LA County Flood Control District v. NRDC, Inc.: A rejection of joint and several liability under the Clean Water Act?

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Until the Supreme Court's decision this January in Los Angeles County Flood Control District v. NRDC, Inc., 133 S. Ct. 710 (2013)(LA County Flood Control District), there had been little guidance from the High Court on the application of the Clean Water Act (CWA) to the unique issues raised by comingled urban runoff. And for sure, the decision put to rest one important question, i.e., does a local agency's improvements to a water of the United States (by lining it with concrete) impose responsibility on that agency for pollutants moving from the improved portion of the water body to the unimproved portion? The Court answered this question in the negative, and affirmed its holding in South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), where it had held the transfer of polluted water between "two parts of the same water body" did "not qualify as a discharge of pollutants under the CWA." In short, whether the water body is improved does not alter the conclusion that there is no "addition" of a pollutant if the pollutant is simply moving from one part of the same water body to another. 133 S. Ct. at 713.

Interestingly enough, the holding itself was not controversial. In fact, all parties to the case (as well as the Solicitor General) agreed there is no "addition" of a pollutant where the pollutant merely moves from one part of the water body to another. The question then becomes: is there any other significance to the *LA County Flood Control District* decision? The short answer is that it remains to be seen, but what can be said is that the Court's reliance on certain critical findings of the district court, along with its reversal of the Ninth Circuit's decision in *NRDC, Inc. v. Los Angeles County Flood Control District*, 673 F.3d 880 (2011) (*NRDC*), is clear indication the High Court will not be receptive to a theory of joint and several liability for comingled urban runoff.

The Ninth Circuit's decision in NRDC

Relying on the citizen suit provisions of the CWA, the Plaintiffs, Natural Resources Defense Council and the Santa Monica Baykeeper, filed suit against the County of Los Angeles and the Los Angeles County Flood Control District, contending they discharged polluted urban/stormwater runoff collected by thousands of municipal separate storm sewer system (MS4) lines running throughout Los Angeles County, and flowing into various navigable waters within Southern California, namely the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek. Many of these rivers, particularly the Los Angeles River, had historically overflowed their banks, and the County Flood Control District

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had supervised and managed the "taming" of the rivers, largely by lining them with concrete channels. *See Rapanos v.United States,* 547 U.S. 715, 769 (2006) (Kennedy, J., concurring in part) (describing Los Angeles River). The Plaintiffs' argued that the level of pollutants discharged within the runoff exceeded limits allowed by the Los Angeles MS4 National Pollutant Discharge Elimination System (NPDES) permit, which governed municipal discharges throughout the County of Los Angeles (except Long Beach) and that the County Flood Control District (along with the county) was responsible.

There was no dispute that the levels of certain pollutants within the waters were in excess of water quality standards, but Defendants argued, among other things, there was no evidence they were responsible for the exceedances. The district court denied Plaintiffs' partial summary judgment motion and granted Defendants' cross-motion, finding:

> Plaintiffs failed to present evidence that the standards-exceeding pollutants pass through the defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor do plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a defendant's outflows.

673 F.3d at 891.

On appeal, the Ninth Circuit reversed this decision for two of the water bodies (i.e., the Los Angeles and San Gabriel Rivers), and although it reversed without expressly relying on the theory of joint and several liability, a review of the decision shows joint and several liability was at the core of its reasoning.

Initially, the Ninth Circuit determined: "While it may be undisputed that exceedances may have been detected, responsibility for those exceedances requires proof that *some entity* discharged a pollutant." *Id*. at 898. The court then framed the issue as whether the evidence shows "any *addition* of pollutants by County Defendants to the Watershed Rivers," recognizing Defendants argument "that by measuring mass-emissions downstream from where the pollutants enter the sewer system, it is not possible to pinpoint which entity, if any, is responsible for adding them to the rivers." *Id*. at 899. Plaintiffs then argued:

> . . . that the monitoring stations are downstream from hundreds of miles of storm drains which have generated the pollutants being detected. To Plaintiffs, it is irrelevant which of the thousands of storm drains were the source of polluted stormwater—as holders of the [NPDES stormwater] Permit, Defendants bear responsibility for the detected exceedances.

Id.

After framing the arguments, the Ninth Circuit then inexplicably found that the mass-emission stations were "located in a section of the MS4 owned and operated by the district," and consistent with a joint and several liability theory of recovery, held that:

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> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Id. at 900.

The Supreme Court's implicit rejection of joint and several liability under the CWA

The Supreme Court granted review on a single narrow issue: "Under the Clean Water Act . . . does the flow of water out of a concrete channel within a river rank as a 'discharge of a pollutant'?" The Court answered this question as follows:

> We hold, therefore, that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA. Because the decision below cannot be squared with that holding, the Court of Appeals' judgment must be reversed.

