No. 10-56017
Date of Decision: August 8, 2013
(Panel: Pregerson, H.; Smith, M.; and Holland, H., D.J.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.
Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES, et al.
Defendants-Appellees

On Appeal From the United States District Court
for the Central District of California,
No. CV08-1467 AHM (PLAx)

BRIEF OF *AMICI CURIAE* THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONERS COUNTY OF LOS ANGELES AND LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the California State Association of Counties avers that it is a nonprofit mutual benefit corporation, which does not offer stock and which is not a subsidiary or affiliate of any publicly owned corporation.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the League of California Cities avers that it is a nonprofit mutual benefit corporation, which does not offer stock and which is not a subsidiary or affiliate of any publicly owned corporation.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the National League of Cities avers that it is a nonprofit Internal Revenue Code Section 501(c)(4) corporation, which does not offer stock and which is not a subsidiary or affiliate of any publicly owned corporation.

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INTERESTS OF THE AMICI CURIAE[1]

The *Amici Curiae* described herein submit this brief as representatives of local governmental entities and municipalities through California and the nation, each of which has a vital interest in ensuring that cities and counties that own and/or operate Municipal Separate Storm Sewer System ("MS4") facilities have clear guidance concerning compliance with the Clean Water Act ("CWA").

The League of California Cities ("League") is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies cases that have statewide or nationwide significance. The Committee identified this case as having such significance.

[1] Under Circuit Rule 29-2(a), counsel of record received timely notice of the intent of these *Amici Curiae t*o file this brief, and all parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for a party, no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and no person or entity, other than *Amici Curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

The California State Association of Counties ("CSAC") is a non-profit corporation with a membership consisting of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and determined that this case is a matter affecting all counties.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for more than 19,000 cities, villages, and towns. Founded in 1924, NLC strengthens local government through advocacy, research, and information sharing on behalf of hometown America.

The *Amici Curiae* maintain a vital interest in ensuring that cities and counties that own and/or operate MS4s have clear guidance concerning their obligations under the CWA, and a reasonable opportunity to comply with those obligations in the conduct of their duties to control stormwater and related flooding for the benefit of their residents. As more fully explained below, the Court's recent opinion in *Natural Resources Defense Council v. County of Los Angeles* has

created an unworkable regulatory scheme for MS4s, which does nothing to protect water quality, and instead encourages opportunistic litigation for the primary purpose of generating attorneys' fees. The Court's opinion also directly conflicts with the standing requirements under Article III of the U.S. Constitution and established U.S. Supreme Court and Ninth Circuit precedent, thus creating confusion and ambiguity on this important issue.

Because the Court's recent ruling exposes local governments and their employees to significant civil and criminal liability, the Court should grant a rehearing in this case to correct the unanticipated and untenable impacts of this decision and ensure uniform rules on Article III standing in the Ninth Circuit are maintained.

SUMMARY OF THE ARGUMENTS

The *Amici Curiae* respectfully request §the Court grant rehearing and/or rehearing *en banc* for the following reasons:

I. The Court's opinion directly conflicts with Article III standing requirements, and established Supreme Court and Ninth Circuit law interpreting these requirements. Article III standing requires plaintiffs prove their injuries are "fairly traceable" to the conduct of the specific defendant that plaintiffs sued, and that the plaintiffs' harm could be remedied by a favorable decision. The decision conflicts with these fundamental requirements by expressly allowing plaintiffs to

sue an MS4 permittee without showing that the defendant actually caused or contributed to the plaintiffs' alleged harm. Article III, established Supreme Court precedent, including *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), and this Court's prior decisions in *Pritkin v. Dept. of Energy*, 254 F.3d 791 (9th Cir. 2001), and *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000), all dictate the opposite result – if the plaintiff does not show that the defendant's discharge to the waterway at issue contained the standards-exceeding pollutants, then a federal court lacks jurisdiction to determine the defendant's liability. (*See Southwest Marine*, *supra*, 236 F.3d at 995.)

