The Ninth Circuit (AK, AZ, CA, HI, ID, MT, NV, OR, WA) has a reputation for listening to the beat of its own drummer. And the Supreme Court has a reputation of taking the drum back and correcting the beat. Will this happen in Los Angeles County Flood Control District v. Natural Resources Defense Council? The State and Local Legal Center (SLLC) has filed an amicus brief in this case, which CSG has signed onto, and thinks (and hopes!) so.

The controversy in Los Angeles County Flood Control District v. Natural Resources Defense Council is over whether the Los Angeles County Flood Control District has violated a federal permit because of the level of pollutants from stormwater that it gathers in municipal separate storm sewer systems (MS4s) located in two California Rivers.

The technical legal question the Court agreed to decide is whether the transfer of water within a single body of water through an MS4 constitutes an addition of any pollutant under the Clean Water Act (CWA). In 2004 in South Florida Water Management District v. Miccosukee Tribe the Supreme Court held that an addition of a pollutant only occurs if a pollutant is transferred from one “meaningfully distinct” water body into another. The SLLC’s brief argues that the segments of the rivers above and below the MS4s in this case aren’t “meaningfully distinct,” so no addition of a pollutant has occurred. This seems to be a foregone conclusion; the MS4s are parts of both rivers.

As the SLLC’s brief points out, the Ninth Circuit “failed to determine . . . whether the segments of the rivers above and below [MS4] were the same bodies of water or different bodies of water, and apparently attached no significance to the question.” From the SLLC’s perspective, the Ninth Circuit simply ignored the Supreme Court’s holding in Miccosukee Tribe.

It seems unlikely the Court is going to say it didn’t actually mean what it said in Miccosukee Tribe. After all, this isn’t one of those cases where changing social values or new information might convince the Court to change its mind.

The bottom line for states is that they regulate water quality in MS4s and federal regulation is redundant. While all signs point towards the Supreme Court applying Miccosukee Tribe and concluding the CWA does not apply in this case, only time will tell.

A date for oral argument in this case has not yet been set. The Supreme Court will issue an opinion in this case by June 30, 2013.

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