CLEAN WATER ACT MATH:
WHEN ADDITION IS NOT ADDITION

By: Kenneth Anspach[1]

Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" without a National Pollution Discharge Elimination System ("NPDES") permit. The term "discharge of any pollutant" is defined, in pertinent part, as, "any addition of any pollutant to navigable waters from any point source." CWA, § 502(12), 33 U.S.C. § 1362(12). Thus, the CWA provides an expansive prohibition of pollution. However, the courts interpreting this prohibition have struggled with what constitutes the "addition of any pollutant." ~~In particular~~For example, does water containing pollutants flowing from one location to another within the same or contiguous bodies of water constitute the "addition of any pollutant?" As set forth below, this question was answered by the U.S. Supreme Court on January 8, 2013 in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc. ("Los Angeles County Flood Control District")* 133 S. Ct. 710, 184 L. Ed. 2d 547 (2013).

An examination of the language of the CWA and a history of the case law construing that language points the way to the Court's decision in *Los Angeles County Flood Control District.* The CWA does not define "addition," although it does define the term "point source" to mean

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"any 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" excluding "agricultural storm water discharges and return flows from irrigated agriculture." CWA, § 502(14), 33 U.S.C. § 1362(14). Pollutant, in turn, is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." CWA, § 502(6), 33 U.S.C. § 1362(6). Section 301(a), therefore, only applies to an "addition" of pollutants from a discernible, confined and discrete conveyance, *i.e.*, a "point source," into navigable waters.

Whether water containing pollutants flowing from one location to another within the same or contiguous bodies of water constitute the "addition of any pollutant" was first addressed by the United States Environmental Protection Agency ("EPA") in several policy statements regarding discharges from dams made in opinion letters and reports to Congress in the 1970s and 1980s. *Catskill Mountains Chapter of Trout Unlimited, Inc v. New York City ("Trout Unlimited")*, 273 F.3d 481, 489-90 (2d Cir. 2001). EPA took the position therein that dam releases should not be considered "discharges" under the CWA and thus NPDES permits would not be required. *Id.* This position was never formalized in a notice-and-comment rulemaking or formal adjudication under the Administrative Procedure Act, 5 U.S.C. §§ 553, 554.

However, EPA's position was adopted by the courts in *National Wildlife Federation v. Gorsuch*, 224 U.S. App. D.C. 41, 693 F.2d 156, 174-75 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988), where the courts held

that the dams did not *add* pollutants "from the outside world." In particular, in *Gorsuch* the court held water quality changes caused by dams were not required to be regulated under the NPDES system and, thus, did not require dam operators to obtain permits. In *Consumers Power Co.* the court held that the release of water from turbines in a hydroelectric facility was not a point source discharge.

On the other hand, in *Committee to Save the Mokelumne River v. East Bay Municipal Utility District,* 13 F.3d 305, 308-09 (9th Cir. 1993), *cert. denied,* 115 S. Ct. (1994) the passage of polluted water over the spillway of a dam used to collect acid mine drainage from an abandoned mine was deemed the discharge of a pollutant subject to an NPDES permit. Likewise, in *Trout Unlimited,* 273 F.3d at 492-494, the court held that "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a "discharge" that demands an NPDES permit.

A common thread throughout these cases was the agreement of the courts that the passage of water from one part to another of a single body of water does not constitute an "addition" of pollutants. As the court stated in *Trout Unlimited*, 273 F.3d at 492, "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot."

This same approach was adopted by the U.S. Supreme Court in two cases, *South Florida Water Management District v. Miccosukee Tribe of Indians ("Miccosukee Tribe"),* 541 U.S. 95, 124 S. Ct. 1537, 158 L. Ed. 2d 758 (2004) and in the case which is the subject of this article, *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710, 184 L. Ed. 2d 547 (2013).

In *Miccosukee Tribe*, a pump station emptied water from a canal into a water conservation area ("WCA"). Respondents argued that the pump station could not be operated without an NPDES permit. Regarding the question of whether the operation of the pump station, which did not add pollutants to the water, could constitute the "discharge of a pollutant" within the meaning of the CWA, the Court determined that the definition of "discharge of a pollutant" included ~~within its reach~~ within its reach point sources that did not themselves generate pollutants. The issue that the Court found determinative, however, was whether the canal and the WCA were distinct water bodies or two parts of the same water body. Quoting the "ladle of soup" analogy from *Trout Unlimited*, the Court vacated a summary judgment entered below in favor of the District and remanded the case for a factual determination of that issue. 541 U.S. at 109-111.

Following on *Miccosukee Tribe*, the Court on January 8, 2013 in *Los Angeles County Flood Control District* was asked to determine whether the flow of water out of a concrete channel within a river into an unlined portion constituted the "discharge of a pollutant" under the CWA. In that case, petitioner Los Angeles County Flood Control District operated a municipal separate storm sewer system ("MS4"), *i.e.*, a drainage system that collects transports and discharges storm water. Because storm water is often heavily polluted, the CWA and its implementing regulations require certain MS4 operators to obtain an NPDES permit before discharging storm water into navigable waters. The District had such a permit for its MS4. Respondents NRDC and Santa Monica Baykeeper filed a citizen suit against District and others under § 505 of the CWA, 33 U.S.C. § 1365, alleging, among other things, that water-quality measurements from monitoring stations within the Los Angeles and San Gabriel Rivers demonstrated that the District was violating the terms of its permit. The District Court granted

summary judgment to the District, determining that the record was insufficient to warrant a finding that the MS4 had discharged storm water containing pollutants exceeding water quality standards detected at the downstream monitoring stations. The Ninth Circuit reversed in relevant part. That court held that the District was liable for the discharge of pollutants that, in the court's view, occurred when the polluted water detected at the monitoring stations flowed out of the concrete-lined portions of the rivers, where the monitoring stations are located, into lower, unlined portions of the same rivers. 184 L. Ed. 2d at 550.

Given this set of facts, the Court addressed the question of, "[u]nder the CWA, does a 'discharge of pollutants' occur when polluted water 'flows from one portion of a 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'?" 184 L. Ed. 2d at 550-551. In answering that question in the negative, the Court, relying on its holding in *Miccosukee Tribe*, held that the transfer of polluted water between "two parts of the same water body," *i.e.*, from an improved portion of a navigable waterway to an unimproved portion of the very same waterway, did not constitute a discharge of pollutants under the Act. 184 L. Ed. 2d at 550-552. In so doing, the Court construed the phrase "addition of any pollutant" at 33 U.S.C. § 1362(12), as follows: "Under a common understanding of the meaning of the word "add," no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body."

In conclusion, the CWA, § 301(a), 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" without an NPDES permit. The term "discharge of any pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA, § 502(12), 33 U.S.C. § 1362(12). In *Los Angeles County Flood Control District*, 184 L. Ed. 2d at

550, the U.S. Supreme Court held that that the transfer of polluted water between "two parts of the same water body," does not constitute the "addition of any pollutant to navigable waters" and, therefore, is not "the discharge of [a] pollutant" requiring an NPDES permit.