



The Supreme Court Takes Two Clean Water Act Cases

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Introduction

- ◆ Intro to Supreme Court CWA decisions
- ◆ The other case
- ◆ *Los Angeles County Flood Control District v. NRDC*
 - WESTCAS amicus brief
- ◆ Consequences



Part 1

Background

How Cases Get To Supreme Ct

◆ Certiorari

- Parties petition for cert

◆ Supreme Court chooses its cases (grants cert)

- Chooses very few

◆ Not many CWA cases

Some Clean Water Act Cases

◆ 404 cases (primarily)

- *Sackett* (2012)
- *Coeur Alaska* (2009)
- *Rapanos* (2006)

◆ 402 cases

- *Miccossukee* (2004)
- New cases

Sackett

- ◆ 2/3 acre residential lot
 - EPA issues enforcement order
 - Penalties: \$75,000/day
- ◆ Sacketts file suit
 - EPA: no "pre-enforcement review"
- ◆ Supreme Court 9-0
 - Sacketts can sue EPA

Coeur Alaska

- ◆ Corps issues permit to discharge mining slurry into lake
 - Would kill all the lake's fish
 - EPA says 404 permit OK
- ◆ Issue: NPDES permit required?
- ◆ Supreme Court 6-3
 - Defers to EPA memo

Rapanos (and Carabell)

- ◆ Wetlands adjacent to roadside ditches
 - Act applies to wetlands adjacent to navigable waters
 - Issue: what's a navigable water?
- ◆ Supreme Court splits 4-1-4
 - 5 justices: Corps regs go too far
 - Plurality: dictionary definition of water
 - Kennedy: significant nexus

Miccosukee

- ◆ Flood Control District pumps water over levee from canal to lake
 - Issue: point source?
- ◆ Supreme Court 9-0
 - Point source includes sources that do not generate pollutants
 - No addition if same water body (8-1)

The New Cases

- ◆ Parties petition for cert
- ◆ Supreme Court asks Solicitor General to comment
 - Solicitor General says don't take them
- ◆ Supreme Court takes them anyway

Part 2

*Decker v. Northwest
Environmental Defense Center*

Decker (and Georgia-Pacific)

- ◆ Stormwater from logging roads
 - Channeled through ditches, pipes
- ◆ EPA silvicultural rule: not a point source
- ◆ Ninth Circuit: yes it is
 - NPS channeled = PS

Supreme Court Will . . . ?

- ◆ Probably reverse
 - ◆ Could hold that Ninth Circuit should have deferred to EPA regulation
 - ◆ Could say that the distinction between PS and NPS isn't just channelization
-



