Petitioners,

v.

NATURAL RESOURCES
DEFENSE COUNSEL, *ET AL.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* FLORIDA STORMWATER ASSOCIATION AND SOUTHEAST STORMWATER ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Stormwater flows over structures and paved surfaces, collecting waste and sediments, as it ultimately spills into rivers, streams, and oceans. Regulating stormwater can be an "administrative nightmare." 131 Cong. Rec. S8086-02 (1985) (statement of Sen. Malcolm Wallop) (discussing the consequences of a statute to regulate individual sources of stormwater runoff). Congress thus crafted, and EPA has since implemented, a carefully designed program to regulate stormwater discharges through municipal separate stormwater systems or "MS4s" within the Clean Water Act's broader regulatory framework. The Ninth Circuit's decision in this case turns this program on its head, undoing the careful regulatory balance that reduces pollution through enforceable obligations without unduly burdening local, state, and federal agencies. In so holding, the Ninth Circuit ignored first principles of administrative law by failing to defer to Congress and the agency charged with implementing the Clean Water Act. It was precisely the type of "fanciful interpretation" Justice Scalia feared at oral

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[1] In accordance with Rule 37.2.(a) of the Rules of the Supreme Court, counsel for Petitioners and Respondents received timely notice of the Amici's intent to file this brief. Counsel for Petitioners and counsel for Respondents have provided separate letters consenting to this brief, which Amici have filed contemporaneously with the brief. No counsel for a party authored this brief in whole or in part, and no person, other than Amici or their counsel, made any monetary contribution to the preparation or submission of this brief.

argument in the earlier iteration of this case. Transcript of Oral Arg., No. 11-460 at pg. 28, ln.25 – pg. 29, ln. 5. And it is the type of interpretation that this Court should now correct because of its far-reaching effects.

The Florida Stormwater Association and the Southeast Stormwater Association have a direct and substantial interest in seeing the Ninth Circuit's decision in *NRDC v. County of Los Angeles,* 725 F.3d 1194 (9th Cir. 2013) reversed on the second question presented by the Petitioners. Amici are non-profit organizations whose members include MS4s, academic institutions, and private engineering and consulting companies that have an interest in promoting and enhancing the effective management and operation of stormwater management systems. Together, Amici's approximately 450 organizational members are at the forefront of developing and implementing effective stormwater policy in Alabama, Florida, Georgia, Kentucky, North Carolina, Mississippi, South Carolina, and Tennessee. Many members have substantial resources committed to reducing pollutants in accordance with MS4 permits similar to the one at issue here. The Ninth Circuit's decision threatens to derail the work already under way.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision below represents an instance of a court overstepping its authority and imposing its own policy determinations in contravention of Congress's mandates under the Clean Water Act, EPA's interpretation of that Act,

and the high walls erected by this Court in *Chevron U.S.A. Inc. v. NRDC, Inc.,* 467 U.S. 837 (1984), and its progeny, to protect the separation of powers. In an effort to get after the Petitioner, the Ninth Circuit's decision threatens to tilt the Clean Water Act's regulatory balance towards an end Congress specifically hoped to avoid, and one EPA has so far avoided.

In particular, to hold the Petitioners' liable, the Ninth Circuit's decision misapprehends the purposes of mass-emission monitoring requirements for MS4s. This threatens the often voluntary use of these requirements to assess water quality trends, and then refine adaptive management programs designed to make the Nation's waters cleaner.

The decision below also confuses water quality standards with the means used to implement them. This results in the Ninth Circuit – not Congress or the agency charged with implementing the Clean Water Act – reading more onerous requirements into Petitioners' permit, disregarding completely EPA's determination that these more onerous requirements are not necessary for MS4s.

Finally, to circumvent an EPA rule that makes a co-permittee responsible – and thus liable – for only its own discharges, the Ninth Circuit simply ignores the rule through a distinction that makes only one thing clear: a co-permittee may be liable for the discharges of others. This, in turn, may discourage the use of system or jurisdiction-wide permits – as Congress specifically contemplated – to an extent that the permitting burden would grow

exponentially – a consequence Congress specifically feared. This Court should thus grant review.

ARGUMENT

I. THE NINTH CIRCUIT ERRED BY HOLDING A CO-PERMITTEE IN A MULTI-JURISDICTIONAL MS4 PERMIT LIABLE BASED SOLELY ON EXCEEDANCES MEASURED AT MASS-EMISSION MONITORING STATIONS; WITHOUT PROOF THAT THE CO-PERMITTEE VIOLATED ITS PERMIT; AND IN CONTRAVENTION OF AN EPA RULE (AS REFLECTED IN THE PERMIT AT ISSUE) THAT MAKES A CO-PERMITTEE RESPONSIBLE – AND THUS LIABLE – FOR ONLY ITS OWN DISCHARGES.

