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Storm Water Pollution: Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.

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I. INTRODUCTION: THE SUPREME COURT'S DECISION

The Los Angeles River is unlike most other rivers in the United States; it is almost entirely encased in concrete and rarely has any water flowing through it.¹ In order to control storm water, Los Angeles County created a system of drains, ditches, culverts, and other channels to divert the Los Angeles River and prevent flooding.² The type of system created by Los Angeles County is known as a municipal separate storm sewer system (“MS4”), which is designed to collect or convey storm water in order to prevent flooding.³

Due to the highly urban areas that surround the Los Angeles River, pollution is a major problem.⁴ The Natural Resources Defense Council, Inc. (“NRDC”) and Santa Monica Baykeeper (“Baykeeper”) sued the Los Angeles Flood Control District (the “District”) claiming that because the District allows, “untreated and heavily polluted storm water to flow unabated

¹ *History of the River*, THE LOS ANGELES RIVER, available at <http://thelariver.com/about/history-of-the-river/> (hereinafter “History of the River”).

² Roderick E. Walston, *Supreme Court Should Not Unduly Expand the Scope of the CWA*, JURIST – SIDEBAR (Nov. 26, 2012), available at <http://jurist.org/sidebar/2012/11/roderick-walston-stormwater-epa.php>.

³ *Stormwater Discharges From Municipal Separate Storm Sewer Systems (MS4s)*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, available at <http://cfpub.epa.gov/npdes/stormwater/munic.cfm>.

⁴ *See Generally, Natural Res. Def. Council, Inc. v. Los Angeles Cnty. Flood Control Dist.*, 673 F.3d 880, 885 (9th Cir. 2010).

from the District's MS4s into the Watershed Rivers, and eventually into the Pacific Ocean, the Defendants violated the Clean Water Act."⁵ In the suit, the NRDC and Baykeeper also alleged that because of the levels of pollutants found in the Los Angeles and San Gabriel Rivers, the NRDC was in violation of its National Pollutant Discharge Elimination System Permit ("NPDES").⁶

On January 8, 2013 the Supreme Court resolved the question: "Under the Clean Water Act (CWA)...does the flow of water out of a concrete channel within a river rank as a 'discharge of a pollutant?'"⁷ The Court held that the flow of water from a concrete channel into an unimproved section of the same waterway is not a "discharge of a pollutant" under the Clean Water Act.⁸ However, the Supreme Court declined to rule on the question of whether "the exceedances detected at the monitoring stations sufficed to establish the District's liability under the CWA for its upstream discharges."⁹

When the case was first brought, the District Court granted summary judgment in favor of Defendant, NRDC, stating that the "record was insufficient to warrant a finding that the MS4 had discharged storm water containing the standards-exceeding pollutants detected at the downstream monitoring stations."¹⁰ On appeal, the Ninth Circuit reversed, holding that the NRDC was liable for the pollutants that were discharged when the water flowed from the manmade sections of the rivers into the natural portions of the same rivers.¹¹ As previously

⁵ *Natural Res. Def. Council, Inc. v. Los Angeles Cnty. Flood Control Dist.*, 673 F.3d 880, 885 (9th Cir. 2010).

⁶ *Id.*

⁷ *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 568 U.S. ____ (2013), available at http://www.supremecourt.gov/opinions/12pdf/11-460_3ea4.pdf.

⁸ *Id.*

⁹ *Natural Res. Def. Council*, 673 F.3d at 885.

¹⁰ *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 568 U.S. ____ (2013).

¹¹ *Id.*

stated, the Supreme Court ultimately reversed the Ninth Circuit’s ruling. In order to understand how the Supreme Court came to this holding, one must understand the historical necessity for the Los Angeles River MS4’s, and the previous precedent set by the Supreme Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*.