133 S. Ct. at 713.

This decision was far from surprising, given all of the parties had agreed that the Ninth Circuit's "analysis was erroneous." *Id.* at n.1. Still, Plaintiffs argued the decision should be affirmed on a different ground, i.e., because "the exceedances detected at the instream monitoring stations are by themselves sufficient to establish the District's liability under the CWA for its upstream discharges." *Id.* However, instead of engaging Plaintiffs on the issue, the Supreme Court stated it had "no opinion on[] the issue the NRDC and Baykeeper seek to substitute for the question we took up for review." *Id.* at 714. Notwithstanding this statement, the unanimous opinion of the High Court shows it was actually rejecting this argument.

First, of significance is the Supreme Court's recognition it:

> was undisputed, the District Court acknowledged, that data from the Los Angeles River and San Gabriel River monitoring stations indicated that water quality standards had repeatedly been exceeded for a number of pollutants, including aluminum, cooper, cyanide, fecal coliform bacteria, and zinc. But *numerous entities other than the District*, the [district] court added, discharge into the rivers upstream of the monitoring stations.

Id.

Importantly, the Court noted the water quality standards were being "repeatedly" exceeded as a result of discharges from "numerous entities." Yet, none of this changed the Court's decision to reverse the Ninth Circuit's finding of liability.

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Second, the High Court cited the district court's conclusion that the "record was insufficient" "to warrant a finding that the District's MS4 had discharged storm water containing the standards-exceeding pollutants detected at the downstream monitoring stations." *Id.* at 712. Thus, instead of agreeing with Plaintiffs, as the Ninth Circuit had, that the "precise location of each outflow is ultimately irrelevant because there is no dispute that MS4 actually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the monitoring stations," the Supreme Court cited the district court's opposite finding of insufficient evidence.

Finally, and importantly, is the Supreme Court's decision to reverse the Ninth Circuit's decision because it could not "*be squared*" with the Supreme Court's holding. Yet, the Supreme Court never explained what the Ninth Circuit got wrong. In fact, the only legal conclusion by the Ninth Circuit which could "not be squared" was its determination that the "precise location of each outfall *is ultimately irrelevant* because there is no dispute that MS4 actually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations." 637 F.3d at 900 (emphasis added).

Other authorities show the CWA does not provide for joint and several liability

Other authority shows that joint and several liability cannot be "squared" with the CWA. For example, the federal regulations governing NPDES permits for MS4 systems provide that a municipal discharger is only to be responsible for exceedances resulting from its own discharge. 40 C.F.R. § 122.26(b)(1) (2013) (defining "Co-permittee" to mean "a permittee to a NPDES permit that is *only responsible* for permit conditions relating to the discharge for which it is the operator.") (emphasis added).

Furthermore, joint and several liability is a tort concept which, if imposed, allows one party, who has discharged, the liability of another (through a judgment or settlement), to then seek "contribution" against the other contributing tortfeasors. *See, e.g.,* RESTATEMENT (THIRD) OF TORTS § 23(a) ("when two or more persons are or may be liable for the same harm . . . the person discharging the liability is entitled to recover *contribution from the other* . . . .").

Yet, the CWA clearly does not allow for "contribution" by one alleged violator against another. *See,e.g.,Middlesex County Sewage Auth. v. Nat'l Seaclamers Ass'n,* 453 U.S. 1, 17–18 (1981) ("Thus, both the structure of the [CWA] and [its] legislative history leads us to conclude that Congress intended private remedies in addition to those expressly provided should not be implied," and that "the courts are not authorized to ignore this legislative judgment."). *See United States v. Savory Senior Housing Corp.*, No. 6:06cv031, 2008 U.S. Dist. LEXIS 17850 (W.D. Va. Mar. 6, 2008); *Envtl. Conservation Org. v. Bagwell*, No. 4:03-CV-807-Y, 2005 U.S. Dist. LEXIS 22027 (N.D. Tex. Sept. 30, 2005) (with both district courts expressly disallowing "contribution" claims under the CWA).

Understanding that there is no "contribution" under the CWA, a decision imposing joint and several liability on a defendant for commingled exceedances, as the *LA County Flood Control District* Plaintiffs argued should be the case, would lead to the absurd result of a defendant bearing 100 percent of the

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liability for penalties and injunctive relief, even if it were no more than 1 percent liable for the exceedances. This result "cannot be squared" with the Supreme Court's holding in *LA County Flood Control District*.

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