1   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - - - - - - - - - - - - - x

3   LOS ANGELES COUNTY FLOOD   :

4   CONTROL DISTRICT,   :

5   Petitioner   :   No. 11-460

6   v.   :

7   NATURAL RESOURCES DEFENSE   :

8   COUNCIL, INC., ET AL.   :

9   - - - - - - - - - - - - - - - - - x

10   Washington, D.C.

11   Tuesday, December 4, 2012

12

13   The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States

15   at 11:11 a.m.

16   APPEARANCES:

17   TIMOTHY T. COATES, ESQ., Los Angeles, California; on

18   behalf of Petitioner.

19   PRATIK A. SHAH, ESQ., Assistant to the Solicitor

20   General, Department of Justice, Washington, D.C.;

21   for United States, as amicus curiae.

22   AARON COLANGELO, ESQ., Washington, D.C.; on behalf of

23   Respondents.

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1   C O N T E N T S

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1                    P R O C E E D I N G S

2                                (11:11 a.m.)

3              CHIEF JUSTICE ROBERTS:  We'll hear argument

4   next in Case 11-460, Los Angeles Flood Control District

5   v. The Natural Resources Defense Council.

6                   Mr. Coates.

7              ORAL ARGUMENT OF TIMOTHY T. COATES

8                 ON BEHALF OF THE PETITIONER

9              MR. COATES:  Mr. Chief Justice, and may it

10  please the Court:

11              In this case, the Ninth Circuit held that a

12  discharge from a point source under the Clean Water Act

13  occurred in the Los Angeles and San Gabriel Rivers,

14  based upon the fact that water moved from channelized

15  portions of the Los Angeles and San Gabriel Rivers into

16  what it termed, quote, "naturally occurring portions of

17  those rivers."

18              The court emphasized, in fact, that the

19  discharge occurred because it moved through the concrete

20  portions.  And in the words of the court itself, found

21  at the cert appendix at 44, it was, "again discharged to

22  the rivers," and the "again" meaning that it was

23  prior -- at prior time, it was in the rivers.

24              This is completely contrary to the Court's

25  decision in Miccosukee Tribe, where the Court held that
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1 there cannot be a discharge for purposes of the NPDES

2 permit program and the Clean Water Act, based upon the

3 mere transfer of water within a single body of water.

4   All the parties to this case agree that is

5 the correct rule. Virtually all the amici agree that is

6 the correct rule. And it's our view that that is

7 dispositive of this case. It is the only live issue

8 before this Court from the Ninth Circuit, and it

9 dictates --

10   JUSTICE SOTOMAYOR: So why don't we just

11 remand and let it sort it out under the right

12 understanding of the legal rule? Which is basically

13 what the government is saying, with an added twist

14 because it thinks there is another legal question that I

15 think the Ninth Circuit has answered, but we could go

16 back and forth on it.

17   MR. COATES: Correct. At minimum, a

18 reversal is -- is warranted, without a doubt, but I

19 think given the record in this case is abundantly clear

20 about what the claims were before the Ninth Circuit and

21 what's going on with these monitoring stations.

22   I mean, these monitoring stations are

23 clearly within the rivers themselves. There is just no

24 dispute about that. Even the Ninth Circuit's opinion,

25 like I said, the language of the opinion

1   suggests that --

2   JUSTICE SOTOMAYOR: Everybody agrees.

3   MR. COATES: Correct. And the reason why I

4   don't think there is an open remand is because there is

5   nothing further in the record, really, to argue about.

6   At minimum, of course, we would prefer

7   reversal, and it would take an open remand. But I

8   think, given the record in this case, the only live

9   claim before the Ninth Circuit was this discharge theory

10   when they found it in the middle of rivers; and, that

11   being resolved against the Respondents, there is no

12   other live issue.

13   CHIEF JUSTICE ROBERTS: Well, it seems to me

14   that they present a very direct syllogism. You have a

15   permit that sets these monitoring stations where they

16   are. The monitoring stations show exceedances, you have

17   violated your permit. What -- what's wrong with that?

18   MR. COATES: Well, because the nature of the

19   monitoring here -- for example, when you look at the

20   permitting question, it doesn't say the monitoring of

21   any permittee. If you look at the permit where it talks

22   about the mass emissions monitoring stations, it talks

23   about measuring discharges and compliance from the MS4,

24   not any individual permittee's MS4.

25   CHIEF JUSTICE ROBERTS: Right. But I

5

1 understand the argument to be that that's the problem

2 that your permit imposes on you; in other words, that

3 this is where the monitoring station is supposed to be.

4 What is it monitoring, if not discharges from the MS4,

5 for which you're responsible?

6 The government suggests that there could be

7 different rules about whether you have to show the

8 allocation or if that's your responsibility.

9 MR. COATES: Well, I think, again, the --

10 the rules say that you look at the permit's terms to

11 interpret it.

12 And the Ninth Circuit did look at the

13 permit's terms. I mean, it -- it dealt with this

14 argument, and it noted that there are several factors in

15 the permit that suggest that it didn't relieve the

16 Respondents of the obligation of having to show an

17 actual discharge of water --

18 CHIEF JUSTICE ROBERTS: Well, you don't --

19 you don't question that there was an actual discharge.

20 The storm sewer system in Los Angeles hasn't been shut

21 down, right?

22 MR. COATES: Correct. But, again --

23 CHIEF JUSTICE ROBERTS: So there are

24 discharges, right?

25 MR. COATES: But not discharges of

 1   pollutants, and that's what's reported.

 2   CHIEF JUSTICE ROBERTS: You don't dispute

 3   that there was at least some small amount of pollutant,

 4   even below the -- the permit level, from your point

 5   sources, do you?

 6   MR. COATES: Well, we don't know that. But

 7   the -- but the point I want to make --

 8   CHIEF JUSTICE ROBERTS: Well, I'm asking you

 9   whether -- I mean, isn't it -- doesn't common sense

10   suggest -- you have asked in your permit for a limit on

11   how much of a --

12   MR. COATES: Sure.

13   CHIEF JUSTICE ROBERTS: -- particular

14   pollutant you can discharge.

15   MR. COATES: But, again --

16   CHIEF JUSTICE ROBERTS: You wouldn't do

17   that, unless you expected to discharge some.

18   MR. COATES: Right. You might do it

19   sometimes, you might do it others, you might do it in

20   concentrations that would cause or contribute to the

21   exceedances; but you still have to have a discharge that

22   causes or contributes to the exceedances.

23   CHIEF JUSTICE ROBERTS: Well, why did you

24   put the monitoring sources where they are, if that

25   wasn't what was going to measure your compliance with

1   the permit?

2   MR. COATES: Because you're required, in

3   a -- in a system-wide permit like this, to suggest -- to

4   propose monitoring which is subject to the approval of

5   the regulatory agency. And it's a question of

6   monitoring of what? Not monitoring of any individual

7   permittee's discharge. In fact, it's not designed for

8   that. We even presented evidence in the district court

9   to that effect.

