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Ryelle Seymour

Boston College Law School, ryelle.seymour@bc.edu

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PERMITTING EFFICIENCY IN STORM WATER EFFLUENT COMPLIANCE

RYELLE SEYMOUR *

Abstract: In *Natural Resources Defense Council, Inc. v. County of Los Angeles*, the U.S. Court of Appeals for the Ninth Circuit addressed the issue of National Pollutant Discharge Elimination System (NPDES) permit violations under the Clean Water Act. Environmental organizations brought suit against the County of Los Angeles and the Los Angeles County Flood Control District after the District published monitoring station reports identifying 140 separate exceedances of permit limitations. Even though the defendants' monitoring station was located downstream from other permittees, the defendants were held liable as a matter of law for the violations because the permit clearly stated that the monitoring station data would be used to determine permittee compliance. This Comment argues that the Ninth Circuit's analysis was correct, and further that preliminary testing for the monitoring station as well as more frequent monitoring and reporting will clarify liability.

INTRODUCTION

Clean water is essential; without it, the processes and functioning of Earth's ecosystems would be futile.¹ All of life depends on water to transport food and nutrients, dilute and remove waste, cool organisms and the land, and generally maintain a climate that sustains life.² In the United States, more than 250 million people depend on fresh water for their drinking water.³

"Dirty water is the world's biggest health risk," threatening human health and lives across the United States.⁴ For instance, when aquatic animals consume dirty water, the toxins are then passed up the food chain and subsequently ingested by humans, posing a number of health risks including immune suppression, reproductive failure, or acute poisoning.⁵ One of the most substantial sources of water pollution in the United States comes from

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2015–2016.

¹ See *Surface and Groundwater*, ENVTL. PROT. AGENCY, <http://epa.sownar.com/agriculture/tsur.html#content> [<http://perma.cc/XMM7-JPYN>].

² See *id.*

³ *Id.*

⁴ *Water*, NAT. RES. DEF. COUNCIL, <http://www.nrdc.org/water/> [<http://perma.cc/5JWN-QUQA>].

⁵ See *Danger, Health*, WATER POLLUTION GUIDE, <http://www.water-pollution.org.uk/health.html> [<http://perma.cc/D7XV-BHZ6>].

storm water runoff.⁶ Storm water runoff is generated when precipitation such as rain and snow becomes polluted after landing on impervious surfaces such as streets, parking lots, and building roofs.⁷ This polluted water then makes its way into storm drains that eventually dump into waters of the United States, such as rivers and oceans.⁸

In 1972, Congress amended the Federal Water Pollution Control Act of 1948 by enacting the Clean Water Act (CWA) to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁹ The CWA prohibits discharging pollutants into the waters of the United States unless the discharge is permitted through an applicable section of the CWA.¹⁰ One of the CWA sections that authorizes discharge into waters of the United States is Section 402, which outlines the National Pollutant Discharge Elimination System (“NPDES”) permit program.¹¹ CWA authorizes the Environmental Protection Agency (EPA) to establish the NPDES permit program to govern point source discharges of pollutants into navigable waters by setting limits, monitoring, and reporting requirements for permitted entities.¹² Pursuant to Section 402(p) of the CWA, EPA is required to issue NPDES permits for medium and large Municipal Separate Storm Sewer Systems (MS4s).¹³

⁶ Nat. Res. Def. Council v. L.A. Cty. Flood Control Dist., 725 F.3d 1194, 1197 (9th Cir. 2013).

⁷ See *NPDES Stormwater Program*, ENVTL. PROT. AGENCY, <https://www.epa.gov/npdes/npdes-stormwater-program> [<https://perma.cc/28N9-ECGE>].

⁸ See *L.A. Cty. Flood Control Dist.*, 725 F.3d at 1197.

⁹ Clean Water Act, 33 U.S.C. § 1251(a) (2012); see *History of the Clean Water Act*, ENVTL. PROT. AGENCY, <http://www.epa.gov/laws-regulations/history-clean-water-act> [<http://perma.cc/Q8WQ-SYVR>].

¹⁰ 33 U.S.C. § 1311.

¹¹ *Id.* §§ 1311, 1342.

¹² See *id.* § 1342; *Clean Water Act (CWA) and Federal Facilities*, ENVTL. PROT. AGENCY, <http://www2.epa.gov/enforcement/clean-water-act-cwa-and-federal-facilities> [<http://perma.cc/PW6U-LQF6>]. “Point source” is defined as:

[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm-water discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362 (14) (2012).

¹³ *Pacific Southwest, Region 9: NPDES Wastewater & Stormwater Permits*, ENVTL. PROT. AGENCY, <http://www3.epa.gov/region9/water/npdes/stormwater.html> [<https://perma.cc/582C-H86V>]. “MS4 refers to conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, and storm drains) which is owned or operated by a state, city, town, county, district, association, or other public body (created by or pursuant to state law).” ARK. DEP’T ENVTL. QUALITY, WHAT IS AN MS4? 1, http://www2.adec.state.ar.us/water/branch_permits/general_permits/stormwater/pdfs/what_is_an_ms4_20120911.pdf [<https://perma.cc/SH4W-7CBR>].