II. THE LOS ANGELES MS4 SYSTEM

Municipal Separate Storm Sewer Systems (MS4s) are conveyances, or systems of conveyances that discharge to waters of the U.S. and are owned by municipalities.¹² In urban areas like Los Angeles, much of the storm water runoff that is collected in the MS4s is highly polluted.¹³ Through the MS4s, this polluted runoff is then discharged back into local bodies of water.¹⁴ In order to deal with polluted discharge, municipalities with MS4s are required to implement a “stormwater management program” (SWMP).¹⁵ The SWMP is designed to “reduce the contamination of stormwater runoff and prohibit illicit discharges.”¹⁶ The waste water collected by the MS4s in Los Angeles County “flows over streets, parking lots, commercial sites, and other developed parcels of land.”¹⁷

Unlike natural surfaces, the concrete MS4s do not absorb the rainwater and capture pollutants.¹⁸ Instead, water collects “suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other

¹² *Stormwater Discharges From Municipal Separate Storm Sewer Systems (MS4s)*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, available at <http://cfpub.epa.gov/npdes/stormwater/munic.cfm>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See, Natural Res. Def. Council*, 673 F.3d at 884.

¹⁸ *Id.*

toxic contaminants.”¹⁹ Through the MS4s, these pollutants make their way into the various water systems in and around the Los Angeles River watershed.²⁰

Unlike sanitary sewer systems and combined sewer systems, MS4s do not pass through a wastewater facility for treatment; MS4s only contain untreated stormwater.²¹ The Los Angeles MS4 system is comprised of over “500 miles of open channels and 2,800 miles of storm drains.”²² This system drains into the Los Angeles River, the San Gabriel River, the Santa Clara River, and Malibu Creek, all of which ultimately flow into the Pacific Ocean; therefore, it is easy to see how a vast amount of water can easily become polluted.²³

III. A HISTORY OF FLOODING

Approximately seven thousand years ago, the indigenous people known as the Tongva and Chumash lived and thrived on the banks of the Los Angeles River.²⁴ In order to deal with period of high rain and flooding, the Tongva tribe created a Yanga (a movable village) in what is presently downtown Los Angeles.²⁵ When the river flooded, the Tongva would move the village to dry ground until the floodwaters receded.²⁶ Many groups repeated this pattern around present day Los Angeles over the last few thousand years.²⁷

While the landscape and area surrounding the Los Angeles River has vastly changed greatly since the Tongva and Chumash inhabited its banks, one aspect has remained the same. The river is constantly going from one extreme to another: during the dry season the river flow is barely a trickle, but during the winter/wet season, the Los Angeles River’s flow can reach

¹⁹ *Envtl. Def. Ctrl., Inc. v. EPA*, 344 F.3d 832, 840 (9th Cir. 2003).

²⁰ *Natural Res. Def. Council*, 673 F.3d at 884.

²¹ *See, Natural Res. Def. Council*, 673 F.3d at 884 (*citing* 40 C.F.R. § 122.26(a)(7), (b)(8)).

²² *Natural Res. Def. Council*, 673 F.3d at 884.

²³ *Id.*

²⁴ History of the River, *supra* note 1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

183,000 cubic feet of water per second; this is equivalent to 40 million garden hoses on full blast, and is fourteen times as strong as the Hudson River.²⁸

For thousands of years, the indigenous tribes would come to the river when it was dry, and then retreat when the floodwaters came.²⁹ From the mid 1800's-1900's, while the population of Los Angeles was exploding, Los Angeles received record rainfalls, causing many devastating floods.³⁰ In order to protect increasing property values from flooding, the Los Angeles Flood Control District was formed in 1914.³¹ The channelization effort of the Flood Control District and Army Corps of Engineers was finally completed in 1960.³² Today, the river is almost entirely encased in cement.³³ The current Los Angeles River Channel spans over 871-square miles.³⁴ Generally, the channelization effort has done an adequate job of protecting the city of Los Angeles from major flooding.³⁵ The history of flooding demonstrates the necessity of the MS4 system in protecting the citizens of Los Angeles and the surrounding areas.