10   CHIEF JUSTICE ROBERTS: Well, the government

11   says that that question -- you're saying, I understand,

12   there are other discharges -- well, you're by far the

13   dominant discharger, but I understand there are others,

14   and they may contribute as well to what the monitoring

15   station says.

16   But the government's position is that, well,

17   that's how you wrote the permit without any allocation;

18   and that whatever allocation issues you have may be

19   between you and the other dischargers, but that doesn't

20   affect the showing of liability.

21   MR. COATES: Well, except for the fact that

22   the permit terms themselves say that each permittee is

23   only responsible for its own discharge. If you read the

24   permit in the general fashion that the Respondents wish,

25   then -- then you're not responsible only for your own

1   discharge.

2   It's essentially you're in immediately and

3   responsible for all of them, until you prove otherwise.

4   And that's just not how the permit reads.

5   CHIEF JUSTICE ROBERTS: Where is that? I

6   know we've got the permit. Where does it read that way?

7   MR. COATES: Let's see. At the Joint

8   Appendix, page 93, G, 4.

9   JUSTICE KENNEDY: What page again?

10   MR. COATES: Volume I of the Joint Appendix,

11   page 93, and it's the fourth paragraph. And it's at the

12   very bottom of the fourth paragraph. "Each permittee is

13   responsible only for discharge for which it is the

14   operator."

15   JUSTICE KENNEDY: Suppose that the district

16   has 85 percent of the water by volume that's put into

17   this river, and then you have this high pollution index.

18   Does that make it an easier case for the challengers?

19   Or is that just irrelevant?

20   MR. COATES: It's just irrelevant, unless

21   you show that, in that bulk of water, there is a higher

22   concentration of pollutants.

23   You could have a major discharger that

24   undertakes more vigorous pollution controls than a

25   smaller discharge. It doesn't necessarily show that

1 you're adding more pollutants, necessarily, or how those

2 pollutants contribute to exceedances measured at the

3 mass emissions monitoring stations.

4   JUSTICE KENNEDY: Well, I have one different

5 question. This is hypothetical. It's not in the case.

6 It's just for me to understand this.

7   Suppose you have the river, and part of it

8 is a concrete bank, and then there's a more natural

9 bedding and then another concrete bank.

10   And when the -- in the dry season, they fix

11 the concrete bank, but they use bad concrete. And a lot

12 of pollutants are coming out of the concrete, but it is

13 in the river. Is that a discharge under this statute?

14   MR. COATES: I don't believe so. Although,

15 I could --

16   JUSTICE KENNEDY: Would there be any --

17   MR. COATES: -- imagine circumstances where

18 you create an outfall unintentionally by -- by

19 funneling. I mean, I think you're talking about just

20 natural erosion of turbidity or whatever into the river.

21 I don't believe that would necessarily be a point

22 source.

23   It might be a non-point source pollution,

24 but I don't believe that would necessarily be a point

25 source if it's just inadvertently -- you know,

10

1   deteriorating in the river.

2   JUSTICE KENNEDY: And that's -- that's a

3   separate provision of the statute, nonpoint source

4   pollutions.

5   MR. COATES: Well, it doesn't sound like --

6   you know, the -- the way it's defined under 1362 is a --

7   you know, like, enclosed conveyance that -- that

8   discharges --

9   JUSTICE KENNEDY: Well, that's not in this

10   case.

11   MR. COATES: Yes, that's not in this case.

12   But I think --

13   JUSTICE KENNEDY: It was just a background,

14   background question for you.

15   MR. COATES: Yes, but I think that that --

16   that probably wouldn't be a discharge from a point

17   source.

18   JUSTICE SCALIA: Mr. Coates, I am -- I am

19   still perplexed.

20   MR. COATES: Yes.

21   JUSTICE SCALIA: You say -- and it seems to

22   be correct, that each -- each alleged polluter is only

23   responsible for his own pollution. But you also say

24   that these monitors are so situated that it is

25   impossible to tell from the monitor who is responsible

1   for the pollution; is that right?

2   MR. COATES: I think that -- I think that is

3   right, but you look for the --

4   JUSTICE SCALIA: So whose fault is that?

5   MR. COATES: Well, the reason why -- the

6   reason why that that's there is to measure, essentially,

7   the health of these rivers so that you can fine-tune the

8   MS4 permit -- the systemwide permit, and so that you can

9   gauge general water quality standards, and if necessary,

10   you can fine-tune it to try and measure individual

11   permittees.

12   And we note that there is a renewed permit.

13   It still has the monitoring stations in it, so under the

14   Ninth Circuit's decision, we would still be discharging

15   at those monitoring stations. But it does provide for

16   outfall monitoring at representative outfalls for

17   individual permittees to do precisely that kind of

18   correlation that we are talking about.

19   JUSTICE SCALIA: What -- what it is -- what

20   is it that provides for that?

21   MR. COATES: There is a renewed permit. The

22   permits are renewed every 5 years. This is -- we are on

23   the third permit now; this is the fourth; it's gone 10

24   years. The renewed permit continues the mass emission

25   station. So, as I mentioned, we are still discharging

1 in middle of the river, as far as the Ninth Circuit is

2 concerned.

3   But it does have provisions for additional

4 monitoring near outfalls, along the banks of the rivers,

5 for various permittees, so that, in the future, you

6 could look at that testing and go, boy, your outfall is

7 producing X, Y, and Z.

8   JUSTICE SOTOMAYOR: So this was a regulatory

9 void?

10   MR. COATES: This was a --

11   JUSTICE SOTOMAYOR: A regulatory void that

12 these -- that there was no requirement previously that

13 you monitor the outfalls?

14   MR. COATES: Monitoring, correct, that there

15 be specific outfall monitoring. It's a regulatory --

16   JUSTICE SOTOMAYOR: So how do you -- how do

17 you envision this permit was -- by the way, just one

18 side question and then on to this one.

19   I thought the Ninth Circuit basically

20 endorsed your view that, under the permit, you're not --

21 you're only responsible for your own pollution.

22   MR. COATES: That is correct.

23   JUSTICE SOTOMAYOR: So it has resolved this

24 issue?

25   MR. COATES: It has resolved this issue.

1   JUSTICE SOTOMAYOR: All right. So that's

2   why I ask why remand and why you're saying why remand.

3   MR. COATES: Yes.

4   JUSTICE SOTOMAYOR: But putting that aside,

5   how do you think the system was supposed to work before?

6   MR. COATES: Well --

7   JUSTICE SOTOMAYOR: Did you have any

8   obligation, once you saw the excess pollutants, to start

9   the reiteration process, to try to figure out who was

10   the cause of this?

11   MR. COATES: Well, if they attribute a -- a

12   violation to a particular permittee -- for example, the

13   district court noted and the Ninth Circuit re-emphasized

14   that you could at least, if you wanted to try and hook

15   it to a single permittee, you could at least try and

16   sample at an outfall for that permittee and then provide

17   evidence that that contributed to exceedances.