The Los Angeles County Board of Supervisors and the Los Angeles County Department of Public Works govern the Los Angeles County Flood Control District (the “District”).¹⁴ Each city in the District operates its own MS4, connecting to the District’s larger MS4, known as the LA MS4.¹⁵ The LA MS4 discharges untreated storm water into the Los Angeles and San Gabriel Rivers, which eventually flow into the Santa Monica Bay and the Pacific Ocean.¹⁶

In *Natural Resources Defense Council, Inc. v. County of Los Angeles*, environmental organizations brought suit against the County of Los Angeles and the District after the District published monitoring station reports identifying 140 separate exceedances of the NPDES permit (the “Permit”) water quality standards in both the Los Angeles and San Gabriel Rivers.¹⁷ The U.S. District Court for the Central District of California granted summary judgment in favor of the defendants because the plaintiff’s only evidence of a CWA violation was data from a monitoring station located downstream of defendants’ discharge point.¹⁸ The U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part.¹⁹ The United States Supreme Court reversed and remanded the case to the Ninth Circuit.²⁰

On remand, the Ninth Circuit ordered the parties to file supplemental briefs addressing the implications of the Supreme Court’s ruling.²¹ After considering the supplemental briefs, the Supreme Court’s ruling, and other matters, the Ninth Circuit held the defendants liable for permit violations as a matter of law.²² The Ninth Circuit reasoned that the Permit clearly stated that the monitoring station data would be used to determine whether the NPDES permittee (“Permittee”) had exceeded the amount of allowable pollutants and was in compliance with the Permit, and the reports from the defendant’s monitoring station showed discharges in excess of the permitted amount.²³ The Ninth Circuit therefore reversed the district court’s grant of

¹⁴ *Nat. Res. Def. Council v. L.A. Cty. Flood Control Dist.*, 725 F.3d 1194, 1197 (9th Cir. 2013).

¹⁵ *Id.* at 1197–98.

¹⁶ *Id.* at 1198.

¹⁷ *Id.* at 1200–01. An exceedance means that the permittee has exceeded the limits specified by either the Clean Water Act or NPDES permit. Sandra J. Beneway, *Analysis of the Air Force’s Clean Water Act Notice of Violation as a Managerial Tool in Achieving Compliance* 31 (Aug. 1994) (unpublished M.S. thesis, Air Force Institute of Technology), <http://www.dtic.mil/dtic/tr/fulltext/u2/a284701.pdf> [<https://perma.cc/Z6XR-7CX2>].

¹⁸ *L.A. Cty. Flood Control Dist.*, 725 F.3d at 1196.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1196–97.

²³ *Id.* at 1197, 1206–07, 1210.

summary judgment in favor of the defendants and remanded to the district court to determine the appropriate remedy for the defendants' violations.²⁴

This Comment argues that the Ninth Circuit's decision was required both by statutory interpretation and case precedent because the Permit explicitly stated that the monitoring data would be used to determine Permit compliance.²⁵ Further, it argues that a preliminary testing period for monitoring stations—as well as more frequent monitoring and reporting—will clarify liability by establishing a baseline for a permittee to monitor pollutant fluctuations and efficiently address anomalies.²⁶

I. FACTS AND PROCEDURAL HISTORY

The Natural Resources Defense Council (“NRDC”) seeks to protect “our water from pollution by defending the Clean Water Act.”²⁷ The Los Angeles Waterkeeper (“Waterkeeper”) has a similar mission: protecting the “waters through enforcement, fieldwork, and community action.”²⁸ Unlike the broad reach of NRDC, the Waterkeeper specifically focuses on Santa Monica Bay, San Pedro Bay, and adjacent waters.²⁹ The District includes eighty-four cities and some unincorporated areas.³⁰ Each of the cities' MS4's connects to the District's larger LA MS4.³¹ The untreated storm water discharged from the LA MS4 is deposited via a point source into the Los Angeles and San Gabriel Rivers, which then flows into the Santa Monica Bay and the Pacific Ocean.³²

In 1990, the first NPDES permit regulating storm water discharges from the entities in the District was issued.³³ The permit was amended and reissued many times since; the 2001 version of the NPDES permit (“the Permit”) was at issue in this litigation.³⁴ The NPDES permittees placed the mass-emissions monitoring stations in the Los Angeles and San Gabriel Rivers (collectively, the “monitoring stations”), downstream from other LA MS4 outfalls operated by the defendants and other non-party permittees.³⁵

²⁴ *Id.* at 1197.

²⁵ *See id.* at 1207; *infra* notes 79–125 and accompanying text.

²⁶ *See infra* notes 79–125 and accompanying text.

²⁷ *Water*, *supra* note 4.

²⁸ *About Us*, L.A. WATERKEEPER, <https://lawaterkeeper.org/about-us/> [<http://perma.cc/86SL-GDL8>].