II. The Court's opinion interprets the National Pollutant Discharge Elimination System ("NPDES") permit for the MS4s in Los Angeles County ("Permit") in a way that makes compliance impossible because a permittee has no jurisdiction to control the other discharges of other permittees and non-permittees being monitored. The Court's interpretation eliminates plaintiff's burden of proof to establish that a particular permittee's discharges caused or contributed to the exceedance of a water quality standard in the water receiving that discharge ("Receiving Water") and establishes the permittee's liability as a matter of law. This makes a permittee liable for activities and conduct over which it has no control. The permittee would be automatically in violation of the permit with no reasonable way to comply, whether or not their MS4 discharge contained that

pollutant. Contrary to the Court's conclusion, this illogical result is not dictated by the plain language of the CWA, its implementing regulations, or the Permit.

III. The Court's opinion creates an incentive for opportunistic parties and their counsel to sue cities and counties for permit violations by easing the requirements for plaintiffs to establish violations and complicating a permittee's ability to defend against these claims, all while doing little to nothing to improve water quality. Holding a permittee liable for water quality standard exceedances caused by a third party does not improve water quality because the party with the ability and duty to remedy the discharge violation is not before the court. Such litigation will do little more than generate potential civil penalties and attorneys' fees, which must be paid out of the limited resources available to cities and counties to the detriment of their residents. This unfortunate incentive created by the Court's opinion conflicts with the CWA and public policy and must be reconsidered.

REASONS FOR GRANTING THE PETITION

I. The Court's Opinion Conflicts with Article III Standing Requirements.

The Court's opinion runs afoul of constitutional standing requirements and established Ninth Circuit precedent. To have standing, a plaintiff must, *inter alia*, show injury that "is fairly traceable to the challenged action of the defendant; and…it is likely, as opposed to merely speculative, that the injury will be redressed

by a favorable decision." (*Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).)

To satisfy the "fairly traceable" requirement, the plaintiff must prove that the conduct stems from "the challenged action of the defendant, and not . . . the result of independent action of some third party not before the court." (*Lujan*, 504 U.S. at 560; *Southwest Marine, supra*, 236 F.3d at 995.) Here, the Court held defendants liable based not on conduct fairly traceable to them, but rather on Receiving Water monitoring results reflecting natural flows and discharges of multiple third parties not before the Court.[2]

Prior to the Court's decision in this case, the established rule in the Ninth Circuit was that, in order for plaintiffs to establish the "fairly traceable" requirement of Article III standing (*i.e.*, causation) in a CWA case, plaintiffs had to prove "that a defendant discharges a pollutant that causes or contributes to the

[2] As the Court itself found, thousands of permitted entities discharge pollutants to the San Gabriel and Los Angeles Rivers. The San Gabriel River watershed contains at least 276 industrial and 232 construction stormwater dischargers, 20 industrial wastewater dischargers specifically permitted to discharge pollutants *in excess of* the applicable water quality standards, 2 water reclamation plants, and 21 separate incorporated cities upstream of the mass-emissions station. (*Natural Resources Defense Council v. County of Los Angeles*, 673 F.3d 880, 889-90 (9th Cir. 2011) (herein, "*NRDC II*").) The Los Angeles River watershed contains at least 1,344 NPDES-permitted industrial and 488 construction stormwater dischargers, 3 water reclamation plants, and 42 separate incorporated cities upstream of the mass-emissions station. (*Id.* at 889.)

kinds of injuries alleged in the specific geographic area of concern." (*Southwest Marine, supra*, 236 F.3d at 995 (quotes and citations omitted).) However, in direct conflict with this established authority, the Court now allows plaintiffs to maintain a suit against an MS4 permittee *without any evidence* that the permittee actually discharged anything in violation of the permit. The Court has weakened the standing requirement to such a degree that it no longer passes constitutional muster.