Part 3

*Los Angeles County Flood Control
District v. NRDC*



LA River Near 4th St Bridge



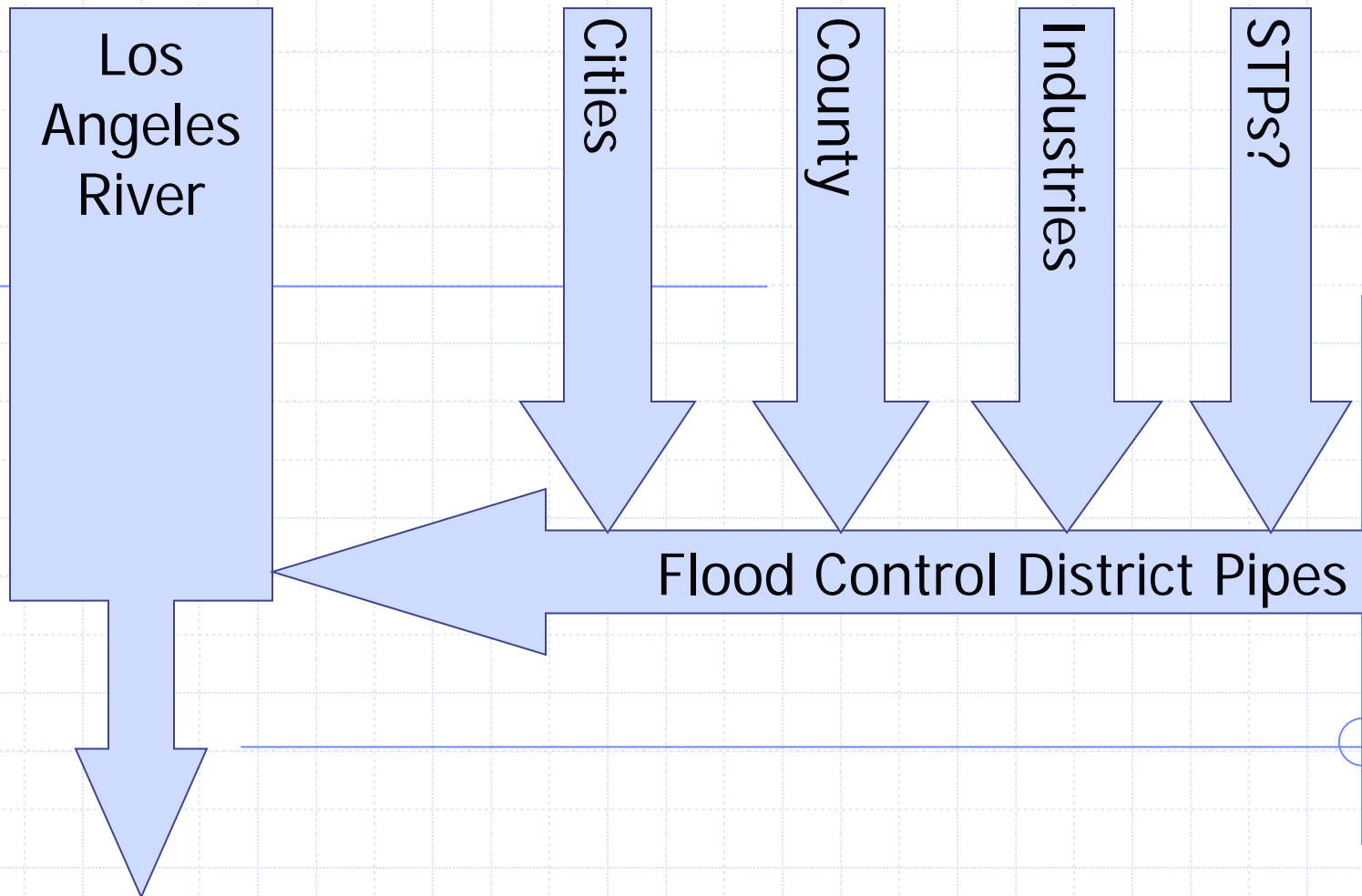
LA River Near 6th St Bridge



The Permit

- ◆ Stormwater permit issued to
 - 84 cities
 - Los Angeles County
 - Los Angeles County Flood Control District
- ◆ Permit: don't cause WQS violations
 - Monitoring stations for compliance
 - (Issue: where are monitoring stations?)

Basic Layout?



In The Trial Court

- ◆ NRDC sues FCD and county
 - Monitoring stations show exceedances
 - Those are permit violations
 - Defendants are liable
- ◆ Trial court (CD Cal)
 - NRDC loses
 - No showing that what is coming out of pipes exceeds WQS