²⁹ *Id.*

³⁰ *L.A. Cty. Flood Control Dist.*, 725 F.3d at 1197.

³¹ *Id.*

³² *Id.* at 1198.

³³ *Id.* at 1199.

³⁴ *Id.*

³⁵ *Id.* at 1200. “Mass-emissions” monitoring stations evaluate the water quality in the receiving water rather than directly evaluating the nature of the storm water runoff that is discharged directly from the LA MS4. Memorandum from Samuel Unger, Exec. Officer, L.A. Reg'l Water

The plaintiffs sent a series of notice letters to the defendants regarding violations of the Permit terms and subsequent liability under Section 505 of the CWA after the District published the annual monitoring results containing “140 separate exceedances of the Permit’s water quality standards, including excessive levels of aluminum, copper, cyanide, zinc, and fecal coliform bacteria in both the Los Angeles and San Gabriel Rivers.”³⁶ Section 505 of the CWA allows private plaintiffs to bring an action enforcing certain provisions of the Act.³⁷ On September 18, 2008, plaintiffs filed their First Amended Complaint and asserted six causes of action under the CWA.³⁸

The district court designated four of the Plaintiffs’ claims as the “Watershed Claims.”³⁹ The district court recognized that the District is responsible for the pollutants when they pass through the monitoring stations, but plaintiffs needed to prove that the defendants violated the Permit limitations by showing exceedances taken from the defendants’ outfalls.⁴⁰ After supplemental briefing, the district court again found that plaintiffs did not prove that the defendants had discharged pollutants in excess of the allowable amount from one of their outlets.⁴¹ The district court entered summary judgment on the “Watershed Claims,” and on June 9, 2010, entered partial final judgment on the “Watershed Claims” in favor of the defendants.⁴²

The plaintiffs appealed, advancing the same argument as they did in the district court, that the defendants’ monitoring reports established liability as a matter of law.⁴³ The Ninth Circuit rejected that claim because plaintiffs failed to prove the individual violations by the defendants.⁴⁴ The Ninth Circuit held the District liable because the District owned and operated the mass-emissions monitoring stations, and the pollutants were located in the point source when detected.⁴⁵

The District’s petition for writ of certiorari was granted in part on June 25, 2012.⁴⁶ The Supreme Court held that under the CWA, a discharge of pollutants does not occur “when polluted water flows from one portion of a

Quality Control Bd. to Bd. Members of L.A. Reg’l Water Quality Control Bd. 14 (Jan. 20, 2012), http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/la_ms4/MS4%20Memo%20012012.pdf [<https://perma.cc/BC4B-TR5M>].

³⁶ *L.A. Cty. Flood Control Dist.*, 725 F.3d at 1200–01.

³⁷ 33 U.S.C. § 1365 (2012).

³⁸ *L.A. Cty. Flood Control Dist.*, 725 F.3d at 1201.

³⁹ *Id.*

⁴⁰ *Nat. Res. Def. Council v. L.A. Cty. Flood Control Dist.*, No. 08-1467AHM, 2010 WL 761287, at *7 (C.D. Cal. Mar. 2, 2010).

⁴¹ *L.A. Cty. Flood Control Dist.*, 725 F.3d at 1202.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1201.

⁴⁵ *Id.* at 1202.

⁴⁶ *Id.*

river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river, and then into a lower portion of the same river[.]”⁴⁷ The Supreme Court reversed the Ninth Circuit’s prior judgment and remanded to the appellate court to address the potential liability for the District’s Permit violations.⁴⁸

On remand, the Ninth Circuit addressed the requirements for liability under the NPDES Permit.⁴⁹ It held that the defendants were liable under the terms of the Permit because the monitoring reports “conclusively demonstrate[d] that pollution levels in the Los Angeles and San Gabriel Rivers [were] in excess of those allowed under the Permit”⁵⁰ It then remanded the case to the district court to determine the appropriate remedy for the violations.⁵¹

II. LEGAL BACKGROUND

In 1948, Congress passed the Federal Water Pollution Control Act (“FWPCA”) to address water pollution at a national level.⁵² In 1972, after much public concern about water pollution, the FWPCA was amended and renamed the Clean Water Act (CWA), with the purpose to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁵³ The amendments set water quality standards and permitting requirements for pollutant discharge into navigable waters and authorized the U.S. Environmental Protection Agency (EPA) “to implement pollution control programs”⁵⁴ Section 301(a) of the CWA makes it unlawful to discharge pollutants unless the discharge is in compliance with an applicable section of the CWA.⁵⁵ One section of the CWA that can be applied to make a discharge lawful is Section 402, which creates the National Pollutant Discharge Elimination System (“NPDES”) permit program.⁵⁶ A NPDES permittee remains in compliance with the CWA by complying with the terms of their NPDES permit.⁵⁷

⁴⁷ *L.A. Cty. Flood Control Dist.*, 725 F.3d at 1202–03.

⁴⁸ *Id.* at 1203, 1205.

