

Environmental Law Update

Supreme Court Clarifies "Discharge of Pollutants" under the CWA

In a brief, unanimous decision released this week, the Supreme Court clarified in its decision in *Los Angeles County Flood Control District v. Natural Resources Defense Counsel, Inc.*, Case No. 11-460, 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 Clean Water Act ("CWA").

The Los Angeles County Flood Control District (the "District") discharges storm water from its municipal separate storm sewer system ("MS4") into the Los Angeles and San Gabriel Rivers pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit. Natural Resource Defense Counsel, Inc. ("NRDC") and others brought a citizen suit against the District under the CWA alleging, among other things, that water-quality data from monitoring stations located within the two rivers—i.e., not where the MS4 emptied into the rivers—demonstrated that the District was violating its NPDES permit. The instream monitoring stations for the two rivers were located in man-made "concrete channels" constructed for flood control purposes. At issue before the Court was whether the flow of water out of these concrete channels into downstream portions that lacked such improvements constituted a "discharge of pollutants" under the CWA.

In the court below, the Ninth Circuit had answered this question in the affirmative. There, the Ninth Circuit reasoned that because the District exerted control over the man-made portions of the concrete channels, a discharge of pollutants occurred under the CWA once the rivers' waters flowed out of the concrete channels into downstream portions that lacked the concrete lining.

The Supreme Court reversed. Taking cues from the Court's earlier decision in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004), the Court reasoned that transferring polluted waters between "two parts of the same water body" does not constitute a discharge of pollutants under the CWA.

On this reasoning, the Court found no discharge of pollutants to occur when water "simply flows from one portion of the water body to another," regardless of whether the water flows through "an improved portion of a navigable waterway into an unimproved portion[.]"

The Court declined to address NRDC's contention that 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, and remanded the case for further proceedings consistent with its opinion.

[Click here to see a copy of the opinion.](#)

Congress Breathes New Life into the Wind Power Production Tax Credit

The wind power production tax credit, which gives a tax break of 2.2 cents for every kilowatt-hour of energy produced by new wind projects for their first ten years of operation, was set to expire at the end of 2012. Over the last few months of 2012, discussions in Congress over the tax credit stalled, sparking uncertainty as to the tax credit's future and triggering a race for project developers to complete outstanding projects before the end of 2012.

As part of the legislation to avoid the fiscal cliff, Congress has now extended the tax credit to any qualifying project that begins construction by the end of 2013. Unlike the former 2012 deadline which required any qualifying wind projects to be completed and operational before the end of the year, the newly passed deadline requires only that construction of the wind project begin by the end of 2013, even if the project is not completed until 2014.

To inquire about the impact of the wind power production tax credit extension on your current or future projects or other related questions, please contact Kevin R. Murray, Nicole C. Squires, Ashley A. Peck, or Jennifer S. Horne at (801) 533-0066.

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