A. Regulating stormwater under the Clean Water Act: Congress's careful and deliberate approach.

1. Fitting a square peg in a round hole.

The Clean Water Act prohibits the "discharge of any pollutant" from any "point source" into "navigable waters" unless the discharger first obtains a national pollutant discharge elimination system or "NPDES" permit. 33 U.S.C. §§ 1311(a), 1342. The Act defines "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14). NPDES permits for point sources

generally have five types of provisions: (1) technology-based effluent limitations ("TEBLs"), which are established after considering technological feasibility and cost; (2) water-quality-based effluent limitations ("WQBELs"), which apply without regard to practicability where TBELs alone are insufficient for a waterbody to achieve water quality standards; (3) monitoring and reporting requirements; (4) standard conditions; and (5) special conditions. *See generally id.* §§ 1311, 1312, 1342.

Because stormwater is a diffuse – not discrete or discernible – source of pollutant discharge, with variable flows and many outfalls that regularly crisscross political boundaries, it was largely exempt from the NPDES requirements until 1987. In 1987, Congress amended the Clean Water Act to regulate stormwater through a phased implementation program for two distinct categories of dischargers: industrial sources and MS4s. *See* Pub. L. No. 100-4, § 405, 101 Stat. 7, 69 (Feb. 7, 1987) (codified at 33 U.S.C. § 1342(p)).[2]

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[2] Prior to the 1987 amendments, ambiguity began to creep into the issue. EPA categorically exempted stormwater uncontaminated from industrial or commercial activity through rulemaking. *See* 40 C.F.R. § 125.4 (1975). But the D.C. Circuit's decision in *NRDC v. Costle,* 568 F.2d 1369, 1377 (D.C. Cir. 1977) put categorical exemptions into doubt.

2. A phased approach to stormwater regulation.

In what EPA refers to as Phase I, the Act allows EPA (or an approved NPDES permitting state) to issue NPDES permits for stormwater discharges associated with industrial activity, and larger MS4s. 33 U.S.C. § 1342(p)(1), (2). As drafted in 1987, the Clean Water Act prohibited EPA from regulating all other stormwater discharges through the NPDES program until October 1, 1992. Recognizing the continuing challenges posed by stormwater regulation, Congress later extended the deadline until October 1, 1994. *See* Pub. L. No. 102-580, § 364, 106 Stat. 4797, 4862 (Oct. 31, 1992).

For Phase II of stormwater regulation, Congress first required EPA to conduct two studies to identify additional stormwater sources for possible control and methods for regulating these sources. 33 U.S.C. § 1342(p)(5). Congress then directed EPA to issue regulations based on the studies. *Id.* § 1342(p)(6). EPA issued its regulations in 1999, extending NPDES permitting to discharges from smaller construction sites and MS4s. 64 Fed. Reg. 68,722 (Dec. 8, 1999); *see also Envtl. Def. Ctr., Inc. v. EPA,* 344 F.3d 832 (9th Cir. 2003).

3. Industrial versus MS4 discharges.

Congress also imposed more stringent requirements on industrial stormwater dischargers

than MS4s.[3] The Clean Water Act provides that NPDES "permits for discharges associated with industrial activity shall meet all applicable provisions of [§ 1342] and § 1311." 33 U.S.C. § 1342(p)(3)(A). This statutory provision thus makes TBELs and WQBELs applicable to industrial stormwater permits. 33 U.S.C. § 1311(b). And it makes the monitoring and reporting requirements of § 1318 applicable to industrial permits. *Id.* § 1342(a)(1). More specifically, this statutory provision triggers the TBEL, WQBEL, and monitoring requirements in 40 C.F.R. § 122.44; the Rule imposes conditions on NPDES permits only "when applicable" under the Clean Water Act. *Id.*

By contrast, NPDES permits for MS4s simply must "require controls to reduce the discharge of stormwater to the maximum extent practicable . . . and any such other provisions as the Administrator or the State determines appropriate." 33 U.S.C. § 1342(p)(3)(B)(iii). "Section 1342(p)(3)(B)(iii) *replaces* the requirements of § 1311" for MS4s. *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1165 (9th Cir. 1999) (emphasis in original). There exists no requirement that MS4s comply with the monitoring and reporting requirements in § 1318 of the Clean

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[3] This makes sense. Industrial sites tend to be smaller, and have fewer and more discrete outfalls. By comparison, the MS4 permit at issue here covers "84 cities and some unincorporated areas" of a County "home to more than 10 million people," and a system with "tens of thousands of outfalls." *NRDC,* 725 F.3d at 1197-98.