18   They didn't do that here, in the lower

19   court.

20   JUSTICE SOTOMAYOR: You mean the Respondents

21   could have done that here?

22   MR. COATES: The Respondents could have done

23   that here. They did not argue that they did that in the

24   Ninth Circuit. They abandoned that -- that contention.

25   CHIEF JUSTICE ROBERTS: So what -- what

1   percentage of discharges come from you, as opposed to

2   the other members of the MS4 --

3   MR. COATES: We have -- we have the most

4   infrastructure. I don't know the specific percentage,

5   but bear in mind that there are 1,400 other entities

6   upstairs --

7   CHIEF JUSTICE ROBERTS: Give me an estimate.

8   MR. COATES: You know, I can't in terms of

9   total water volume. But we are -- we are the largest

10   player in that portion of the system. I'm not going to

11   downplay that.

12   What I'm saying is that there is no

13   necessary correlation between that and, ipso facto,

14   you're the one causing the exceedances at the monitoring

15   stations; that, again, there has to be something

16   traceable to our discharge that contributes to those

17   exceedances.

18   CHIEF JUSTICE ROBERTS: What -- what goes

19   into these discharges, besides the rainwater runoff?

20   MR. COATES: Here, it's just stormwater.

21   CHIEF JUSTICE ROBERTS: Okay.

22   MR. COATES: I mean, a municipal separate

23   storm sewer system --

24   CHIEF JUSTICE ROBERTS: So your -- your

25   hypothesis is, in some of these minority dischargers,

1   that, for some reason, their rainwater would have a

2   different amount of pollutants than your rainwater?

3   MR. COATES: Well, they could -- they could

4   very well have storm discharge different -- Yes, there

5   are other discharges upstream from -- there are

6   industrial sites that discharge water into the L.A.

7   River, so -- no, absolutely. Absolutely. And again --

8   you know, a large jurisdiction, we may be more proactive

9   in terms of doing pollution control as well.

10   There is just no automatic correlation to

11   that. And I think, as the district court said -- you

12   know, it's not so much to ask to at least sample at one

13   outfall to try and show that kind of correlation, so you

14   can show exceedances at the margin.

15   JUSTICE KAGAN: I'm sorry, you mean --

16   JUSTICE KENNEDY: Was the -- was the Ninth

17   Circuit's error -- was the Ninth Circuit's error here a

18   factual one, because it was based on the location of the

19   stations? Or was it a legal one because it

20   misinterpreted our Miccosukee case?

21   MR. COATES: It -- it's a legal one. I

22   don't believe it's a factual mistake, for a couple of

23   reasons. One, the language that -- that I cited, that's

24   in the cert appendix at 44, where it talks about the

25   water, again, discharged to the river, suggests that

 1   that water was in the river, and now, it's moving

 2   through our concrete channels and it's, again,

 3   discharged into the river. Its distinction that it

 4   draws is that there is something different because the

 5   MS4 is an intrastate manmade construction, as opposed to

 6   a naturally occurring river, which talks about the

 7   distinction being made in that regard.

 8   And finally, the record is just abundantly

 9   clear on where these monitoring stations are. The

10   opinion itself at cert appendix, page 18, footnote 4,

11   cites our website as the location of the monitoring --

12   for the location of the monitoring stations. And that

13   website clearly says they are within the Los Angeles and

14   San Gabriel Rivers. And, in fact, appellant's brief --

15   the Respondents' brief in the lower court, specifically

16   said the same thing.

17   And the --

18   JUSTICE SOTOMAYOR: You just said there were

19   polluters upstream. Are those industrial polluters

20   upstream --

21   MR. COATES: There are -- there are --

22   JUSTICE SOTOMAYOR: -- or industrial

23   facilities, are they within your MS4?

24   MR. COATES: They are not. They have

25   separate NPDES permits.

 1   JUSTICE SOTOMAYOR: But what you're saying

 2   is that there are outfalls from different people into

 3   the same river.

 4   MR. COATES: Correct. Correct.

 5   JUSTICE SOTOMAYOR: All right. So we don't

 6   know whether the outfall is from your MS4 or from some

 7   other source?

 8   MR. COATES: Correct, because they are all

 9   upstream of the -- of the monitoring station.

10   JUSTICE BREYER: Okay. So you say they have

11   two remedies, that the NRDC, if they think you are

12   polluting, could have done -- could do two things. One,

13   they could go and get some expert to try to get a sample

14   or to make an estimate, based on what he knows about the

15   industrial sites that it's actually your storm drains

16   that are polluting. That's one thing they could do; you

17   say they didn't do it.

18   Okay. The second thing they could do is

19   they go to the permitting authority, and they could say,

20   will you please ask the L.A. County to monitor the

21   actual storm drains when they come in, a sample thereof.

22   And you're saying they could have done that, but they

23   don't have to now because, now, that is a requirement.

24   And we are doing it.

25   MR. COATES: That's correct.

1   JUSTICE BREYER: That's correct. Okay.

2   MR. COATES: That's correct. That's

3   correct.

4   CHIEF JUSTICE ROBERTS: Okay. Where --

5   where is that requirement?

6   MR. COATES: Excuse me?

7   CHIEF JUSTICE ROBERTS: Where is that

8   requirement that you're now doing?

9   MR. COATES: We -- in our reply brief, we

10   cite the fact that a -- a -- the permit has just been

11   renewed. We are waiting for the final version to go

12   online and to see it. I think what we cite to the Court

13   is the last one that was before the regional board. It

14   lines -- it lines out.

15   CHIEF JUSTICE ROBERTS: So you are not doing

16   it now?

17   MR. COATES: We are not doing it now. I

18   mean, there's -- the new permit is technically

19   effective. It could be stayed if someone challenges it.

20   I think it's open until it's challenged until December

21   11th. But under the renewed permit, there is outfall

22   monitoring -- specific outfall monitoring. Now, the

23   mass emission station is still there, and under the

24   Ninth Circuit's opinion, we are still discharging there

25   and responsible for the exceedances.

1   So -- but that's the type of monitoring that

2   plaintiffs want, and that's in the new permit. If they

3   want it in the last permit, they could have disputed it;

4   they could have contested the last permit. But they

5   didn't do so. This is a fine-tuning program. I mean,

6   municipal stormwater is a complex issue. Congress

7   didn't treat it the same way it did industrial

8   stormwater.

9   JUSTICE KENNEDY: Is it your position that

10   the rivers -- the two rivers in question are outside the

11   MS4? I thought there was a suggestion in the

12   government's brief that you could have both the river

13   and the MS4 that could cover the same area.

14   MR. COATES: We have -- in the lower courts,

15   the district personnel refer to the channelized portion

16   as part of our MS4 because it's all flood control to us.