In The Ninth Circuit

- ◆ NRDC wins
 - ◆ Evidence shows permit violations
 - ◆ But . . .
-

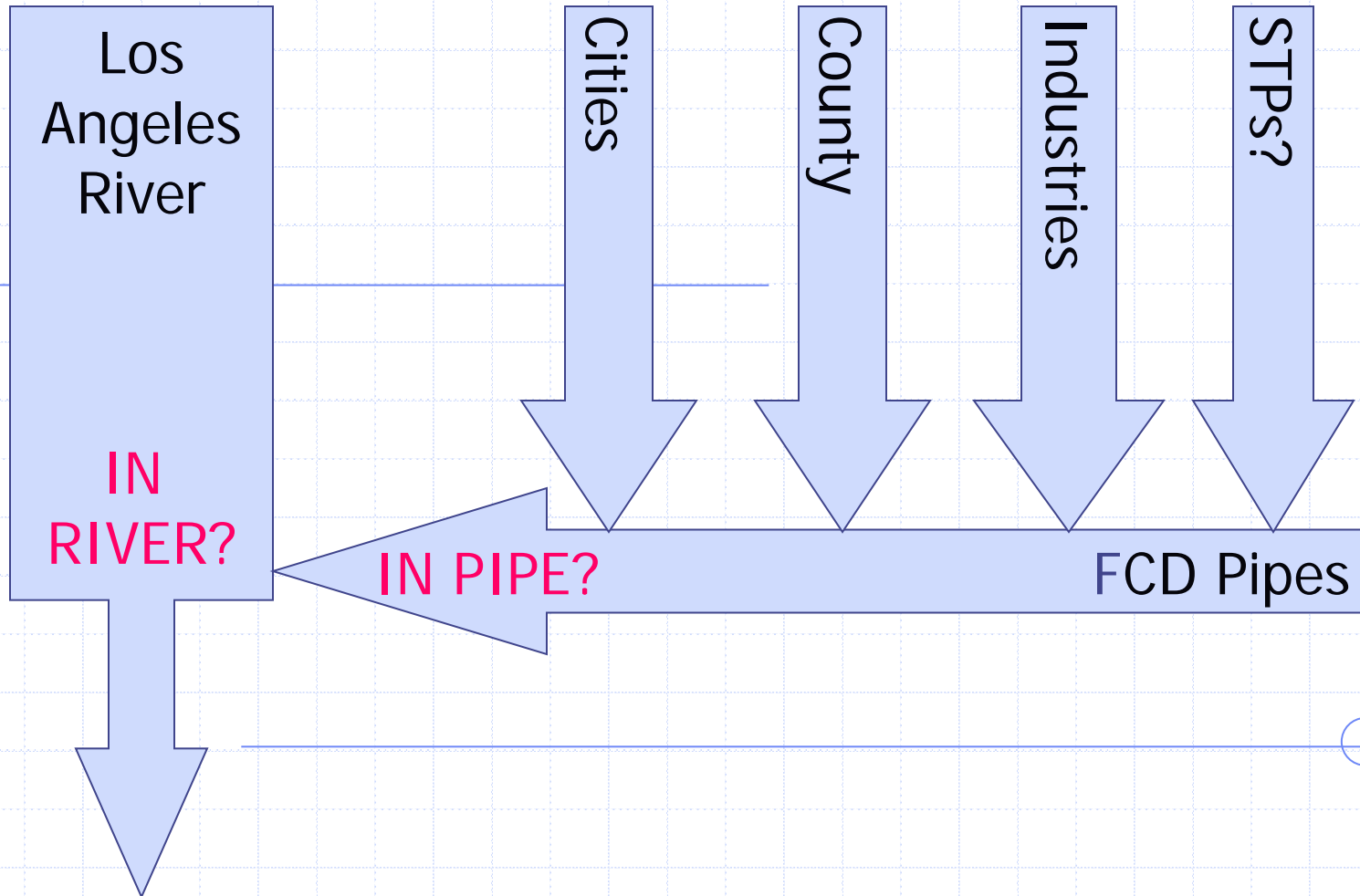
Decision Is Unclear

◆ Ninth Circuit implies that monitoring stations are in pipe

- Fairly represent discharges from pipe to river

◆ But monitoring stations are actually in river

Monitoring Stations?



District Argues . . .

- ◆ That the Ninth Circuit held that . . .
 - Water flowing from a natural river channel
 - Through an artificial channelized stretch
 - And then back into a natural channel
 - Is a point-source discharge regulated by the Clean Water Act
- ◆ District: That's wrong

Is This A Discharge?

Natural
River

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The diagram consists of three light blue rectangular boxes with black text, arranged vertically. Each box is connected to the next by a downward-pointing arrow. The top box is labeled 'Natural River', the middle box 'Artificial Channel', and the bottom box '(Same) Natural River'. A horizontal blue line passes through the middle of the 'Artificial Channel' box. To the left of the top box, a vertical blue line with a small circle at the top and bottom extends from the top of the page to the middle of the 'Artificial Channel' box. To the right of the bottom box, a vertical blue line with a small circle at the top and bottom extends from the middle of the 'Artificial Channel' box to the bottom of the page. A horizontal blue line also extends from the right side of the 'Artificial Channel' box to the right edge of the page.