IV. MICCOSUKEE TRIBE OF INDIANS

In its January 8, 2013 NRDC decision, the Supreme Court relied heavily on the precedent it set in *South Florida Water Management District v. Miccosukee Tribe of Indians* when coming

²⁸ *The Los Angeles River Shed*, THE RIVER PROJECT, available at <http://www.theriverproject.org/learn/know-your-watershed/the-los-angeles-river-watershed> (hereinafter, "L.A. River Shed").

²⁹ Matthew Segal, *Life of the L.A. River*, LOS ANGELES MAGAZINE (April 1, 2011), available at <http://www.lamag.com/features/2011/04/01/life-of-the-la-river1>.

³⁰ Justin Cram, *Los Angeles Flood of 1938: Cementing the River's Future*, KCET (Feb. 28, 2012), available at <http://www.kcet.org/socal/departures/landofsunshine/la-river/los-angeles-flood-of-1938-channelization.html> (hereinafter, "Cementing the River's Future").

³¹ Edgar C. Kenyon, Jr., *History of Ocean Outlets, Los Angeles Country Flood Control District*, LOS ANGELES FLOOD CONTROL DISTRICT, available at http://journals.tdl.org/icce/index.php/icce/article/viewFile/934/031_Kenyon.

³² History of the River, *supra* note 1.

³³ Cementing the River's Future, *supra* note 30.

³⁴ L.A. River Shed, *supra* note 28.

³⁵ Cementing the River's Future, *supra* note 30.

to the conclusion that the Los Angeles MS4s do not constitute a “discharge of a pollutant” under the CWA.³⁶ The purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³⁷ At issue was whether the District was violating the CWA by discharging pollutants from storm water runoff into navigable waters in Los Angeles.³⁸ The CWA prohibits the “discharge of a pollutant” unless it is expressly authorized by the CWA.³⁹ “Discharge of a pollutant” has been defined as ‘any addition of any pollutant to navigable waters from any point source.’⁴⁰ Under the CWA, MS4s are included as “point sources.”⁴¹

In *Miccosukee*, the Supreme Court held that the “transfer of water between two points in a single water does not ‘add’ anything under the Clean Water Act.”⁴² In reaching its decision in the NRDC case, the Supreme Court relied solely upon the authority of *Miccosukee*. The Defendant Indian tribe used a pumping station to pump water across a levee in order to drain canals on one side and impound water on the other.⁴³ The Plaintiff sued claiming the outfall from the pumping station resulted in a violation of the CWA.⁴⁴ The Supreme Court held that there is no addition of a pollutant under the CWA “unless the waters from which a pollutant has been conveyed are ‘meaningfully distinct.’”⁴⁵ The Court also noted that manmade improvements that convey water between two portions of a single body of water do not

³⁶ See Generally, *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 568 U.S. ____ (2013).

³⁷ 33 U.S.C. § 1251(a).

³⁸ *Natural Res. Def. Council*, 673 F.3d at 883.

³⁹ Roderick, *supra* note 2.

⁴⁰ See *Natural Res. Def. Council*, 673 F.3d at 884 (citing 33 U.S.C. § 1362(14)).

⁴¹ 33 U.S.C. § 1362(14).

⁴² See *South Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

⁴³ *Id.* at 100-101.

⁴⁴ *Id.*

⁴⁵ *Id.* at 109-110.

constitute a “discharge of a pollutant” when the different portions of the body of water are not distinct.⁴⁶

In reaching its decision in the NRDC case, the Supreme Court relied solely on the authority established in *Miccosukee* by stating: “[a]dhering to the view we took in *Miccosukee*, we hold that the parties correctly answered the sole question presented in the negative.”⁴⁷ The Supreme Court further reinforced the *Miccosukee* holding when it said: “[a]s the Second Circuit [aptly] put it . . ., ‘[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not “added” soup or anything else to the pot.’”⁴⁸ Therefore, because the Los Angeles MS4 system is simple diverting water from a water source back into that same water source, the District was not found to be in violation of the CWA.⁴⁹