17   However, we have never said it's all the same for

18   purposes of a discharge. We've been very careful about

19   that, that, for a discharge from a point source, an

20   outfall, not the monitoring stations -- in fact, in the

21   district court, plaintiff somewhat argued that theory,

22   the monitoring stations, when you're MS4, they're

23   exceedances; ergo, exceedances in your MS4.

24   And we pointed out, under Miccosukee, there

25   is no discharge of water. There's no discharge because

 1   it's merely transferring water as water moves past the

 2   monitoring stations. And then --

 3   JUSTICE GINSBURG: What was the purpose of

 4   having the monitoring station if nothing can be done?

 5   And are -- the monitoring shows, yes, there is a lot of

 6   pollutants in there, and we know that at least some of

 7   them have to be ascribed to the district. But you say,

 8   unless you -- you show the outflow, that it comes from

 9   there, no liability.

10   Why shouldn't it be that, given there is

11   going to be a contribution that the district is making,

12   that the district should have the burden of showing, no,

13   there are all these other ones out there, so our

14   percentage is X, not the whole thing?

15   MR. COATES: Well, again, the -- the Water

16   Act makes you responsible for a discharge in violation

17   of permit terms, so you have to have a discharge by the

18   permittee.

19   The permit terms itself are not written in

20   that fashion. Again, it says we are only responsible

21   for our own discharge. Could you write a permit that

22   way? Perhaps. But this permit was not written that

23   way.

24   And, in fact, the Ninth Circuit agreed with

25   us on that. The permit language is not tricky on that.

1   You could have permittee monitoring. You could. And

2   that's what the renewed permit does. But that is not

3   this permit.

4   The regional board -- as I said, it's part

5   of a process. There have been three permits over the

6   last -- since 1990. And we have a fourth permit, and it

7   has some new provisions to fine tune it for precisely

8   this reason.

9   I note that -- the biggest dispute we seem

10   to have on this monitoring issue -- and -- and it's one

11   that I think the discussion we are having bears out, is

12   that it is not a straightforward issue; that when you

13   look at the statute itself, the Statute 1342(p)(3)

14   distinguishes between industrial stormwater dischargers

15   and municipal stormwater discharges.

16   Now, I think it is worth looking at that

17   provision because, if you look at (a), and that talks

18   about industrial dischargers, it says they have to meet

19   every requirement of this provision. And if you go to

20   1342(a), it includes everything, including the

21   monitoring requirements of 33 U.S.C. 1318.

22   But if you look at 1342(p)(3), subdivision

23   (B), which talks about municipal stormwater, you do not

24   see that language. You do not see that "must comply"

25   with every other provision of this section. It doesn't

22

1   say that.

2   It only has, essentially, three

3   requirements, which is these permits can be granted on a

4   system-wide or jurisdiction-wide basis, you have to only

5   allow stormwater, and that the -- must provide to try

6   and manage pollutants to the maximum extent practicable.

7   And that's the sum total of it.

8   So I don't think you can assume that these

9   are identical monitoring requirements. It's, at the

10   very least, a complex question. I think it's one that

11   would have behooved the Court to be able to obtain more

12   amicus assistance on. And part of it is the way that

13   this was raised to this Court, that this was a proper

14   issue for a cross-petition.

15   And the only justification I've seen for

16   this is I saw a letter come to the Court advising it of

17   two cases, I think, LeTulle v. Scofield -- I don't know

18   if it's LeTulle or LeTulle -- and Ryerson v. United

19   States. And neither of one of those suggest that this

20   is an appropriate issue for the Court.

21   JUSTICE SCALIA: Is -- is your description

22   of the statute meant to conclude, or does it -- does it

23   conclude, that these outsource monitoring stations which

24   exist under the new permit are not really required?

25   MR. COATES: Well, not necessarily

1 statutorily required, but they are part of the -- the

2 permit, yes. They're in there. They're in there.

3 We're not --

4   JUSTICE SCALIA: Oh, I understood that.

5 Yes.

6   MR. COATES: We've agreed -- we've agreed --

7   JUSTICE SCALIA: Can you put in the permit

8 stuff that the statute does not require?

9   MR. COATES: Well, you can -- I think you

10 can agree to terms in a permit, yes.

11   JUSTICE SCALIA: Okay.

12   MR. COATES: Yeah.

13   And with that, I would reserve the balance

14 of my time for rebuttal.

15   CHIEF JUSTICE ROBERTS: Thank you, counsel.

16   Mr. Shah.

17   ORAL ARGUMENT OF PRATIK A. SHAH,

18   FOR UNITED STATES, AS AMICUS CURIAE

19   MR. SHAH: Mr. Chief Justice, and may it

20 please the Court:

21   The answer to the question presented in this

22 case is both straightforward and undisputed. Under this

23 Court's decision in Miccosukee, no addition, and thus,

24 no discharge of pollutant occurs, when water flows from

25 a channelized portion of a river to a downstream portion

1   of that same river.

2   Because the monitoring stations at issue are

3   actually located within the rivers themselves, the court

4   of appeals erred in concluding that a discharge of

5   pollutants occurred when, quote, "the still-polluted

6   stormwater flowed out of the concrete channels where the

7   monitoring stations are located, through an outfall and

8   into the navigable waterways."

9   And because the court of appeals rested its

10 liability determination on that erroneous premise, the

11 judgment should be vacated and the case remanded to the

12 court of appeals.

13   JUSTICE GINSBURG: Mr. Shah, what about the

14 problem that one of the amici brought up concerning

15 dredged material? Said that if we just say Miccosukee

16 applies, then when there's a dredging operation and the

17 material is redeposited back into the same water, then

18 that would also -- there would be no responsibility

19 based on that.

20   MR. SHAH: Right. Your Honor, I think -- I

21 think the one amicus that does raise that issue raises

22 it limited to -- the biggest counterexample they raise

23 is the one that you raise about Section 404 permits for

24 dredged and fill material. Those permits are just very

25 different in kind.

1   Section 404 applies to dredged and fill

2   material, which almost, by definition, is going to be

3   coming from the source itself. And so we think that the

4   Miccosukee line of decision just doesn't apply to that

5   permitting regime, which -- which is a very different

6   sort of permitting regime than we have at issue here.

7   And in any event, I think it's far beyond

8   the question presented in this case, the Miccosukee

9   rule.

10   JUSTICE SOTOMAYOR: Counsel, tell me why

11   remand? I thought -- and correct me at whatever step

12   I'm wrong, okay -- that the district court rejected

13   Respondents' argument that the mere monitoring excesses

14   created liability. What it said is you have to follow

15   the terms of the permit and make the permittee

16   responsible only for their excess discharges, and you

17   haven't shown us any evidence that does that.

18   The Ninth Circuit agreed that the permittee

19   is only liable for its own discharges. It held the

20   permittee liable because it believed that the discharges

21   were within their source -- within their outflow. So

22   what are we remanding for? The legal question of

23   whether the -- the -- the monitoring stations

24   automatically create liability has been answered in the

25   negative by both courts.