Artificial
Channel

(Same)
Natural
River

Analysis

- ◆ CWA regulates discharges of pollutants
 - Requires an “addition” of a pollutant
 - From the outside world
- ◆ Stream passing through channel (or pipe) doesn't add anything

Solid Support

- ◆ Case law: flow through dam not regulated discharge
- ◆ *Miccosukee*: no addition if same body of water
- ◆ EPA water-transfer rule: no addition for water transfers
 - 11th Circuit defers

Counterargument?

- ◆ NRDC brief due 29 October
 - Ninth Circuit got law right?
- ◆ Oral argument 4 December

WESTCAS Amicus Brief

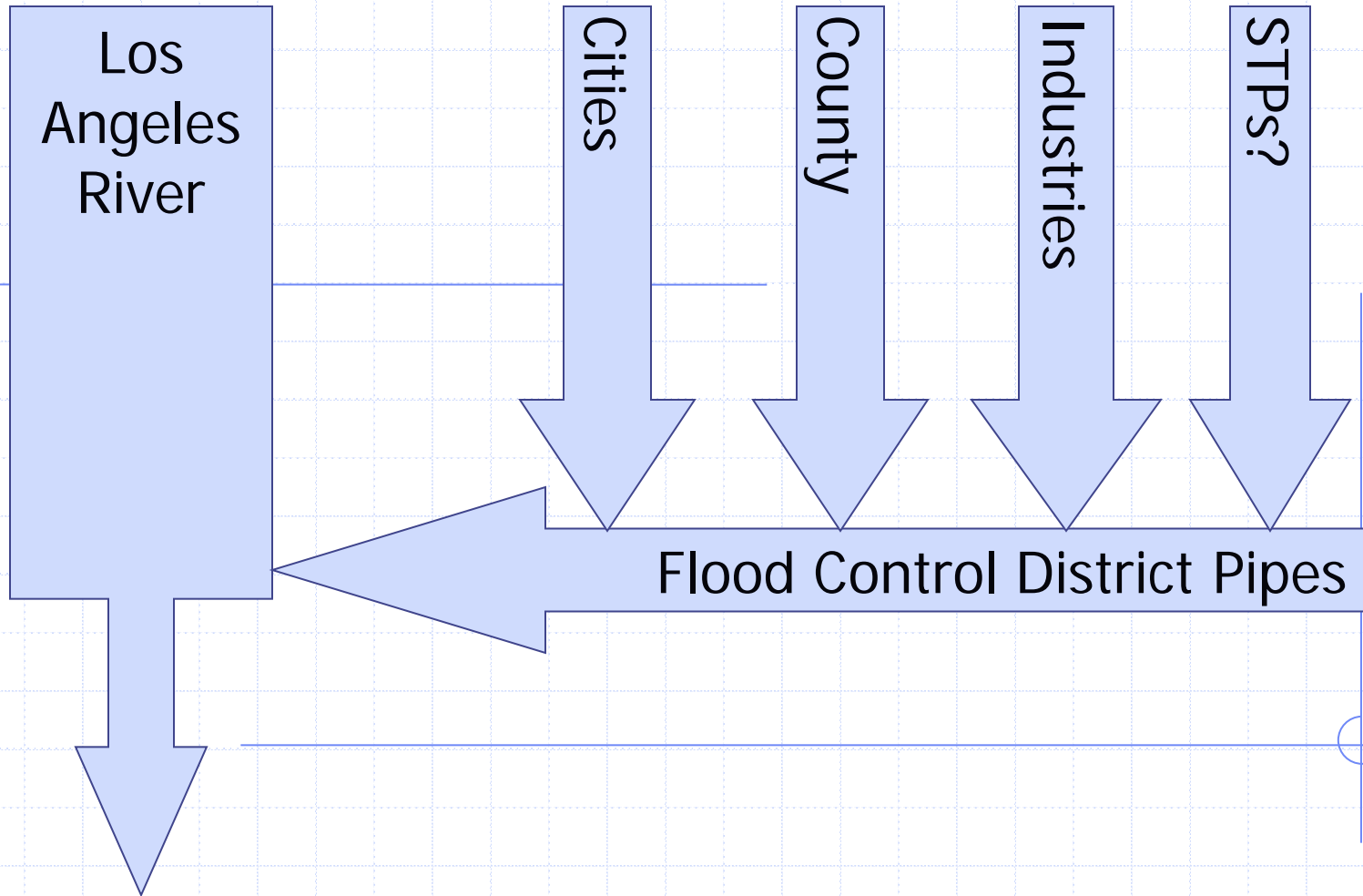
◆ The problem

- NRDC is going after municipalities
 - Stormwater permits typically prohibit causing or contributing to WQS violations
 - WQS apply “at end of pipe”
 - Are we sitting ducks?
-

Two Arguments

- ◆ A municipality isn't responsible for other people's discharges
 - ◆ Municipalities should not be required to attain impossible goals
-

Who Is Discharging?



Ninth Circuit: The District

- ◆ District owned and operated MS4
- ◆ District “controlled the polluted stormwater”
- ◆ “the Act is indifferent to the originator of water pollution”

But EPA regulations . . .

- ◆ Specify that Clean Water Act regulates discharges *through* storm sewers
 - ◆ Specify that when several municipalities are "co-permittees"
 - Each is responsible only for its own discharge
-

If Ninth Circuit Is Right

- ◆ Industries don't need NPDES permits
 - For discharges into storm sewers
 - EPA cannot regulate if no discharge of a pollutant
- ◆ Cities are responsible for everything coming out of their pipes

EPA Position?

- ◆ Discharge takes place at outfall
 - Not when industry puts water in sewer
 - ◆ But who is discharging through that outfall?
 - Only municipality?
 - Also permitted industries?
-

Analysis

- ◆ Regs are entitled to deference
 - Entities can discharge *through* storm sewer
 - Each discharger responsible for its own discharge
- ◆ Storm sewers are not like sanitary sewers

Sanitary v. Storm Sewers

◆ Sanitary sewers

- Pretreating industries DO NOT need NPDES permits
- Sewage-treatment plant is discharger