⁴⁹ *Id.* at 1205.

⁵⁰ *Id.* at 1210.

⁵¹ *Id.*

⁵² Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251–1357 (2012)).

⁵³ Clean Water Act of 1972, 33 U.S.C. §§ 1251–1357; see *History of the Clean Water Act*, *supra* note 9.

⁵⁴ *History of the Clean Water Act*, *supra* note 9; see 33 U.S.C. §§ 1251–1357.

⁵⁵ 33 U.S.C. § 1311(a).

⁵⁶ *Id.* §§ 1311(a), 1342.

⁵⁷ See *id.* § 1342(k).

The NPDES program addresses water pollution by establishing enforceable effluent limitations for point sources that discharge pollutants to waters of the United States.⁵⁸ The EPA Administrator prescribes the standards for compliance, “including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.”⁵⁹ The CWA requires NPDES permittees to monitor their discharges to demonstrate compliance with the permit limits.⁶⁰ Congress implemented the self-monitoring component of the permit to make it easier to enforce the Act.⁶¹

In 1987, Congress amended the CWA and authorized EPA to regulate storm water point sources by creating a separate permitting program for city storm sewer systems (“MS4”).⁶² MS4 permittees establish monitoring to produce data representative of the their discharge.⁶³ EPA requires permittees to submit a “monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening point to be sampled” and explains “why the [chosen] location is representative”⁶⁴ It is unlawful for permittees to not monitor their pollutant discharges.⁶⁵ It is also a violation of the CWA for a permittee to discharge pollutants in excess of the levels specified in the permit.⁶⁶ Citizens may enforce permit conditions under Section 505 of the CWA, known as the citizen suit provision.⁶⁷ The EPA Administrator may also authorize a state to administer the NPDES permit program for discharges within the jurisdiction of such state.⁶⁸

Pursuant to the Porter-Cologne Water Quality Control Act, California has delegated water pollution enforcement and NPDES permitting to the State Water Resources Control Board (“SWRCB”) and nine regional

⁵⁸ See *id.* § 1342; *National Pollutant Discharge Elimination System (NPDES)*, ENVTL. PROT. AGENCY, <https://www.epa.gov/npdes> [<https://perma.cc/U2HR-KUBW>].

⁵⁹ 33 U.S.C. § 1342(a)(2).

⁶⁰ 40 C.F.R. § 122.44(i)(1) (2015) (stating that each NPDES permit shall include conditions meeting monitoring requirements to assure compliance with the permit limitations).

⁶¹ See *National Pollutant Discharge Elimination System; Revision of Regulations*, 44 Fed. Reg. 32,854, 32,863 (June 7, 1979) (“Congress intended that prosecution for permit violations be swift and simple . . .”).

⁶² *L.A. Cty. Flood Control Dist.*, 725 F.3d at 1209.

⁶³ 40 C.F.R. § 122.48(b).

⁶⁴ *Id.* § 122.26(d)(2)(iii)(D).

⁶⁵ *Id.* § 122.26(d)(2)(i)(F) (“Permit applications for discharges from large and medium municipal storm sewers . . . shall include . . . monitoring procedures necessary to determine compliance and noncompliance with permit conditions . . .”).

⁶⁶ See *id.* § 122.41(a) (“Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for [an] enforcement action . . .”).

⁶⁷ 33 U.S.C. § 1365 (2012).

⁶⁸ *Id.* §§ 1342(a)(5), (b).

boards.⁶⁹ The SWRCB for the Los Angeles Region (the “Regional Board”) issues the NPDES permits in Los Angeles.⁷⁰ The NPDES permit contains monitoring and reporting requirements, general requirements of the CWA and specific provisions related to storm-sewer infrastructure and discharge.⁷¹ The relevant section of the Permit at issue in this litigation is Part 2, titled “Receiving Water Limitations,” which includes the Monitoring and Reporting Program procedure.”⁷²

Pursuant to Part 2, the limitations prohibit discharges that violate, or contribute to violating, the Water Quality Standards (“WQSs”) or Water Quality Objectives (“WQOs”).⁷³ WQSs and WQOs are determined by criteria established in the Basin Plan, California Ocean Plan, National Toxics Rule, California Toxics Rule, and other state or federally approved surface water quality plans.⁷⁴ To effectuate Part 2, the state’s Monitoring and Reporting Program requires these permittees (the “Permittees”) to report their pollution monitoring at least annually.⁷⁵ The purpose of the mass-emissions monitoring is to “assess compliance . . . [m]easure and improve the effectiveness of the Stormwater Quality Management Plans . . . [and] [a]ssess the overall health and evaluate long-term trends in receiving water quality.”⁷⁶ The Permit requires that the Principal Permittee designate monitoring sta-

⁶⁹ Porter-Cologne Water Quality Control Act, CAL. WATER CODE §§ 1300–16104 (West 2015).