1   MR. SHAH: Justice Sotomayor, I agree with

2   your reading of -- of both opinions below.

3   I think what we're asking for is the Court

4   to do what it normally does when it vacates an erroneous

5   part of a judgment and sends it back, that is, leave it

6   open to the court of appeals, to address any issues

7   consistent with this Court's opinion.

8   We think it's conceivable that the Ninth

9   Circuit might approach the permit construction issue

10   differently, once it's corrected of the

11   misimpressions --

12   JUSTICE SOTOMAYOR: How would it --

13   MR. SHAH: -- that it had before it.

14   JUSTICE SOTOMAYOR: -- what could it do

15   differently?

16   MR. SHAH: I think, in particular, the Ninth

17   Circuit construed this permit on the understanding that

18   there was a discharge of polluted water after it flowed

19   past the monitoring station and said that the district

20   could be liable, based simply on the exceedance measured

21   by the mass emission station alone.

22   JUSTICE SOTOMAYOR: How does that change the

23   answer to the legal question that the permittee -- both

24   courts have said the permittee is only liable for their

25   own discharges. And unless this proves that they

27

1 discharged -- they, themselves, discharged, which it

2 can't because it's in the river and not within the

3 source --

4   MR. SHAH: Well, it --

5   JUSTICE SOTOMAYOR: -- how can that, alone,

6 establish liability?

7   MR. SHAH: Well, again, I think the Ninth

8 Circuit predicated its permit interpretation on the

9 understanding that there would be at least some way to

10 hold a permittee -- in this case, the district -- liable

11 based on the mass emission exceedance alone, and that's

12 because it misapprehended that there would be a

13 discharge of flow of the polluted water.

14   It could be, and it may not be. We don't

15 know until it gets back to the Ninth Circuit. It may be

16 that the Ninth Circuit would reject the view that you

17 could have a permit that sets up a permitting regime

18 that does not allow a plaintiff to sue any particular

19 permittee, unless it has evidence beyond that provided

20 by the monitoring regime.

21   JUSTICE SCALIA: So -- so -- so what follows

22 from that; that the district is liable because it's a

23 lousy permit?

24   MR. SHAH: Well, Your Honor, if --

25   JUSTICE SCALIA: I do not see how this

1   court -- how the -- how the court of appeals is going to

2   be able to do anything different, other than say there's

3   no liability here, unless, of course, it adopts another

4   fanciful interpretation of the statute, which is

5   something I worry about.

6   MR. SHAH: Well, Your Honor, we think that

7   this permit -- again, the terms of this permit are both

8   complex and ambiguous. We do not think that permits

9   should be written this way. We think permits that

10   provide for water quality -- for MS4s to adhere to water

11   quality standards based on ambient monitoring should be

12   coupled with either individual --

13   JUSTICE SCALIA: I -- I agree with that, but

14   how can this permit possibly be interpreted in such a

15   way as to hold a district liable?

16   MR. SHAH: Well, I think the most

17   persuasive -- and, again, we don't take a firm position

18   on this, but I think the most persuasive argument on the

19   other side would be that, when permit writers issue a

20   permit, they -- they assume that the permitting regime

21   provided in the permit would provide a basis to seek

22   enforcement of that permit. If that were true --

23   JUSTICE SCALIA: They would assume that;

24   but, if it doesn't, it doesn't.

25   MR. SHAH: Well --

1   JUSTICE SCALIA: So what do you do if it

2   doesn't?

3   MR. SHAH: Well, one could imagine a regime

4   where the permittees, that is, the municipalities who

5   apply for a joint permit, would agree to a shared

6   presumption of liability. For example, there are --

7   JUSTICE SCALIA: They have -- they have not

8   agreed.

9   MR. SHAH: Well, again, we don't --

10   JUSTICE SCALIA: So you're going to impose a

11   shared thing? I see no way for the court of appeals to

12   do this in -- in a fashion that will not bring the case

13   right back here, and you'll be asking us to send it back

14   to the same panel.

15   MR. SHAH: Well, Your Honor, I don't think

16   it's a cert-worthy issue, how to interpret the terms of

17   this specific -- this is a fairly --

18   JUSTICE BREYER: But, anyway, you say that

19   the court held the same thing in two other cases

20   involving two other rivers, and they didn't cross-appeal

21   from that, and so that issue isn't really in front of

22   us.

23   MR. SHAH: Well, Your Honor --

24   JUSTICE BREYER: And if they did hold what

25   you said, then they'd have to reopen the other two

1   cases.

2   MR. SHAH: Right. You Honor, I think in

3   terms of the cross-petition issue, that is a closed

4   question. I don't think the Court needs to get near it

5   because I think there are several other good reasons why

6   this Court should not decide the permit construction

7   issue itself.

8   JUSTICE BREYER: Okay. But if we decide

9   that they needed file a cross-petition and they didn't,

10   then what's the basis for our remanding, rather than

11   reversing?

12   MR. SHAH: Well, Your Honor --

13   JUSTICE BREYER: It's that issue that what

14   we have to decide.

15   MR. SHAH: Your Honor, it's established that

16   this Court -- even if a cross-petition were required,

17   it's established that this Court has the authority to

18   remand for disposition of any further issues once a case

19   comes before this Court. So the cross-petition --

20   JUSTICE SOTOMAYOR: Why should we, in light

21   of the clarity of the permit? That's the question

22   Justice Scalia is asking.

23   MR. SHAH: Sure. I think the Court should

24   just follow its ordinary practice. We're not asking for

25   anything different than its ordinary practice of

1   vacating the judgment and remanding for further

2   proceedings, consistent with its opinion.

3   JUSTICE GINSBURG: And if there -- if

4   there --

5   JUSTICE SCALIA: But that is not our

6   ordinary practice, when -- when nothing can happen on

7   remand, except -- except to give judgment for the

8   Petitioner here.

9   MR. SHAH: Well, I think it would be unusual

10   for the Court to reverse and then instruct that judgment

11   be entered in favor of Petitioner. Of course, the Court

12   is free to do that, and it may decide to do that. We

13   just think that there is a possibility that the Ninth

14   Circuit would -- would take a different approach.

15   JUSTICE BREYER: Sometimes, the Court says

16   the bottom line in that italicized thing, which I've

17   never fully understood when and when we don't do it, but

18   it just says, "Reversed."

19   MR. SHAH: Right.

20   JUSTICE BREYER: And then, sometimes, it

21   says, "It is so ordered." And exactly when you write

22   the word "Reversed" -- but I usually just ask the Clerk,

23   all right.

24   (Laughter.)

25   JUSTICE BREYER: But the question -- the

1   question is when do we do the one or the other, and I

2   think, here, what they're saying is, just write the word

3   "Reversed," we'll deal with the rest of it. All right.

4   So that's --

5   MR. SHAH: Right. And, again, the Court is

6   well within its -- its discretion to do that. We

7   think --

8   CHIEF JUSTICE ROBERTS: Doesn't that always

9   say that in the judgment of the Court?