Water Act.[4] Thus, the TBEL, WQBEL, and monitoring requirements of 40 C.F.R. § 122.44 are inapplicable to MS4s unless EPA makes a contrary determination to this effect; EPA has made no such determination. *Defenders of Wildlife,* 191 F.3d at 1166 ("EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards.").

The Clean Water Act's legislative history provides the rationale for treating MS4s differently than others sources subject to the NPDES program. In discussing the conference report for the 1987 amendments, Senator Stafford stated:

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[4] 40 C.F.R. § 122.26(d)(2)(i)(F), however, imposes a very different kind of monitoring requirement for MS4 permittees that serve more populated areas, i.e., Phase I MS4s. Unlike traditional monitoring programs that focus on compliance with a given NPDES permit, making it easier to enforce effluent limits in the NPDES permit, the Phase I MS4 monitoring requirements are designed to give permittees "practical tools . . . in order to determine if their stormwater programs are working, and [to] help elucidate where additional efforts may be most critical"; monitoring is not required for Phase II MS4 permits. EPA MS4 Permit Improvement Guide, at 98, *see also* 99, 103. (Apr. 2010) *available at* http://www.dep.state.fl.us/water/stormwater/npdes/docs/ms4permit-improvement-guide-epa_0410.pdf.

> Mr. President, I would like to explain to my colleagues why a little more time is needed to develop a comprehensive municipal storm sewer program. These 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. As an EPA official explained in a meeting of the conferees:
>
> These are not permits in the normal sense we expect them to be. These are actual programs. These are permits that go far beyond the normal permits we would issue for an industry because they in effect are programs for stormwater management that we would be writing into these permits.

132 Cong. Rec. S16424-02 (1986). Senator Stafford's words (echoing those of an EPA official) recognize that MS4 discharges are very variable because the type, flow, and concentration of pollutants depend on the activities occurring in the drainage area. *See id.*

EPA reiterated this point in its 1996 guidance on stormwater regulations. There, EPA explained that the difficulty of applying numeric effluent limits to stormwater discharges stems from the fact that such limits were created to calculate (and remedy) water quality impacts from "process wastewater discharges which occur at predictable rates with predictable pollutant loadings under low

flow conditions in receiving waters." Questions & Answers Regarding Implementation of an Interim Permitting Approach for WQBELs in Stormwater Permits, 61 Fed. Reg. 57,425, 57,426 (Nov. 6, 1996). But stormwater is not predictable as to flow, pollutant type, or pollutant concentration, making unsuitable the methodologies ordinarily used to derive numeric TBELs and WQBELs. *Id.*

4. **Encouraging the inclusion of co-permittees.**

The legislative history further explains why the Clean Water Act provides that NPDES permits for MS4s "may be issued on a system or jurisdiction-wide basis" where the permits "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." 33 U.S.C. § 1342(p)(3)(B)(i)-(ii). Discussing changes made by conferees to the stormwater section of the 1987 Clean Water Act amendments, Congressman Snyder feared "the disastrous consequences that could result" if NPDES permits for MS4s did not include co-permittees – "local, State, and Federal officials would be inundated with an enormous permitting workload." 132 Cong. Rec. H10923-01 (1986). Congress, therefore, amended the original bill to include language designed to encourage the inclusion of co-permittees in NPDES permits for MS4s with the goal of "reduc[ing] the universe of permits required for stormwater from millions to thousands." *Id.*

The definition of "co-permittee" in 40 C.F.R. § 122.26(b)(1) reflects the Congressional intent to

encourage MS4s to seek system-wide or jurisdiction-wide NPDES permits. The Rule provides that a "co-permittee means a permittee to a NPDES permit that is *only responsible* for permit conditions relating to the discharge for which it is the operator." *Id.* (emphasis added). By limiting responsibility (and by extension liability) to a permittee's "discharge for which it is the operator," the Rule encourages MS4s to enlist co-permittees. Without the Rule, MS4s would be unwilling or unable to enlist co-permittees for fear of exposing themselves to greater responsibility and liability, making it unlikely that local governments in a drainage basin would pool resources or otherwise cooperate on the best means to reduce pollutants in stormwater flow that ignores political boundaries. Balkanization of multisystem permits would result, the effectiveness of stormwater programs would suffer, and Congress's fears would be realized. *See* 132 Cong. Rec. H10923-01 (1986).