⁷⁰ *NPDES Municipal Permit*, L.A. Stormwater, L.A.’s Watershed Protection Program, <http://www.lastormwater.org/about-us/npdes-municipal-permit/> [<https://perma.cc/AT8E-WTT7>].

⁷¹ *See NPDES Frequent Questions*, U.S. ENV’T L PROT. AGENCY, <https://www.epa.gov/npdes/npdes-frequent-questions#pane-1> [<https://perma.cc/PRQ2-A48J>].

⁷² *See* CAL. REG’L WATER QUALITY CONTROL BD., NPDES PERMIT-RECEIVING WATER LIMITATIONS 17 (2001), http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/los_angeles_ms4/reopener/2%20-%20la%20ms4%20permit%20w%20proposed%20language%20changes%20except%20finding%20may%2018%20200_.pdf [<https://perma.cc/CH7M-7QN8>]. Individual permits contain both general and specific requirements; the discussion of the “Permit” in this Part refers to the general CWA requirements incorporated into the NPDES permits issued by the SWRCB.

⁷³ *See id.*

⁷⁴ *See generally* JOHN B. MARSHACK, STATE WATER RESOURCES CONTROL BOARD, CAL. ENV’T L PROT. AGENCY, A COMPILATION OF WATER QUALITY GOALS (2016), http://www.waterboards.ca.gov/water_issues/programs/water_quality_goals/docs/wq_goals_text.pdf [<https://perma.cc/RCB5-APPLE>] (describing the promulgation and enforcement of California’s water quality standards).

⁷⁵ U.S. ENV’T L PROT. AGENCY, GUIDANCE MANUAL FOR THE PREPARATION OF PART 2 OF THE NPDES PERMIT APPLICATIONS FOR DISCHARGES FROM MUNICIPAL SEPARATE STORM SEWER SYSTEMS 5–20 (1992), <https://www3.epa.gov/npdes/pubs/own0246.pdf> [<https://perma.cc/LYR8-8K3S>].

⁷⁶ L.A. CTY. DEP’T OF PUB. WORKS, EXECUTIVE SUMMARY, at es-1 (n.d.), http://dpw.lacounty.gov/wmd/npdes/2003-04_report/ExecutiveSummary.pdf [<https://perma.cc/HBD5-2HKW>].

tions throughout the County to conduct mass-emissions monitoring for the LA MS4⁷⁷ The permittees are responsible for their own discharge.⁷⁸

The courts treat the NPDES permit as a contract—in consideration of NPDES permit compliance, a permittee may receive a waiver to the general prohibition of discharging pollutants into waters of the United States.⁷⁹ The court will apply the same interpretation principles to the permit’s terms and enforcement as they would to any other contract.⁸⁰ If the permit’s language in context “is plain and capable of legal construction, the language alone must determine the permit’s meaning.”⁸¹ If the language of the permit is ambiguous, extrinsic evidence may be supplemented to aid interpretation.⁸² A permit is ambiguous if reasonable people could interpret the terms to have more than one meaning.⁸³ “[A] court must give effect to every word or term’ in an NPDES permit ‘and reject none as meaningless or surplusage’”⁸⁴ There is an obligation to interpret the permit in light of the permitting authority’s intention.⁸⁵

III. ANALYSIS

In *Natural Resources Defense Council, Inc. v. County of Los Angeles*, the U.S. Court of Appeals for the Ninth Circuit held that National Pollution Discharge Elimination System (“NPDES”) permit (“Permit”) violations resulted in liability as a matter of law because the Permit clearly stated that

⁷⁷ See Letter from Samuel Unger, Exec. Officer, L.A. Reg’l Water Quality Control Bd., to Bd. Members, L.A. Reg’l Water Quality Control Bd., on Key Issues Raised by Stakeholders Regarding the Reissuance of the Los Angeles Count MS4 Permit 7 (2012), http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/la_ms4/MS4%20Memo%20012012.pdf [<https://perma.cc/W7T2-BXT6>] (“The permit establishes that the Principal Permittee shall monitor the mass emissions stations.”).

⁷⁸ See Letter from Gail Farber, Director of Pub. Works, and Gary Hildebrand, Assistant Deputy Director, Watershed Mgmt. Division L.A. Cty. Dep’t of Pub. Works, to State Water Resources Control Bd. (July 28, 2011), http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/santaclarariver_bacteria/comments/gary_hildebrand.pdf [<https://perma.cc/9VZL-VSD5>].

⁷⁹ See 33 U.S.C. §§ 1251(a), 1342 (2012).

⁸⁰ See *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995).

⁸¹ See *Piney Run Pres. Ass’n v. Cty. Comm’rs of Carroll Cty.*, 268 F.3d 255, 270 (4th Cir. 2011).

⁸² See *id.*

⁸³ See *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999).

⁸⁴ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (describing how it is a “cardinal principle of contract construction” that “a document should be read to give effect to all of its provisions and to render them consistent with each other”); *In re Crystal Props., Ltd., L.P.*, 268 F.3d 743, 748 (9th Cir. 2001); see also RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981) (“[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.”).