10   MR. SHAH: Doesn't it always say what, Your

11   Honor?

12   CHIEF JUSTICE ROBERTS: Does it say, "It is

13   so ordered," in the judgment that we release?

14   MR. SHAH: Yes, yes. And I think the

15   typical -- I think the typical phrasing would be vacate

16   and -- and remand for further proceedings.

17   JUSTICE GINSBURG: Mr. Shah, am I right

18   about that this other theory, if it were open to the

19   Ninth Circuit, would apply equally to the other rivers

20   that Justice Breyer mentioned, and those were out of the

21   case because, when it got to the Ninth Circuit, we were

22   talking about only the Los Angeles and the San Gabriel?

23   MR. SHAH: That's right, Your Honor.

24   JUSTICE GINSBURG: That -- that other theory

25   would apply to all four.

33

1   MR. SHAH: I -- I think that is correct, and

2   the Ninth Circuit may decide that, therefore, it's not

3   going to revisit its permit interpretation. I think it

4   might be within the Ninth Circuit's discretion, since it

5   still has the case on remand, if it were to revisit its

6   permit construction.

7   CHIEF JUSTICE ROBERTS: The reason it would

8   not look at Malibu and -- what's the other one that

9   we're already --

10   MR. SHAH: The other watershed.

11   CHIEF JUSTICE ROBERTS: Yes -- would be

12   because it wouldn't comply with the cross-petition rule.

13   MR. SHAH: No.

14   CHIEF JUSTICE ROBERTS: We're are not going

15   to send it back to them to --

16   MR. SHAH: No -- I'm sorry. I thought it

17   would be that the rationale that they used for those two

18   rivers, it would be in tension with it, and if they

19   agree that the rationale which led them to deny -- to

20   deny liability on those two rivers, that may lead them

21   to adhere to its current permit interpretation.

22   CHIEF JUSTICE ROBERTS: Do -- do you have a

23   position on the cross-petition issue?

24   MR. SHAH: No, Your Honor, we do not.

25   CHIEF JUSTICE ROBERTS: Thank you, counsel.

1   MR. SHAH: Thank you.

2   CHIEF JUSTICE ROBERTS: Mr. Colangelo.

3   ORAL ARGUMENT OF AARON COLANGELO

4   ON BEHALF OF THE RESPONDENTS

5   MR. COLANGELO: Mr. Chief Justice, and may

6   it please the Court:

7   We do not defend the judgment on the Ninth

8   Circuit's stated rationale, but on alternative grounds

9   that are properly before this Court. The compliance

10   monitoring included in the permit determines

11   Petitioner's liability for permit violations as a matter

12   of law, as the Clean Water Act, EPA regulations, and the

13   permit's own terms all require.

14   CHIEF JUSTICE ROBERTS: Well, where is the

15   permit's own terms? Your friend cited JA 93, which says

16   each permittee is responsible only for a discharge for

17   which it is the operator. So where does the permit

18   clearly show the opposite?

19   MR. COLANGELO: Your Honor, let me point you

20   to three provisions in the permit that, taken together,

21   compel this result. The first is page 195 of the Joint

22   Appendix, the paragraph numbered D(1). And this refers

23   to the individual permittees, and it says, "Each

24   permittee must comply with all of the terms,

25   requirements, and conditions of this order. Any

1   violation of this order constitutes a violation of the

2   Clean Water Act, its regulations, and the California

3   Water Code, and is grounds for enforcement action."

4   And that's the first of the three

5   provisions, and it is undisputed here that there are

6   permit violations. The monitoring included in the

7   permit that Petitioner and its co-permittees chose has

8   demonstrated, since 2003, undisputed permit violations.

9   The second provision is page 98 --

10   JUSTICE SCALIA: Wait. But -- but before

11   you go further, it says each permittee must comply. It

12   doesn't say that each permittee shall be responsible or

13   shall be liable. And it's the other provision that says

14   that each permittee is responsible only for a discharge

15   for which it is the operator.

16   MR. COLANGELO: Correct.

17   JUSTICE SCALIA: So you got more --

18   MR. COLANGELO: Yes, You Honor.

19   JUSTICE SCALIA: -- more besides 195.

20   MR. COLANGELO: Well, and what 195 adds is

21   it says any violation is grounds for enforcement action.

22   Now, JA 98 talks about exactly this

23   circumstance, when violations are detected at the

24   monitoring stations. And about halfway down JA 98, it

25   says, if exceedances of water quality objectives or

1   water quality standards persist -- and that's only

2   measured in one place; that's at the compliance

3   monitoring in the rivers -- notwithstanding

4   implementation of control measures and other

5   requirements of this permit, quote, "the permittee,"

6   individually, "the permittee shall assure compliance

7   with discharge prohibitions and receiving water

8   limitations by complying with the following procedure."

9   It then sets out four steps that each

10   permittee must comply with to bring the MS4 within the

11   permit limits. Now, that is --

12   JUSTICE SCALIA: Of course, the very first

13   step is A, "Upon a determination by either the permittee

14   or the regional board that discharges are causing or

15   contributing to an exceedance of an applicable water

16   quality standard, the permittee shall promptly notify,"

17   et cetera. They cannot make such a determination

18   because of the nature of the monitoring -- monitoring

19   here.

20   MR. COLANGELO: That's -- that's incorrect,

21   Your Honor. The permit compels this result because

22   there is only one place in the permit that that

23   monitoring is required, and that is the in-stream mass

24   emission stations that the permittees chose. And the

25   permit says, explicitly, the monitoring results at those

37

1   locations are used to assess compliance and determine

2   whether the MS4 is contributing to violations.

3   JUSTICE BREYER: But as I read it, and he

4   explained it, I thought that, look, what they're

5   thinking is this: Stormwater is really a big problem,

6   and it's really complicated how you work it out, and we

7   want the agencies to work it out. So the purpose of

8   this monitoring thing is we first determine that there

9   is an exceedance.

10   Now, once we determine that there is an

11   exceedance, which is the point of this pertinent

12   particular requirement, then we're going to go on to

13   decide who. And what we're going to do is leave you

14   with two possible choices. One is you can try to figure

15   out who, which means you've got to get an expert and

16   monitor it; or let us now have a new permit which

17   will -- will -- you know, which will -- which will put

18   some responsibility on the individuals, because we'll

19   monitor higher up the river.

20   Now, that's a rational way for an agency to

21   proceed and it leaves you with pretty good remedies.

22   And so why -- why are we running all around, trying to

23   work this thing out? Why don't you just sort of try to

24   deal with it as they described it and say, okay, we're

25   going to either prove you did it before or at least we

 1   can prove it now?

 2   MR. COLANGELO: There are two answers to

 3   that, Your Honor. The first is this is all sorted out

 4   during the permitting process. This permit was adopted

 5   by the State agency and upheld by State courts upon the

 6   Petitioner's challenge after 5 years of litigation. The

 7   permit was based on an 80,000 page administrative record

 8   and the testimony of 29 witnesses. And the point of

 9   this process is that permit terms are fixed once the

10   permit is finalized and approved by the courts.