To satisfy the minimum requirements of Article III standing, plaintiffs cannot rely on speculative inferences to connect thier alleged injury to the challenged action. (*Simon, supra*, 426 U.S. at 44-45 & n.25 ("[U]nadorned speculation will not suffice to invoke the federal judicial power.").) Accordingly, the Ninth Circuit has logically concluded that a plaintiff cannot satisfy Article III standing requirements when suing a party that did not cause, and has no power to remedy, the alleged harm. (*Pritkin, supra*, 254 F.3d at 798 (citing *Simon, supra*.) A plaintiff's failure to sue the party with the ability and duty to correct the alleged harm requires speculation as to the causal link between defendant's actions and the plaintiff's alleged injury and, therefore, is insufficient to establish Article III's causation requirement. (*Id.*) For the same reasons, a plaintiff must sue the correct party so that its injury can be redressed by a favorable decision. (*See Laidlaw Environmental Servs., supra*, 528 U.S. at 169 (redress is provided by "a sanction

that effectively abates the conduct and prevents its recurrence"); *Pritkin*, 254 F.3d at 800-801.)

Because liability is decoupled from a permittee's actions, the Court's decision allows plaintiffs to maintain a suit (and obtain a judgment of liability) without any demonstrated causal link between the defendant permittee's actions and the quality of the Receiving Water at the downstream mass-emissions stations. The decision also allows a lawsuit to proceed against a defendant without proving that the defendant has the power and duty to act to address the alleged harm. An MS4 permittee only has the authority to address water quality within its own portion of the MS4. (*See* Permit at 6, Provision D. 1. ("The requirements in this Order cover all areas within the boundaries of the Permittee municipalities … over which they have regulatory jurisdiction"); 40 C.F.R. §122.36 (Phase II MS4s only subject to non-compliance "in your jurisdiction"); 40 C.F.R. §122.26(b)(1) (defining "co-permittee" as "a permittee to a NPDES permit that is only responsible for the permit conditions relating to the discharge for which it is operator").)

Thus, a plaintiff must meet its burden to establish that the particular permittee-defendant has the clear power and duty to remedy the observed Receiving Water exceedances so that a court may redress the plaintiff's alleged harm. No plaintiff can establish the causation or redressability elements of Article

III standing based *solely* on exceedances measured at the mass-emissions stations or by in-stream water quality.[3]

Amici curiae request that the Court reconsider its decision to conform to the established Article III standing requirements.

II. The Court's Interpretation Makes Permit Compliance Untenable.

A. The Court's Interpretation of the Permit Unreasonably Eliminates a Permittee's Ability to Control Its Own Compliance.

The Court's decision ignores the plain language of the Permit and its own holding on permit interpretation. (Slip op., 24 ("an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation that leaves a part unreasonable, unlawful, or of no effect") (quoting Restatement (Second) of Contracts §203(a) (1981)).) The Court's decision violates construction principles by reading words out of the Permit and imposing liability based solely on downstream mass-emissions monitoring data without evidence of corresponding "[d]ischarges from the MS4 that caused or contributed to" a Receiving Water exceedance. (*See* Permit at 2, Part 2.1 (emphasis added).) Without tying the exceeding pollutants to a causal or contributory discharge, the

[3] The appropriate regulatory response when Receiving Water standards are exceeded is to adopt a Total Maximum Daily Load ("TMDL") for the pollutant. (33 U.S.C. §1313(d); 40 C.F.R. §§130.2(i), 130.7; *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-29 (9th Cir. 2002).) TMDLs address all pollutant sources and generally allow time for those sources to come into compliance.

Court has made it impossible for a permittee to ensure compliance with the Permit. Permittees cannot control the actions of the numerous independent third parties that also discharge to the Receiving Waters upstream of the mass-emissions stations. The law does not compel the doing of impossibilities and, accordingly, the Court's interpretation of the Permit is unreasonable. (*See Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996) (citing the Black's Law Dictionary 912 (6th ed. 1990) (defining *"lex non cogit ad impossibilia"*).)

The Court's holding in *NRDC II*, which requires Los Angeles County MS4 discharges to strictly comply with water quality standards referenced in the Permit's Receiving Water Limitations, has already imposed a significant burden on those cities and counties because it ignored the fact that the Permit does *not* include numeric effluent limitations based on applicable water quality standards, such as those required for industrial NPDES discharges. Federal regulations provide a different regulatory construct because it is infeasible for MS4s to strictly comply with strict water quality standards due to the variable and intermittent nature of municipal stormwater.[4] (*Accord* 40 C.F.R. §122.44(k)(2)-(3).)