V. CONCLUSION

MS4 systems are not only found on the west coast; similar systems have been implemented throughout the United States.⁵⁰ If the Supreme Court ruled in favor of the NRDC, the potential liability could reduce other municipality’s ability to fund flood-control programs. In order to secure debt funding, which is essential to the implementation of massive flood control systems, the municipality is required to present a detailed plan that describes all the costs, benefits, needs, and measures it is going to undertake.⁵¹ This plan must be presented years

⁴⁶ *Id.* at 105.

⁴⁷ *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 568 U.S. ____ (2013).

⁴⁸ *See, Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 568 U.S. ____ (2013) (quoting *South Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-110 (2004)).

⁴⁹ *Id.*

⁵⁰ Andres Brookes, *Channelized Rivers: Perspectives for Environmental Management* (1998).

⁵¹ *Guidance for Municipal Stormwater Funding*, NAT’L. ASSOC. OF FLOOD AND STORMWATER MGMT. AGENCIES (Jan. 2006), available at <http://water.epa.gov/polwaste/nps/upload/Guidance-Manual-Version-2X-2.pdf>.

before the flood control project can begin.⁵² A favorable ruling for the NRDC would introduce even more uncertainty about the costs and maintenance of a MS4 system. This could cause municipality's to pursue less effective flood control measures when a MS4s are really what they need.

While the Supreme Court's decision doesn't directly address the water pollution issues in Los Angeles, it may still have positive impacts because of the attention the case received in various media outlets. Increased awareness of water pollution in Los Angeles may be the catalyst for the implementation of more progressive pollution reduction programs. For example, the District, the Army Corp of Engineers, the California Department of Fish and Game, and the Regional Water Quality Control Board are all responsible for monitoring and maintaining the MS4 system.⁵³ With increased public pressure, these groups can be forced to remove even more sediment and debris, which would help remove objects from the MS4s that obstruct water flow and increase pollution.⁵⁴

Another, more progressive approach to reducing the pollution would be for Los Angeles to implement a large scale system of "rain gardens," like those being built in downtown Buffalo.⁵⁵ Rain gardens are perfect for cities as they are simply shallow depressions in the ground where plants and grasses can be planted to trap runoff.⁵⁶ Because rain gardens are simply

⁵² *Id.*

⁵³ *Waste Discharge Requirements for Earth-Bottom Channel Clearing*, CNTY. OF LOS ANGELES DEPT. OF PUBLIC WORKS, available at <http://dpw.lacounty.gov/LACFCD/WDR/Default.aspx>.

⁵⁴ *Id.*

⁵⁵ See Dan Tevlock, *Buffalo a Little Greener in Lower West Side*, INVESTIGATIVE POST (Mar. 13, 2013), available at <http://www.investigativepost.org/2013/03/13/buffalo-getting-a-little-greener/>; and Thea Hassan, *Green Streets Come to Buffalo*, BUFFALO RISING (MAY 24, 2011), available at <http://www.buffalorising.com/2011/05/green-streets-come-to-elmwood.html>.

⁵⁶ *About Rain Gardens*, LA RAINGARDENS, available at http://www.laraingardens.org/index.php?option=com_content&view=article&id=53.

shallow depressions, they have been successfully used in industrial applications.⁵⁷ It would be relatively easy for the city of Los Angeles to build rain gardens on sidewalks, and in parking lots throughout the city. By using this relatively cheap and simple solution, Los Angeles could reduce the amount of pollutants introduced into the regions waters systems via the County's MS4s.

⁵⁷ See, *How Does an Industrial Rain Garden Grow*, OREGON PUBLIC BROADCASTING (Jan. 3, 2012) (detailing the use of rain gardens to successfully reduce water pollution at an industrial ship yard), available at <http://earthfix.opb.org/water/article/how-does-an-industrial-rain-garden-grow/>.