11   Now, the reason we didn't challenge the

12   permit at the time is that we were defending the permit

13   alongside the State agency as an intervenor against

14   Petitioner's challenge. Petitioner in State court for

15   years made exactly the opposite argument that it makes

16   here. It said that it was entitled to a safe harbor

17   provision in the permit, to excuse it from liability,

18   because it would be held responsible based on this

19   in-stream monitoring.

20   Now, there may be, as a -- as a technical or

21   scientific matter, better monitoring programs, to

22   determine who's putting in what and where exactly it is

23   coming from, but that cannot be reopened upon an

24   enforcement proceeding.

25   JUSTICE GINSBURG: But how do -- the

1 district is a big contributor, but there are other

2 contributors. So, on your theory, how do we determine

3 what is the share that the district would be liable for?

4   MR. COLANGELO: Your Honor, the permit

5 includes a blueprint that sorts that out, and it

6 parallels the traditional notion of several liability.

7 Where there are multiple contributors to a single harm,

8 each is responsible for its share --

9   JUSTICE KENNEDY: But you still have to show

10 that there is a contributor. And I've been through

11 these sections, and it seems to me that a reasonable

12 interpretation of this section is that there is a

13 violation if a particular permittee violates.

14   And what I'm taking away from your argument

15 is that, once there is a violation, all the permittees

16 are liable, and that just can't be.

17   MR. COLANGELO: It can be, Your Honor, and

18 that's the -- that's the solution that the permit works

19 out and that the permittees negotiated for in advance.

20   JUSTICE SCALIA: What's the third section,

21 Mr. Colangelo? I'm waiting breathlessly for your third

22 section. You said there were three.

23   (Laughter.)

24   MR. COLANGELO: The third, Your Honor --

25   JUSTICE SCALIA: I've got 195. I've got 98.

1   Where is the third one?

2   MR. COLANGELO: The third, Your Honor, is JA

3   109.

4   JUSTICE SCALIA: 109.

5   MR. COLANGELO: And this parallels a

6   provision in EPA's regulations.

7   At the very bottom of JA 109, subsection D,

8   it says, "The permittee shall carry out all inspection,

9   surveillance, and monitoring procedures necessary to

10   determine compliance and noncompliance with permit

11   conditions."

12   So the problem with Petitioner's theory is

13   that they are violating this provision of the permit,

14   which is taken virtually verbatim from EPA regulations,

15   which says that the discharger has the responsibility to

16   measure and report its own violations.

17   And stepping back to talk about the Clean

18   Water Act program, generally, and the discharge permit

19   program, generally, no one is entitled to discharge

20   without a permit; a permit fixes terms that must be

21   complied with; and at the heart of the permitting

22   program is self-monitoring and self-reporting of

23   violations.

24   CHIEF JUSTICE ROBERTS: Looking at 109, it

25   strikes me as a little bit circular to say -- to say

1   they have the responsibility to carry out inspection and

2   surveillance and monitoring to ensure compliance with

3   the permit, and their point is, well, we're not -- we're

4   not not in compliance with the permit because you

5   haven't -- there hasn't been an allocation of the

6   discharges to them.

7   MR. COLANGELO: Well -- and the problem with

8   that, Your Honor, is that it leads to no liability ever

9   for the discharger, even though it concedes --

10   CHIEF JUSTICE ROBERTS: Well, I think that

11   might be -- I think that might be right, but that gets

12   back to the question of whether the permit is -- is

13   poorly drafted.

14   MR. COLANGELO: Right.

15   CHIEF JUSTICE ROBERTS: And -- and I guess

16   the idea is they're changing the permit so to -- to cure

17   that problem.

18   MR. COLANGELO: The permit has changed. It

19   is not yet effective, Your Honor, but there is a new

20   permit that will be in effect shortly. But on the

21   question of whether --

22   JUSTICE SCALIA: Well, why -- why do you

23   need that if -- if the present permit covers it as

24   clearly as you say? I mean self -- self-monitoring.

25   MR. COLANGELO: That is absolutely --

1   JUSTICE SCALIA: My goodness, you're going

2   to go through all of this how many -- how long did it

3   take you to challenge this and blah, blah, blah, blah?

4   Why go through all that if, indeed, the present permit,

5   as you say, is perfectly adequate?

6   MR. COLANGELO: The present permit is

7   adequate. The State agency renewed the permit. That's

8   a matter of course. It changed the monitoring program.

9   The point is that whatever monitoring the State agency

10   sets and that the State courts uphold is the monitoring

11   that determines compliance.

12   JUSTICE GINSBURG: Well, wouldn't you

13   still -- I'm not clear if you gave me an answer to how

14   the district share would be determined. It is not the

15   only polluter. Are you saying each permittee is

16   responsible for the whole?

17   MR. COLANGELO: No, Your Honor. That's

18   joint and several liability. And here, JA 93, which

19   Petitioner cites, says that each permittee is

20   responsible only for its discharges. That's just --

21   JUSTICE GINSBURG: So how do we find out

22   what is its part -- what is its share?

23   MR. COLANGELO: The permit sets that out.

24   The permit says, once a violation is detected, each

25   permittee has to go back upstream, conduct enhanced

1   monitoring to identify the particular sources of

2   pollution within its jurisdiction, control those

3   sources, but only those within its jurisdiction, and

4   continue that process until the problem is resolved.

5   JUSTICE KENNEDY: Is that the 109 language

6   you cite?

7   MR. COLANGELO: No, Your Honor. That's at

8   both 98, which I cited second, and page 213.

9   JUSTICE BREYER: Okay. So the upshot would

10   be, however, as I understand it, and correct me if I'm

11   wrong, that since they're doing that now anyway under

12   the new permit -- and you can question my hypothetical

13   assumption there -- but if they are doing it under the

14   new permit, then the only result of your winning this

15   would be to transfer the running of the district from

16   the agency to the court. And I suspect the Ninth

17   Circuit knows less about it than you participating in

18   a -- some kind of negotiation with the agency.

19   MR. COLANGELO: No, not at all, Your Honor.

20   The -- the Petitioner retains the authority and, indeed,

21   the responsibility to identify the particular sources

22   within its jurisdiction that are causing the problem and

23   abating only those. So it is limited, in response to

24   Justice Ginsburg's earlier question, only to its own

25   share.

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1   There is no question that there are other

2   contributors, but the permit doesn't impose a violation

3   only upon the entity who is the sole cause. There

4   are -- there are many polluters that discharge into

5   these rivers. The permit specifically says it is

6   unlawful to cause or contribute to a violation of water

7   quality standards. So prohibiting a contribution

8   assumes that there will be other contributors and that

9   the Petitioner will not be the sole cause.