[4] For example, stringent copper water quality standards applied to urban stormwater runoff cannot be consistently achieved until the products used in the manufacturing of automobile brake pad linings are modified no later than 2025. (*See* California S.B. 346 (2010).) It is unclear whether any "Best Management Practices" ("BMPs") will consistently reduce copper levels below the extremely low standards referenced in the Permit. (*See* Permit at 1-2, Provision B. 2.) The same problem exists for zinc from tire wear and other pollutants as well. Unlike

The *ipso facto* liability interpretation now adopted by the Court (which could be argued to apply to any NPDES permit using mass-emissions or other comingled water monitoring) presumes that Receiving Water Limitations equate to end-of-pipe effluent limitations and holds that plaintiffs can rely solely on Receiving Water data to establish a permittee's liability without having to prove the defendant-permittee discharged any pollutants at all.

Plaintiffs properly have the burden of proving an unlawful "addition of any pollutant" that violates a permit or the CWA. (33 U.S.C. §§1365(a)(1), (f); 1311(a), 1362(11)(defining "discharge of a pollutant").) As this Court previously and correctly observed, a plaintiff can easily sample at least one of the permittee's outfalls or conduct more probing discovery, and prove that the MS4 discharged the same pollutant(s) in such an amount as to cause a Receiving Water exceedance. (*NRDC II*, *supra*, 673 F.3d at 901.) Instead, the Court now effectively imposes a requirement on MS4s to constantly sample all of their outfalls in order to have data to prove that no MS4 discharges "caused or contributed" whenever downstream Receiving Water exceedances occur. This sampling burden for a large MS4 is infeasible. For example, as this Court recognized, "a comprehensive map of the

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industrial dischargers, cities and counties cannot go out of business to avoid liability. Thus, requiring immediate and strict compliance with such standards leaves MS4 owners and operators in immediate and sustained non-compliance for copper and other pollutants for many years, and subjects cities and counties to potentially millions of dollars in civil penalties and attorneys' fees.

County Defendants' storm sewer system does not exist, no one knows the exact size of the LA MS4 or the locations of all its storm drain connections and outfalls," which are "too numerous to catalog," (slip op., 8), so it would be impracticable to monitor every outfall in order to prove that none caused or contributed to an exceedance observed at a downstream mass emissions station.[5]

B. The Court's Interpretation of the Permit as Imposing Ipso Facto Liability Is Not Required by the CWA or Its Implementing Regulations.

The Court has placed cities and counties in an untenable position by imposing the impossible burden to disprove a finding of liability. The opinion makes cities and counties and their employees subject not only to costly civil penalties and attorneys' fees in citizen suits which most can scarcely afford, but also to criminal liability

[5] The Court's decision would also lead to an inconsistent result in circumstances where the exceedance observed in the Receiving Water was caused by a separate permitted discharge, an exempt non-stormwater discharge, or a discharge caused by a third-party's upset. Permittees are not required to prohibit non-stormwater discharges into the MS4 and water courses where the discharges are covered by a separate NPDES permit or fall within certain enumerated categories, such as natural flow, flows from emergency firefighting activity, and flows incidental to urban activities, (*see* Permit, Part 1.A., 18-19; 40 C.F.R. §122.26(d)(2)(iv)(B)), and permittees are afforded an affirmative defense to liability where the discharge was caused by an upset and certain requirements are met (*see* Permit, Part 6.N., 72; 40 C.F.R. §122.41(n)(2)). In those circumstances, the discharger would not be liable for the water quality standards exceedance, but another co-permittee under the Permit would be. The Court's interpretation leads to this illogical result because it holds a permittee liable for a third party's *legal* activities.

without any evidence of an unlawful discharge. (33 U.S.C. §1319(a)-(c), (g).) This harsh result is not warranted by the Permit, the CWA, or public policy.