B. The Ninth Circuit's decision: unraveling Congress's careful and deliberate approach to regulating stormwater.

While seemingly interpreting the NPDES permit at issue as a contract, the Ninth Circuit's decision threatens to rewrite Congress's careful and deliberate approach to regulating stormwater. The decision reflects a fundamental misunderstanding of the role that monitoring stations play for MS4s. The decision compounds this mistake by treating exceedances measured at monitoring stations as violations of the Clean Water Act. And the decision discourages the inclusion of co-permittees by creating

an unworkable distinction between responsibility and liability under 40 C.F.R. § 122.26(b)(1).

1. Using monitoring to fine-tune solutions – not measure compliance.

As an initial matter, the Ninth Circuit's mistakes stem from its failure to recognize – as Congress and EPA already have – that NPDES permits for MS4s are unique. These permits are not meant to include numeric effluent limitations designed to limit pollutants spewing from the end of a pipe; "[t]hese are permits that go far beyond the normal permits [EPA] would issue for an industry because they in effect are programs for stormwater management that [EPA] would be writing into these permits." 132 Cong. Rec. S16424-02 (1986) (quoting EPA official).

The stormwater management programs written into each MS4 permit include a host of carefully designed best management practices ("BMPs") to reduce pollution to the "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). The BMPs evolve as the permitting agencies and the permittees learn which methods and techniques work and which do not. Monitoring is an essential part of this learning process – of this iterative BMP approach designed to adapt and improve. *See* note 4 *supra* (citing 40 C.F.R. § 122.26 and EPA's MS4 Permit Improvement Guide). But the monitoring and reporting requirements of § 1318 and 40 C.F.R. § 122.44 are not required for MS4s; often MS4s

voluntarily agree to take-on such obligations to better assess and adjust the BMPs to maximize their efficiency and reduce the discharge of pollutants.

Yet the Ninth Circuit held that the monitoring and reporting requirements in the permit at issue would be meaningless if they were not used to judge compliance with the ambient water quality standards being monitored. *NRDC,* 725 F.3d at 1205-06. In so holding, the Ninth Circuit ignored the paragraph of the Monitoring and Reporting Program in the permit that states: "ultimately, the results of the monitoring requirements outlined below should be used to refine the [plan] for the reduction of pollutant loadings and the protection and enhancement of the beneficial uses of the receiving waters in Los Angeles County." California Regional Water Quality Control Board Los Angeles Region, *Monitoring and Reporting Program CI-6948*, Order No. 01-182, June 15, 2005. And the Ninth Circuit incorrectly noted that the monitoring and reporting requirements of § 1318 and 40 C.F.R. § 122.44(i) – used to judge compliance for *other types of* NPDES permittees – must necessarily apply to MS4s. *See NRDC,* 725 F.3d at 1209.

The Ninth Circuit's decision may have a chilling-effect on MS4s voluntarily taking-on the type of mass-emissions monitoring that provides a snapshot of ambient water quality, and that serves an important role in assessing whether existing BMPs are effective. Specifically, because of the Ninth Circuit's decisions, permittees might resist monitoring obligations that expose them to liability under the Ninth Circuit's decision. Data previously

used to begin conversations regarding the effectiveness of existing methods and approaches (and to refine such methods and approaches) would – in many cases – simply vanish for fear of liability. This, in turn, would impede the iterative BMP approach that reduces pollutant discharges into the Nation's waters – an absurd result in conflict with the Clean Water Act's overarching goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's water." 33 U.S.C. § 1251(a).

2. Authorized exceedances are not violations.

The Ninth Circuit also concluded "that the pollution exceedances detected at the County Defendants' monitoring stations are sufficient to establish the County Defendants' liability for NPDES permit violations as a matter of law." *NRDC,* 725 F.3d at 1197. Not so.

First, an exceedance in itself cannot constitute a violation of the Clean Water Act. The relevant distinction is one between authorized and unauthorized exceedances. *Center for Native Ecosystems v. Cables*, No. 04-cv-02409, 2006 U.S. Dist. LEXIS 1594 (D. Co. Jan. 9, 2006) ("Wyoming will not take enforcement action against a nonpoint source discharger who is implementing BMPs in good faith, even where an exceedance of water quality standards is demonstrated." (citations omitted)); Black's Law Dictionary, violation (9th ed. 2009) (defining violation as "an infraction or breach of the law").

Second, here the Petitioners' discharges complied with the NPDES permit and were thus authorized. The Ninth Circuit's conclusion to the contrary confuses the relevant water quality standards with numeric WQBELs. In particular, the Ninth Circuit reasons that "[i]f the [Petitioners'] monitoring data shows that the level of pollutants in federally protected water bodies exceeds [the relevant water quality standards], then, as a matter of permit construction, the monitoring data conclusively demonstrate that the . . . [Petitioners] are liable for Permit violations." *NRDC,* 725 F.3d at 1207. This cannot be.

