Los Angeles County Flood Control Dist. v. NRDC

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NPDES Permit Requirement

- Addition
- Of a “pollutant” (almost anything, including heat)
- To a “navigable water” (=“waters of the United States”) (surface waters that are navigable or that have a surface connection or a “significant nexus” to a navigable water)
- From a “point source” (a pipe, ditch, or other conveyance)

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Hydroelectric and Other Conveyances

- No NPDES permit is needed because no pollutants are added from the "outside world":
  - *National Wildlife Fed'n v. Gorsuch* (D.C. Cir. 1982) (dams)
  - *National Wildlife Fed'n v. Consumers Power Co*. (6th Cir. 1988) (pumped storage)
- *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians* (U.S. Supreme Court 2004)
  - Permit requirement is not limited to the source's pollutants.
  - Permit is not required if waters are "not meaningfully distinct."
  - Did not address "unitary waters" argument.

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Transfers to Different Bodies of Water

- Some federal courts of appeal have held that transferring water to a different body of water (to which it would not have naturally flowed) was an "addition" that required an NPDES permit. *E.g.*:
  - *Dubois v. U.S. Dept. of Agriculture* (1st Cir. 1996) (water pumped from a river to a pond)
  - *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (2d Cir. 2001) (water transferred to a different basin)

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EPA Transfer Rule

- In response to these decisions, EPA in 2008 adopted an exemption to the NPDES permit requirement for transfers of water from one water of the United States to another. 40 C.F.R. §122.3(i).
- The exemption does not apply if:
  - The transferred water is subject to "intervening industrial, municipal, or commercial use."
  - The transfer activity itself adds pollutants to the water.

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Background of *Los Angeles County*

- NPDES permit for a municipal separate storm sewer system (MS4).
- Permit required monitoring in the channelized Los Angeles and San Gabriel Rivers.
- Permit prohibited discharges from the MS4 that caused or contributed to instream water quality standards violations.
- Citizen suit based on in-river monitoring results that exceeded water quality standards.

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Ninth Circuit Decision

- Rejected argument that water quality standards violations measured in the rivers were themselves violations of the permit; held that there must be some proof that a discharge from the MS4 caused or contributed to the violation.
- Held that, because the channelized river itself was part of the MS4, the MS4 added pollutants in excess of water quality standards to the rivers downstream.

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Supreme Court Decision

- In a 5-page opinion, the Supreme Court reversed the Ninth Circuit.
- No party argued that the Ninth Circuit correctly characterized the discharge from the channelized portion of the river as an addition of pollutants to waters of the United States.
- Reaffirmed *Miccosukee,* holding that there is no addition of pollutants by "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway."

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Transfer of Water to a Different Body of Water

- Neither *Miccosukee* nor *Los Angeles County* addresses whether a transfer to a different body of water is an "addition" that requires an NPDES permit.
- EPA's transfer rule exempts such transfers from the permit requirement.
- The Eleventh Circuit, relying on *Chevron* deference, has upheld the rule. *Friends of the Everglades v. South Fla. Water Mgmt. Dist.* (2009).
- Separate challenges to the rule are still pending in the Second and Ninth Circuits.

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