

High Court's Stormwater Ruling Leaves CWA Rules Murky

By **Sean McLernon**

Law360, New York (January 08, 2013, 9:42 PM ET) -- Though the U.S. Supreme Court on Tuesday narrowly shielded Los Angeles County from liability for stormwater pollution found in area rivers, it left untouched thornier, longstanding issues regarding how discharges are regulated under the Clean Water Act, attorneys said.

The Ninth Circuit had found the Los Angeles County Flood Control District liable for polluting two rivers with stormwater that was channeled through a sewer system for flood control and then pumped back into lower portions of the rivers. The high court reversed the Ninth Circuit ruling, which would have required costly CWA permits for water moving through sewer systems within a single river.

The unanimous decision was limited to the narrowest issues of the question presented, however, leaving uncertainty over how to handle discharges between multiple bodies of water and how to determine which parties can be held responsible for stormwater pollution.

Mayer Brown LLP partner Timothy S. Bishop said the decision's narrow focus was unsurprising, because the high court made clear in its 2004 *South Florida Water Management District v. Miccosukee Tribe* decision that pumping polluted water from one portion of a body of water to another is not a discharge under the CWA.

Bishop, who was one of the attorneys who argued the *Miccosukee* case before the high court, said the court had to step in because the Ninth Circuit blatantly contradicted that Supreme Court ruling.

"It is an annoying instance of the court having to correct error in the Ninth Circuit," Bishop said. "It's simply a reaffirmation of *Miccosukee*. It's now absolutely clear, no doubt, but it doesn't answer any of the broader questions."

One of those broader questions involves permit requirements for transfers of polluted water between two or more bodies of water. Environmental groups currently are challenging the U.S. Environmental Protection Agency's exemption for such transfers in Florida federal court. The case is expected to reach the Supreme Court, according to Bishop.

"When it comes up to the high court, it will force the justices to think about what *Miccosukee* means, and the ruling will have much more of an impact," Bishop said.

Pillsbury Winthrop Shaw Pittman LLP partner Wayne M. Whitlock said there is reason to believe that the justices will knock down any challenge to the water transfer rule that reaches the high court if the court follows the same rationale it used in Tuesday's narrow ruling.

"This case said the mere transfer of water isn't the basis for treating it as a new discharge — if you're not adding a pollutant to a water, you shouldn't be regulated," Whitlock said. "Maybe that principal would apply in water transfer rules too because most cases involve just moving the same discharge to another place."

The decision also leaves doubt as to who can be ultimately held responsible for stormwater pollutants, especially when there are multiple sources of contamination. The environmental groups who sued the L.A. flood control district said that the municipality is still liable because it is the largest polluter, but the high court declined to address that issue in its ruling.

"No one is saying it wasn't polluted water, the court just stipulated that it didn't meet requirements for a permit," Sheppard Mullin Richter & Hamilton LLP partner Geoffrey K. Willis said. "There is still the question of who was the source of those pollutants."

The lack of a clear standard for measuring liability in mixed water could lead to tighter regulation, according to Willis. More permits may require specific testing from point sources in order to determine where exactly the waste comes from, he said.

Requiring point source monitors throughout an entire municipal system would be extremely expensive for a large city like L.A., however, and it would still be difficult to determine the source of toxins, according to Morris Polich & Purdy LLP partner Steven L. Hoch.

Demonstrating causation within a flood control district is exceedingly difficult, but the only way to guarantee freedom from liability is to try and pinpoint the source of pollution and shift blame elsewhere, Hoch said.

"Everybody is going to be pointing fingers at everybody else," Hoch said.

The high court could have established more clarity with a broader decision, but decided to punt on the issue, Hoch said.

"The fact that this is a unanimous decision meant they had to zero in on the most minute area presented," Hoch said. "They chose not to look at the nuances of all this."

Much Shelist PC partner David L. Rieser said the court knew from the beginning that it was not going to issue a transformative decision, only taking the case in order to correct the Ninth Circuit.

"They had issued cert for a very narrow ruling, and I'm sure they did that for a reason," Rieser said. "They wanted to solely to look at what was discharged from a concrete stormwater drain in a single body of water."

The flood control district is represented by Timothy T. Coates of Greines Martin Stein & Richland LLP, Howard D. Gest and David W. Burhenn of Burhenn & Gest LLP, and its own counsel.

The environmental groups are represented by Aaron Colangelo of the NRDC.

The case is Los Angeles County Flood Control District v. Natural Resources Defense Council et al., case number 11-460, in the U.S. Supreme Court.

--Editing by John Quinn and Chris Yates.

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