⁸⁵ *Piney Run Pres. Ass’n*, 268 F.3d at 270.

the monitoring station data would be used to determine whether the NPDES permittee had exceeded the amount of allowable pollutant discharge, and was in compliance with the Permit.⁸⁶

In deciding *County of Los Angeles*, the Ninth Circuit rejected the defendants' position that the mass-emissions monitoring station was not designed to measure permittee compliance.⁸⁷ By treating the NPDES permit as a contract, the court determined that the Permit language explicitly stated: "Assessing compliance with this [Permit]" is one of the "primary objectives of the Monitoring Program."⁸⁸ Because of the explicit language in the Permit, the court determined that there was not more than one reasonable interpretation, and therefore the Permit language was unambiguous.⁸⁹

The defendants contended that the mass-emissions monitoring data was not intended to establish liability for permit violations without independent monitoring of a permittee's city storm sewer system ("MS4") because the Permit language stated: "Each permittee is responsible only for a discharge for which it is the operator."⁹⁰ The Ninth Circuit rejected this argument because this interpretation would lead to the unreasonable result of allowing unlimited discharge from the District's larger MS4 ("LA MS4") without liability for the monitoring results, when the purpose of the monitoring is to assess permittee compliance with discharge limitations.⁹¹ To give effect to all of the terms in the Permit in a consistent fashion, the court interpreted the Permit language at issue to address remedy instead of liability for the Permit violations.⁹² The court therefore reasoned that since the monitoring data showed pollutants in excess of permissible limits defined in the terms of the Permit, the defendants were not in compliance and were liable for violating the Permit limitations.⁹³

Although the court determined that the language of the Permit explicitly established that the monitoring data would be used to determine Permit compliance, it proceeded to address the "extrinsic considerations" establishing liability for pollutant discharge exceedances under the Permit.⁹⁴ The court rejected the defendants' contention that the monitoring program did

⁸⁶ 725 F.3d 1194, 1206, 2010 (9th Cir. 2013).

⁸⁷ *Id.* at 1205.

⁸⁸ *See id.* at 1204–05 ("NPDES permits are treated like any other contract."). Although there is a general prohibition against discharging into waters of the United States, the NPDES permit under the CWA acts as a waiver to the general prohibition, allowing the permittee to discharge in consideration of complying with the Permit requirements such as effluent limitations and monitoring. *See* 33 U.S.C. §§ 1311, 1342 (2012).

⁸⁹ *L.A. Cty. Flood Control Dist.*, 725 F.3d at 1205.

⁹⁰ *Id.* at 1204, 1206.

⁹¹ *Id.* at 1206.

⁹² *Id.*

⁹³ *Id.* at 1206–07.

⁹⁴ *Id.* at 1207.

not measure, nor was it implemented to measure, individual permittee compliance, as this result would render the Permit unlawful under the Clean Water Act (CWA).⁹⁵

The *County of Los Angeles* court cited to an amicus brief filed by the permitting authority in a similar case that explicitly stated its position on this issue.⁹⁶ In the brief, the permitting authority rejected the defendants' position, recognizing that enforcement of the Permit in an integrated storm sewer system could not be avoided because the source of pollutants could not be definitively ascertained.⁹⁷ The permitting authority further noted that because the monitoring program did not produce individualized permittee data, individualized permittee data was not required to establish liability.⁹⁸

Finally, the court noted that to effectuate the purpose of the CWA, the NPDES program for MS4s relies on self-monitoring.⁹⁹ The court reasoned that Congress implemented self-monitoring to "promote straightforward enforcement of the Act," allowing enforcement based on "little, if anything, more than the . . . reports submitted by the permittee itself."¹⁰⁰ As required by law, the defendants chose the locations of the monitoring stations that "were necessarily 'representative' of the monitored activity . . ."¹⁰¹ The data collected at defendants' monitoring stations was therefore representative of their pollutant discharges under the Permit.¹⁰²

The *County of Los Angeles* case was remanded to determine the appropriate remedy for the defendants' violations because the Ninth Circuit determined that pollution levels in excess of those allowed under the Permit constituted liability as a matter of law.¹⁰³ The defendants' contention that there was no proof that any individual defendant discharged pollutants in excess of the permitted amount was unsuccessful because the Permit language and the current monitoring program established liability for reports showing pollutants in excess of the allowable amount.¹⁰⁴

Under contract law, the Ninth Circuit's holding that the defendants are liable for Permit violations was legally sound.¹⁰⁵ Furthermore, the court's decision was consistent with the purpose and language of the CWA.¹⁰⁶ Alt-

⁹⁵ *Id.*

⁹⁶ *Id.* at 1207–08.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1208.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1209.

¹⁰² *Id.* at 1209–10.

¹⁰³ *See id.*

¹⁰⁴ *See id.* at 1206–07.

¹⁰⁵ *See id.* at 1204–05.