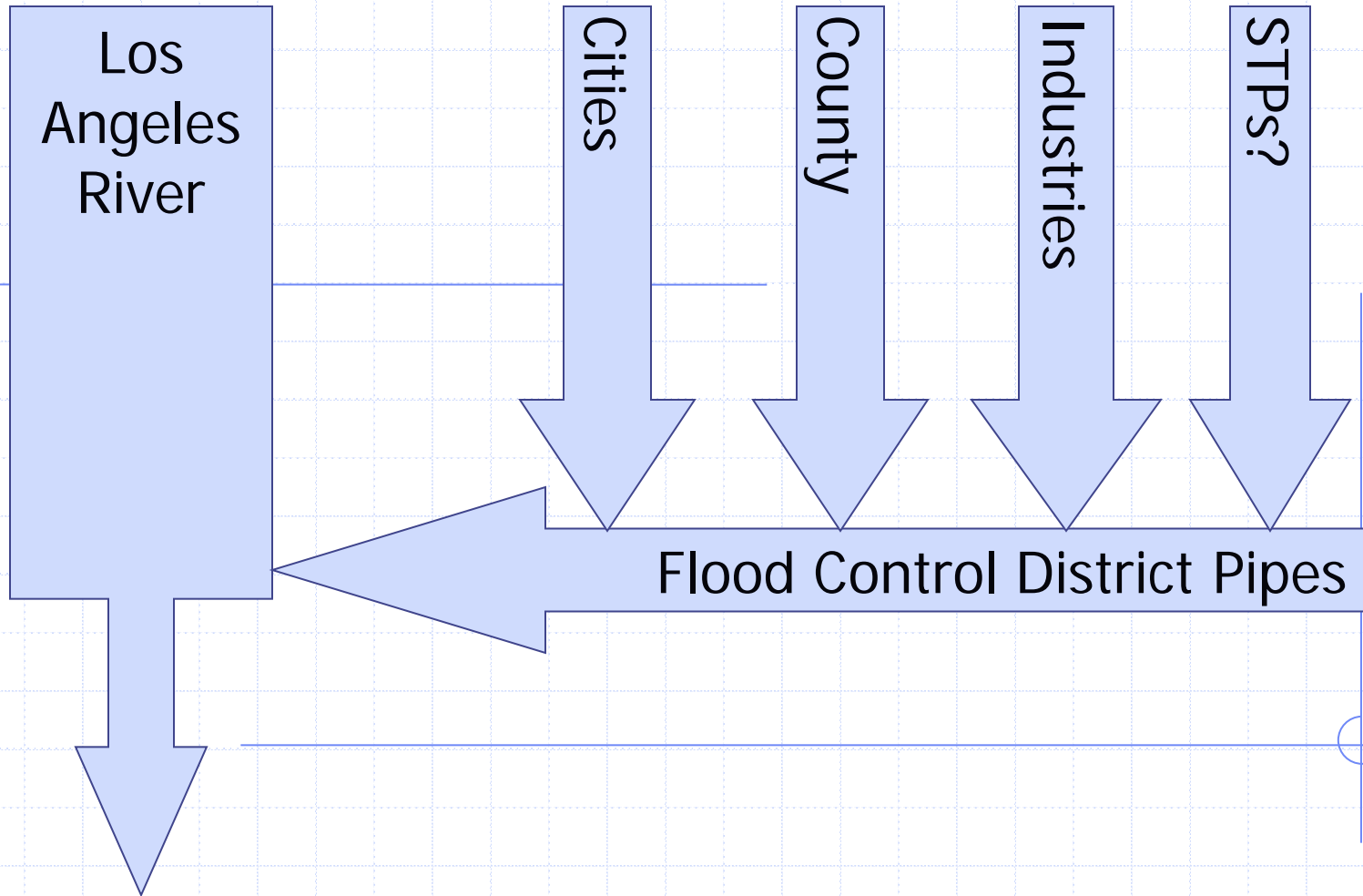
◆ Storm sewers

- Industries DO need NPDES permit
- Municipality is NOT (only) discharger

Doesn't Make Sense

- ◆ To hold municipalities liable for discharges through storm sewers
 - ◆ Consider dry-weather discharges
 - From industries
 - From sewage-treatment plants
 - ◆ But: "pre-treatment" program
-

Who Is Discharging?



So . . .

- ◆ Many discharges through one outfall
 - Cannot characterize any discharge from outfall sample alone
- ◆ But check monitoring reports

Second Argument

- ◆ CWA requires municipalities to implement controls to reduce discharge of pollutants to “maximum extent practicable”
- ◆ Attainment of all WQS not practicable
 - Or possible
- ◆ Municipalities should not be held liable

Why Impossible?

◆ Bacteria, mud

◆ Bacteria from:

- Birds, deer raccoons, rodents
- Ruminants, humans
- Birds, dogs
- Wildlife, livestock
- Geese, sheep
- Sheep, horses

Mud

◆ Natural background levels

- Big Muddy
- Mississippi Delta

◆ Naturally beneficial levels

- *Herminghaus*
- Less mud because of dams

◆ Flow, not mud, the issue

Defenders of Wildlife

- ◆ Ninth Cir, 1999
- ◆ Congress did not intend municipal stormwater to comply with WQS
- ◆ But EPA can impose this requirement because CWA allows for “such other provisions” as EPA “determines appropriate”

Response to *Defenders*

- ◆ Not “appropriate” to impose impossible requirements
- ◆ Ninth Circuit did not consider appropriateness



Part 4

Consequences



Supreme Court Decision

- ◆ Early 2013
- ◆ Not likely to decide our issues
 - But may say something

What To Do?

- ◆ Watch your DMRs
- ◆ Negotiate reasonable permits
 - If WQS can't be attained in wet weather . . .
 - Exception for impracticability or inappropriateness
- ◆ If you get sued . . .