

## Supreme Court Reverses Ninth Circuit on Clean Water Act Discharges

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On January 8, 2013, the Supreme Court issued a decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, a citizen suit alleging that a municipal separate storm sewer system (MS4) operator had violated its NPDES permit. At issue in the case was whether the flow of water out of a concrete channel within a river constitutes a discharge of a pollutant. The Natural Resources Defense Council (NRDC) had brought a citizen suit under section 505 of the Clean Water Act against the Los Angeles County Flood Control District (District), and alleged the District was violating the effluent limits in its NPDES permit based on water quality measurements from monitoring stations in the Los Angeles and San Gabriel Rivers. In the lower court proceedings, the district court acknowledged that data revealed water quality exceedances for numerous pollutants, but found that other entities aside from the District discharge into the rivers upstream of the monitoring stations. Because of this, the district court concluded there was insufficient evidence to warrant a finding that the District had discharged storm water containing the levels of pollutants detected at the downstream monitoring stations.

The Ninth Circuit reversed in part, holding that a “discharge” for purposes of the Clean Water Act occurred when contaminated water at the monitoring stations, which is located within concrete channels maintained by the District, migrates from the concrete channels to non-concrete lined areas. The Supreme Court reversed, holding that a discharge of pollutants does not occur when polluted water flows from one portion of a river through a concrete channel or other engineered improvement, into a lower portion of the same river.

Interestingly, the Court noted that all parties, including the NRDC, agreed with its holding. Instead, the NRDC argued that the Ninth Circuit mistakenly thought the monitoring stations were actually sampling the District’s MS4 stormwater *before* it was discharged to the rivers. The NRDC argued that the exceedances detected at the instream monitoring stations were enough to establish the District’s liability for its upstream discharges. However, the Court declined to address this argument as not covered by the narrow issue on which it granted review.

**Important takeaway: a “discharge of pollutants” under the Clean Water Act does not occur when contaminants flow from one portion of a water body into another portion of the same water body.**

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