Water quality standards (which are not self-executing) and the numeric WQBELs used to implement them are two distinct things. The permit at issue contains no numeric WQBELs. EPA requires none. *See* Interim Permitting Approach for WQBEL in Stormwater Permits, 61 Fed. Reg. 43,761, 43,761 (Aug. 26, 1996). The Ninth Circuit's decision to simply read numeric WQBELs into the Petitioners' permit treads on the discretion specifically conferred by Congress on EPA, and thus contravenes the very foundations of administrative law. 33 U.S.C. § 1342(p)(3)(B)(iii) (requiring "controls to reduce the discharge of stormwater to the maximum extent practicable . . . and any such other provisions as the Administrator or the State determines appropriate"); *see also Defenders of Wildlife,* 191 F.3d at 1165-66 ("EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has

the authority to require less than strict compliance with state-water quality standards.").

3. Discouraging the inclusion of co-permittees.

The Ninth Circuit's decision may moreover result in the end of MS4 permits on a "system or jurisdiction-wide basis." 33 U.S.C. § 1342(p)(3)(B)(i). As discussed above, enlisting co-permittees is only viable for individual MS4s because EPA has defined a "co-permittee" as "a permittee to a NPDES permit that is *only responsible* for permit conditions relating to the discharge for which it is the operator." 40 C.F.R. § 122.26(b)(1) (emphasis added). Black's Law dictionary, in turn, defines "responsibility" as "liability." Black's Law Dictionary, responsibility (9th ed. 2009). It further notes that the "to say that someone is legally responsible for something often means only that under legal rules he is liable to be made either to suffer or to pay compensation in certain eventualities." *Id.*

The definition of "co-permittee" in 40 C.F.R. § 122.26(b)(1) appears almost verbatim in the Petitioners' permit, which provides that "each permittee is responsible only for a discharge for which it is the operator." *NRDC,* 725 F.3d at 1206 (internal quotations omitted). But the Ninth Circuit completely alters its meaning and effect by explaining that "[l]imiting a Permittee's responsibility to discharges for which it is the operator applies to the appropriate *remedy* for Permit violations, not to *liability* for those

violations." *NRDC,* 725 F.3d at 1206 (emphasis in original) (internal quotations omitted).

The Ninth Circuit fails to explain the distinction it draws between responsibility and liability. *See NRDC,* 725 F.3d at 1206.[5] To Amici, the Ninth Circuit's decision simply contravenes the clear meaning of EPA's Rule, exposes co-permittee's to liability for each other's discharges, and thus renders 33 U.S.C. § 1342(p)(3)(B)(i) superfluous.

The safest thing to do from the perspective of MS4s is to end the routine practice of enlisting co-permittees, and inundate EPA (or an approved NPDES permitting state) with individual NPDES permit applications. In other words, for MS4s, the surest way to avoid liability under the Clean Water Act of $37,500 per violation per day, *see* 40 C.F.R. Part 19, is for MS4s to contravene Congress's clear

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[5] The Ninth Circuit suggests that the Petitioners are liabile for Clean Water Act violations but not responsible for the remedies for these violations. *NRDC,* 725 F.3d at 1206. If correct, the Ninth Circuit's distincition – of liability without remedy – raises an important issue: whether Respondents have standing under Article III of the U.S. Constitituion. Specificially, if the Petitioners are not responsible for any remedies, then it is unlikely that Respondents' injuries could be redressed. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 ("it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision" for Respondents to have Article III standing).

intent to favor the inclusion of co-permittees. This is another absurd result.

CONCLUSION

Congress recognized, and EPA has since reaffirmed, that regulating stormwater differs from regulating traditional point sources; that end-of-pipe regulations cannot work when addressing stormwater runoff with hundreds and possibly thousands of outfalls spread across political boundaries in a given watershed; that encouraging permittees to work together within a watershed is vital to curbing pollutants in stromwater runoff; that cooperation among co-permittees within a watershed – not fear of liability because of one's co-permittees – is essential to improving the effectiveness of stormwater management programs. Still the Ninth Circuit "cut a great road through the law to get after the [Petitioners]" following this Court's initial decision. *Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 195 (1978) (quoting R. Bolt, A Man for All Seasons, Act I, p. 147 (Three Plays, Heinemann ed. 1967)). Amici urge the Court to again grant Petitioners' writ of certiorari, to again reverse the Ninth Circuit, and to again "give the [Petitioners] benefit of law, for [the stormwater program's] own safety's sake." *Id.*

Respectfully submitted.

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February 27, 2014