The Court's endorsement of plaintiffs' *ipso facto* liability argument is based in part on its holding that the CWA and its implementing regulations require an MS4 permit's monitoring program to be sufficient, in and of itself, to establish each permittee's compliance with the Permit. (Slip op., 26-32.) The Court based this holding on plaintiffs' arguments[6] and its erroneous conclusion that, if the mass-emissions station monitoring was insufficient to establish each co-permittee's compliance with the Permit, the Permit would violate 33 U.S.C. §1342(a)(2), 40 C.F.R. §122.44(i)(1), and 40 C.F.R. §122.26(d)(2)(i)(F). None of these provisions, however, actually requires such a monitoring program in MS4 permits.

Both 33 U.S.C. §1342(a)(2) and 40 C.F.R. §122.44(i)(1) only require NPDES permits to include the *applicable* requirements of certain sections of the CWA and its implementing regulations. Neither of these provisions states that an MS4 permit must require monitoring sufficient to establish each co-permittee's individual compliance with the permit.

[6] Plaintiffs' arguments equate to a time-barred challenge to the Permit. Had the Plaintiffs believed the Permit was illegal for its monitoring failures, they had the obligation to raise those issues in an appeal or lose the ability to do so. (*See* Cal. Wat. Code §13330(c) ("If no aggrieved party petitions for writ of mandate within the time provided by this section, a decision or order of the state board or a regional board ***shall not be subject to review by any court***.")(emphasis added).)

CWA §1342(a)(2) provides that "[t]he Administrator shall prescribe conditions for [NPDES] permits to assure compliance with the requirements of paragraph (1) of this subsection," which provides that permitted discharges must "meet either (A) all *applicable* requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are *necessary* to carry out the provisions of this Chapter." (33 U.S.C. §1342(a)(2).) Nothing in this provision states that *all* requirements of the cited sections apply to municipal stormwater dischargers (and it is clear that they do not),[7] or that these provisions require monitoring sufficient to establish each individual co-permittee's permit compliance, particularly in a BMP-based permit. (*See* 33 U.S.C. §1342(p)(3)(B)(iii).)

Similarly, the CWA implementing regulations only require NPDES permits to include certain specified conditions "when applicable." (40 C.F.R. §122.44(i)(1).) The Court's conclusion that this regulation requires all NPDES permits to require monitoring "to assure compliance with permit limitations" is unsupported as the regulation plainly does not include this blanket requirement. The regulation mandates only that NPDES permits include specific, enumerated monitoring requirements, when applicable, to assure compliance with permit conditions. (40 C.F.R. §122.44(i)(1)(i)-

[7] For example, in *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999), this Court held that section 1311 does not apply to MS4 dischargers.

(iv).) These specific monitoring requirements apply to NPDES permits that include numeric effluent limitations or where the permitting authority has determined a particular monitoring requirement is necessary.[8] (*Id.*) The regulation's plain language shows that NPDES permits that do not include specified numeric effluent limitations,

[8] 40 C.F.R. §122.44(i)(1)(i)-(iv) provides, in pertinent part:

> [E]ach NPDES permit shall include conditions meeting the following requirements *when applicable*:
> …
> [T]he following monitoring requirements:
>
> (1) To assure compliance with permit limitations, requirements to monitor:
>
> (i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;
>
> (ii) The volume of effluent discharged from each outfall;
>
> (iii) Other measurements as appropriate including pollutants in internal waste streams …; pollutants in intake water for net limitations …; frequency, rate of discharge, etc., for noncontinuous discharges …; pollutants subject to notification requirements …; and pollutants in sewage sludge …; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(f) of the CWA.
>
> (iv) According to [certain specified] test procedures….

(40 C.F.R. §122.44(i)(1).) MS4 permits contain no mass limits, volumetric limits, limits on internal waste streams or intake water; thus, this section is inapplicable to MS4 permits. In this case, the Permit's monitoring served the following purposes, not compliance: "The Monitoring Program … proposes to advance the assessment of receiving water impacts, identification of sources of pollution, evaluation of [BMPs], and ***measurement of long term trends in mass emissions***." (Permit at 7, Provision C.3. (emphasis added); *see also* Exh. 1 to Petitioners' Request for Judicial Notice at 3.)

such as the Permit at issue, are ***not*** required to include monitoring establishing each co-permittee's compliance.