¹⁰⁶ *See* 33 U.S.C. §§ 1251–1357 (2012) (stating the purpose of the CWA as to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"); *L.A. Cty. Flood*

though the decision was sensible in light of contract law and the CWA, it might lead to new regulations requiring a preliminary testing period for the monitoring station as part of the permit process, as well as more frequent monitoring and reporting.¹⁰⁷ These new regulations would clarify liability by informing permittees of the area they are liable for, raising awareness as to the pollutant composition early on, and effectuating speedy enforcement and compliance with the NPDES program.¹⁰⁸

Because the NPDES permit is treated as a contract, the court's role is to enforce the contract based on the terms in the permit.¹⁰⁹ Because the plain language of the Permit explicitly stated that the Monitoring Program was intended to assess compliance with the Permit, there was no need for the court to look to extrinsic evidence to interpret its terms.¹¹⁰ Nonetheless, because of the defendants' issue with a seemingly contradictory term in the Permit, the court looked to extrinsic evidence—such as the purpose of the CWA and the permitting authority's interpretation—and determined that under the Permit, the defendants were liable for exceeding the Permit limitations.¹¹¹ Thus, regardless of whether or not the plain language of the Permit stated that the monitoring program was intended to determine compliance, the extrinsic evidence also supported the court's determination that the defendants were liable.¹¹²

Because permittees choose the monitoring station locations as representative of their outfalls, it is sensible that individual contribution amounts need not be determined.¹¹³ As evidenced by *County of Los Angeles*, it is difficult to measure the distinct sewer system effluent from a point source due to the comingling of pollutants once they are dispersed into water.¹¹⁴ Nevertheless, an exceedance of effluent limitations from a point source is a violation of the Permit and CWA, regardless of the pollution origin.¹¹⁵

The NPDES application process should require the prospective permittee to run preliminary testing before choosing where to locate the monitoring station, as well as collect information on upstream discharges to the

Control Dist., 725 F.3d at 1200, 1204 (describing how the purpose of the mass-emissions monitoring is to estimate emissions and assess trends and exceedances).

¹⁰⁷ See *infra* notes 79–125 and accompanying text. The Administrator determines the necessary requirements to carry out the provisions of the CWA. See 33 U.S.C. § 1342 (a)(1)(B), (2).

¹⁰⁸ See *infra* notes 116–120 and accompanying text.

¹⁰⁹ *L.A. Cty. Flood Control Dist.*, 725 F.3d at 1204.

¹¹⁰ *Id.* at 1204–05.

¹¹¹ *Id.* at 1205, 1207–10.

¹¹² See *id.* at 1207–10.

¹¹³ See *id.* at 1209.

¹¹⁴ See *id.* at 1208.

¹¹⁵ See 33 U.S.C. § 1311 (2012).

MS4.¹¹⁶ If the results from the preliminary testing show pollutants different in either type or volume than expected, the prospective permittee should have the option to research the source of pollutants or relocate the monitoring station (if it is determined that the pollutants are derived from a source other than the prospective permittee).¹¹⁷ Although preliminary testing will not ensure consistent monitoring results throughout the duration of the permit, the permittee will be aware of the baseline specifying the type and quantity of pollutants in the MS4 at the time of initial permitting.¹¹⁸ More consistent reporting and monitoring will alert the permittee and regulatory authority early on if there is a flux in the type or quantity of pollutants; this will result in faster resolution of the anomaly and less possibility of continuous unchartered pollution without liability.¹¹⁹ For example, if from one month to the next there is an influx of a certain pollutant, the permittee can use one of EPA's public search tools to ascertain whether new nearby facilities were granted a NPDES permit, whether there has been new development, or whether there is a facility nearby that uses the specific pollutant.¹²⁰

¹¹⁶ See 40 C.F.R. § 122.48(b) (2015) (requiring that the monitoring be "sufficient to yield data which are representative of the monitored activity"). As the reported data will be representative of the permittee's effluent, there should be a preliminary testing period informing the permittee of the current pollutant composition to allow an informed decision on where to locate the monitoring station and to ensure that the reporting is representative of the permittee's effluent. See *id.* For instance, a month long preliminary test producing data similar to that of the monitoring station will inform the prospective permittee of the pollutant composition and set a baseline for future monitoring. See *id.* Since the NPDES permit is issued in draft form for public comment before it is approved, information regarding the upstream discharges would be useful for the public to determine if the proposed location is unreasonable. See 33 U.S.C. § 1342(a).

