

High Court Denial Puts Onus On Cities To Track Pollution

By **Sean McLernon**

Law360, New York (May 05, 2014, 7:35 PM ET) -- By refusing Monday to review a Ninth Circuit decision holding Los Angeles County liable for water pollution, the U.S. Supreme Court issued a warning to municipalities negotiating stormwater permits: Prove the source of polluted discharges, or you may ultimately be on the hook for them.

City and county water agencies will want to avoid ending up in the same position as the Los Angeles County Flood Control District, which can now be held accountable for water pollution from debris, chemicals and other pollutants that mix with rain and enter local waterways.

The L.A. County discharges are coming from hundreds, perhaps even thousands, of sources, but the agency has no reliable method in place to link the pollution to a factory or industrial plant or other sources that could be responsible. According to the Ninth Circuit, that leaves the county liable.

The high court declined to take up the case, leaving L.A. County frustrated — an official described the court's decision as “disturbing” — and putting other localities on notice. For stormwater pollution that is already difficult to track, municipalities will need to make sure they know where the discharges are coming from to stand any chance of avoiding full liability for contaminated rivers and waterways.

“From a discharger's point of view, I suppose this is wonderful, because wherever you put your stuff, you're going to be protected because the guy that runs the big pipe is going to be hit unless they have monitoring equipment someplace else,” Morris Polich & Purdy LLP partner Steven L. Hoch said.

The monitoring stations for the LACFCD are located at mass discharge points, making it difficult for the district to figure out which entities were responsible for the pollution. The Ninth Circuit said the LACFCD was stuck with the liability, as the monitoring data shows that the district is not in compliance with the permit and must pay the price.

The good news for cities and counties around the U.S. is they should be able to avoid the L.A. County's fate by securing favorable language during stormwater permit negotiations, according to Mayer Brown LLP partner Timothy S. Bishop

“The way to deal with this error for the future is for municipalities that manage water that has been polluted by others to ensure that their permits make absolutely clear the limits of their responsibility,” Bishop said.

National Association of Clean Water Agencies general counsel Nathan Gardner-Andrews said other localities should be paying attention and make sure to learn from LACFCD's experience.

"If anything else, what this case will mean for other utilities is: Don't make the same mistakes as the ones in this permit," Gardner-Andrews said. "It's a bit of a cautionary tale."

NACWA did not intervene in the case, which was appealed to the Supreme Court for the second time. During the first go around, the LACFCD secured a unanimous decision overturning the Ninth Circuit's finding that water coming from one portion of a river before it enters a separate storm sewer system and then flows into a lower portion of the same river is a discharge under the Clean Water Act.

This time, the LACFCD couldn't convince the justices to take up the case after the Ninth Circuit again ruled in favor of the Natural Resources Defense Council and other environmental groups on the basis of the monitoring data.

"They really decided on a very specific issue that is very specific for the L.A. permit," Gardner-Andrews said. "They got down into the weeds of what is in that particular permit itself."

It was unfortunate language that caused all of these problems, according to Gardner-Andrews, but it also means that other municipalities have a better idea of what not to do.

"Folks will be a lot more cautious going forward, particularly in the Ninth Circuit, about how liability is assigned [during permit negotiations]," Gardner-Andrews said.

Municipalities could use their leverage to determine under what conditions stormwater can enter the sewer system, experts say. They might require some kind of pretreatment program to cut down on some of the pollution, or at least require self-monitoring from large dischargers.

It may help the agencies to take initiative right away and develop better monitoring systems on their own. They would cost more money, but it might be cheaper in the long run to get a better sense of where the pollution is coming from rather than trying to deal with it after the fact through enforcement actions, Gardner-Andrews said.

"It all boils down to having a good sense of the sources of information when you go into permit negotiations," Gardner-Andrews said.

The NRDC claims there are already green infrastructure solutions available for LACFCD and other agencies looking to cut down on the pollution, keeping the levels of discharge low enough that the permit isn't violated in the first place. But even with green infrastructure in place, NRDC water program director Steve Fleischli said the decision should push other agencies to increase their monitoring to better understand where the pollution is coming from.

"Maybe the county's example here will encourage others to have monitoring at individual outfalls instead of in the water body itself," Fleischli said.

Tracking pollution from the source may not be enough to get all the answers, however, according to Hoch. Not only will it be expensive to set up hundreds of monitoring stations across the district, the effort still might not be enough to avoid liability.

“The problem for the flood control district is even if you can find that top 500 entities that discharge, there still could be another 1,000 or 2,000 that no one knows anything about,” Hoch said.

LACFCD chief engineer Gail Farber remains concerned for other permit holders, saying there are plenty of other large water districts in the state that cover multiple jurisdictions that could face similar problems if environmental groups like the NRDC challenge them in court.

“I would expect that the same plaintiffs here will look for other large systems and try to bring them into a lawsuit, or at least some negotiation,” Hoch said.

The LACFCD is represented by Timothy T. Coates of Greines Martin Stein & Richland LLP and Howard Gest and David W. Burhenn of Burhenn & Gest LLP.

The environmental groups are represented by Aaron Colangelo of NRDC.

The case is Los Angeles County Flood Control District et al. v. Natural Resources Defense Council et al., case number 13-901, in the Supreme Court of the United States.

--Editing by Elizabeth Bowen and Chris Yates.