The Court's reliance on 40 C.F.R. §122.26(d)(2)(i)(F) is similarly misplaced. (Slip op., 26-27.) Section 122.26(d)(2)(i)(F) describes only NPDES permit *application* requirements. This regulation requires only that a permit applicant possess adequate legal authority "established by statute, ordinance or series of contracts" to carry out necessary compliance monitoring. (40 C.F.R. §122.26(d)(2)(i)(F).) It does not refer or relate to the required content of an NPDES permit.

III. The Court Creates an Undesirable Incentive for Opportunistic Litigation Without Corresponding Improvement in Water Quality.

The Court's decision imposing CWA liability on MS4s with no evidence that stormwater was discharged in violation of the Permit conflicts with the requirements of the CWA. Federal courts only have jurisdiction where individual discharges have been proven to violate the CWA and/or the applicable NPDES permit(s). Because each permittee only has control over itself, has no power or duty to control other co-permittees or dischargers to the Receiving Water, holding a permittee liable for someone else's discharges will not improve water quality and serves no statutory purpose. Accordingly, the Court's interpretation of the Permit as subjecting a permittee to liability without evidence that the permittee discharged pollutants in violation of its permit is unreasonable and unsupportable. (*Cf. Menzel*

v. County Utilities Corp., 712 F.2d 91, 95 (4th Cir. 1983)(refusing to impose CWA liability for discharges where subjecting discharger to liability would serve no statutory purpose).)

Litigation against permittees that did not cause an unlawful discharge only serves to divert money that cities and counties could be using for vital services (including improved stormwater management programs) to pay civil penalties and attorneys' fees. By imposing liability without proof of unlawful discharges, the Court's opinion provides substantial incentive for opportunistic attorneys to file CWA lawsuits against cities and counties, confident that they will receive an attorneys' fee award. (*Cf. Gunther v. Lin*, 144 Cal. App. 4th 223, 251 (2006) (noting, in the context of an Americans with Disabilities Act lawsuit, that a proposed interpretation of the statute to lower the plaintiff's burden of proof would "open[] the door for abusive litigation….We cannot believe that the Legislature ever intended to create an incentive for that.").)

Amici curiae submit that the Court's decision will encourage such predatory litigation even in cases where the state and federal governments are working on constructive watershed-based programs, like TMDLs, to solve Receiving Water exceedances. The Court's unreasonable decision, which encourages expensive and unnecessary litigation and conflicts with the purposes of the CWA and public policy, must be reconsidered. (*Cf. New Orleans Gaslight Co. v. Drainage*

Comm'n, 197 U.S. 453, 460 (1905) ("The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised.").)

CONCLUSION

For the foregoing reasons, the *Amici Curiae* support the Petition of Defendants and Appellees County of Los Angeles and Los Angeles County Flood Control District for Rehearing and/or Rehearing *En Banc*.

Respectfully submitted,

DOWNEY BRAND LLP

/s/ Melissa Thorme
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LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, and NATIONAL LEAGUE OF CITIES

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULES 29-2, 35-4, AND 40-1

I certify that pursuant to Circuit Rules 29-2, 35-4, and 40-1, the attached amicus brief in support of petition for panel rehearing/petition for rehearing.

XX Monospaced, as 10.5 or fewer character per inch and contains 4,186 words (petitions and answers must not exceed 4,200 words)

___ Or in compliance with Fed. R. App. P. 32(a)(7) and does not exceed 15 pages.

DATED: September 9, 2013

/s/ Melissa A. Thorme
MELISSA A. THORME

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2013, the foregoing *AMICUS CURIAE BRIEF* ON BEHALF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE LEAGUE OF CALIFORNIA CITIES, THE NATIONAL LEAGUE OF CITIES is being electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and that participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Melissa A. Thorme
MELISSA A. THORME