¹¹⁷ See 40 C.F.R. § 122.48(b). Because monitoring is intended to produce data that is representative of the monitored activity, the permittee should relocate the monitoring station if the results of the preliminary testing are not representative of the monitored activity to effectuate the purpose of the monitoring under the NPDES permit. See *id.*

¹¹⁸ See *id.*

¹¹⁹ See CAL. REG'L WATER QUALITY CONTROL BD., MONITORING AND REPORTING PROGRAM FOR NPDES PERMIT NO. CAS004001: WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHEDS OF LOS ANGELES COUNTY, EXCEPT THOSE DISCHARGES ORIGINATING FROM THE CITY OF LONG BEACH MS4E-55 to -66 (2012), http://www.waterboards.ca.gov/losangeles/water_issues/programs/storm_water/municipal/la_ms4/Revised/2nd%20REVISED%20TENTATIVE%20-%20Attachment%20E_11-5-12.pdf [<http://perma.cc/N79F-79XN>]. Requirements show different reporting requirements for different pollutants and water bodies. *Id.* For instance, estuary bacteria was scheduled to be reported daily, but toxic pollutant monitoring for a harbor scheduled is monitored annually. *Id.* It can be inferred that the more frequent the water body is monitored, the less pollutants it will have since an exceedance of the allowable limit will require action to get it within the allowable limit. See *id.*

¹²⁰ See *National Pollutant Discharge Elimination System (NPDES): EPA Tools Related to NPDES*, ENVTL. PROT. AGENCY, <https://www.epa.gov/npdes/epa-tools-related-npdes> [<https://perma.cc/9TKF-N4Y2>]. Federal and state "right-to-know" laws permit workers to access information regarding chemicals in their workplaces. See *Right-to-Know Laws and Rights*, AFSCME, <http://www.afscme.org/news/publications/workplace-health-and-safety/safe-jobs-now-a-guide-to-health->

As *County of Los Angeles* illustrates, the more time that passes between reporting, the more difficult it is to determine the sources of the comingled pollution.¹²¹ More frequent monitoring and reporting will inform the permittee of exceedances earlier, and if the permittee does not address the exceedance, it will constitute the permittee's acquiescence of unlawful pollution.¹²²

The State Regional Boards in California learned "that programs having more specific permit requirements were generally more comprehensive and effective in controlling storm water pollution."¹²³ "The specificity of the provisions enabled the permitting authorities to enforce MS4 permits and improve the water quality of storm water discharges."¹²⁴ The permitting authorities should promulgate explicit regulations requiring preliminary testing before final issuance of the permit, as well as monitoring and reporting on a monthly basis.¹²⁵

CONCLUSION

The U.S. Court of Appeals for the Ninth Circuit's decision in *Natural Resources Defense Council, Inc. v. County of Los Angeles* determined that if a monitoring station reports pollution amounts exceeding those allowed un-

and-safety-in-the-workplace/chapter-5-controlling-chemical-hazards/right-to-know-laws-and-rights [https://perma.cc/V62F-WZMW].

The federal law that provides these rights is OSHA Hazard Communication Standard (29 C.F.R. 1910.1200). Private-sector employees must provide chemical information to their workers under the OSHA standard. Most states have their own Right-to-Know laws that cover public-sector workers. In some of these states, workers have stronger rights than under the federal Hazard Communication Standard.

Id.

¹²¹ See *Nat. Res. Def. Council v. L.A. Cty. Flood Control Dist.*, 725 F.3d 1194, 1202 (9th Cir. 2013) (plaintiffs could not prove the individual contributions to the Permit violations).

¹²² See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 839–40 (Vicki Been et al. eds., 2010). In *United States v. Metalite Corp.*, the court rejected the defendant's argument that the relevant sections of the CWA outlined a specific intent of crime. No. 99-008-CR-B/N, 2000 U.S. Dist. LEXIS 11507, at *11 (S.D. Ind. 2000). Although the enforcement provision of the CWA does not require intent of crime, one can still be liable for a violation regardless of whether the permittee realizes they are committing a crime. See PLATER, *supra*, at 840. Therefore, because a violation of exceeding permit violations does not require intent, the fact that a permittee would have knowledge of the violation makes for an even stronger case against a permittee if there is an exceedance after the permittee is notified in the report. See *id.*

¹²³ STATE WATER RESOURCES CONTROL BD., CALIFORNIA ENVTL. PROT. AGENCY, PHASE II SMALL MUNICIPAL SEPARATE STORM SEWER SYSTEM (SMALL MS4) GENERAL PERMIT 2 (2013), http://www.swrcb.ca.gov/publications_forms/publications/factsheets/docs/ms4factsheet_010413.pdf [http://perma.cc/4J37-LQVH].

¹²⁴ *Id.*

¹²⁵ See *id.* (Since more specific permit requirements are more effective, the state should be explicit with the requirements.).

der a Clean Water Act (CWA) permit, the permittee is liable as a matter of law under the Act. In reaching this conclusion, the court applied contract law principles to effectuate the purpose of the CWA.

Although the permit clearly states that monitoring station data will be used to determine permit compliance, requirements that there be preliminary testing of a proposed monitoring station location, and increased frequency of monitoring and reporting, will clarify liability and further the goals of the CWA. These requirements should lead to less enforcement litigation dealing with the source of pollutants because the permittee will be able to compare the monthly reports to the established baseline, rendering the permittee unable to deny liability if no action is taken to amend the exceedance. More frequent self-reporting will improve compliance with the National Pollution Discharge Elimination System program, leading to overall better water quality, as there will be less accumulation of pollutants before they are discovered.