10   CHIEF JUSTICE ROBERTS: Well, this is all

11   fine and good. Your -- your friend, though, says you

12   should have cross-petitioned because the relief you seek

13   expands the judgment below, and there are all these

14   cases saying you can't do that.

15   MR. COLANGELO: Your Honor, the relief we

16   seek would not expand the judgment below because the two

17   rivers on which we lost are out of the case.

18   CHIEF JUSTICE ROBERTS: Well, I understand

19   that, but -- it seems reasonable, but they do cite a lot

20   of cases that say you can't do that. You can't just

21   sort of say, oh, I give up on the others because the

22   judgment, I guess, is one whole, and you would be

23   changing the judgment.

24   MR. COLANGELO: Accepting this argument,

25   Your Honor, would not change the judgment. The cases

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1   that Petitioner cites are all examples -- except for

2   one, which I'll get to in a second -- where the

3   Respondent was seeking to change the judgment, either in

4   its favor or to get lesser relief, or where the result

5   would necessarily have changed the judgment.

6   Here, accepting this argument would not

7   change the judgment.

8   JUSTICE GINSBURG: Why was it giving up --

9   you're giving up on the two rivers, even though your

10 theory would work the same way with respect to them?

11   MR. COLANGELO: That's correct, Your Honor.

12 And that's consistent with the cross-petition rule. A

13 respondent who is satisfied with the result below and

14 does not seek to change the judgment does not need to

15 cross-petition. A cross-petition is only necessary --

16   JUSTICE GINSBURG: But do you think that the

17 trial court was wrong, the district court was wrong, and

18 the Ninth Circuit, both times, when they said, well, you

19 didn't prove -- there was no -- there was no proof that

20 the district was responsible for a given part. So, on

21 your theory, both the district court and the Ninth

22 Circuit were wrong on that?

23   MR. COLANGELO: On that legal question, Your

24 Honor, yes. But this Court can affirm on any basis

25 preserved below, and this was also preserved in our

1   brief in opposition at the jurisdictional stage, as long

2   as it would not change the judgment.

3   And here's why it would not. Let me

4   distinguish the Northwest Airlines v. County of Kent

5   case, which Petitioner cites. That case presents, in

6   fact, the opposite situation of what we have here. In

7   that case, Respondent's argument, had it been accepted,

8   would have required the district court to grant further

9   relief in continuing proceedings on a claim that no

10   longer existed because the Respondent's argument was

11   that there was no private right of action at all.

12   Our case is the opposite because, if the

13   Court accepts our position, we simply don't get any

14   further relief with respect to claims that are waived to

15   which we would have been entitled. And the two cases

16   that we've cited by letter last week both represent

17   exactly that situation.

18   JUSTICE SCALIA: Mr. Colangelo, did you

19   raise this argument in your brief in opposition?

20   MR. COLANGELO: Yes, Your Honor, we did.

21   JUSTICE SCALIA: Where is it in that? I was

22   looking for it.

23   MR. COLANGELO: It's in two places in the

24   brief in opposition, page 4 to 5, where we set out this

25   compliance monitoring framework, and page 18 to 19.

1   JUSTICE SCALIA: That may be, but you don't

2   support -- and page what?

3   MR. COLANGELO: Page 18 to 19.

4   And then, again, in our supplemental brief,

5   Your Honor.

6   JUSTICE SCALIA: But you don't --

7   MR. COLANGELO: At the cert stage.

8   JUSTICE SCALIA: -- you don't say that

9   that's the basis for supporting the decision below. I

10   certainly didn't interpret it.

11   MR. COLANGELO: We do -- let me just quote

12   what may be the most explicit thing, Your Honor, which

13   is at the very bottom of page 4 in our supplemental

14   brief at the cert stage. "The Court of Appeals' ruling

15   was both correct and equitable. Every Clean Water Act

16   permit must include monitoring provisions ensuring that

17   permit conditions are satisfied."

18   And we lay out the compliance monitoring.

19   That's 4 to 5 of our supplemental brief in opposition to

20   cert.

21   JUSTICE SCALIA: I don't have your

22   supplemental brief in front of me.

23   CHIEF JUSTICE ROBERTS: Where on 4 to 5?

24   MR. COLANGELO: At the very bottom of page

25   4, the last two lines, and the top of page 5.

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1   Final -- now, most of our supplemental brief

2   and our brief in opposition were addressing why we did

3   not think Petitioner's question merited this Court's

4   review. This is the argument that we made in defense of

5   the judgment below, "The Court of Appeals ruling was

6   both correct and equitable. Every permit must include

7   sufficient monitoring to determine compliance."

8   JUSTICE SCALIA: Well -- but -- but that --

9   that's just to say you can rely on -- on the extant

10   monitors.

11   MR. COLANGELO: Absolutely, Your Honor. And

12   Petitioner's saying we're not --

13   JUSTICE SCALIA: So you say -- you know,

14   they were correct. You have to find some basis for

15   liability, and they use the monitors, and that's it. It

16   didn't -- it didn't say, in detail, that these people

17   had to go and -- and set up their own monitoring

18   under -- under the permit.

19   MR. COLANGELO: Your Honor, that was the --

20   that was our argument in the Ninth Circuit and at the

21   cert stage, and that -- we do lay out exactly how the

22   permit works. The point is that the permit imposes

23   liability on the multiple dischargers --

24   JUSTICE SCALIA: You -- you told this to the

25   Ninth Circuit, and the Ninth Circuit said no?

1   MR. COLANGELO: That's correct, Your Honor.

2   That's correct. But we can -- we can defend the

3   judgment on a basis, even one that the Ninth Circuit

4   rejected.

5   To go back --

6   JUSTICE KAGAN: Counsel, suppose we did what

7   the -- the Solicitor General says to do and vacated

8   this. Can you think of any reason why the Ninth Circuit

9   would change its mind? I mean, is there any connection

10   between these two issues that you can point to, such

11   that our making clear to the Ninth Circuit that they

12   made a mistake on one actually would affect their

13   analysis on the other?

14   MR. COLANGELO: There is one reason, Your

15   Honor, and that is that a permit is interpreted like a

16   contract, and it is a cardinal rule of contract

17   interpretation that a contract should be read where --

18   where possible to be both lawful and enforceable.

19   So the Ninth Circuit may go back down and

20   say, okay, with this corrected understanding of the

21   universe of law and facts that apply, we see that

22   Petitioner's reading of the permit would render it

23   unenforceable because none of the permittees can be held

24   liable and, therefore, unlawful because the Clean Water

25   Act requires all permits to include within it

1   self-monitoring and self-reporting to demonstrate a

2   violation.

3   So the Ninth Circuit -- now, it may just --

4   it may just say, we say what we said before. But it

5   could reconsider on that basis, and that would be a

6   legitimate basis for it to do so.

7   To go back to the earlier question about

8   where there is a discharge, there is no question that

9   Petitioner discharges these pollutants to these rivers,

10   so the only question for this enforcement proceeding is

11   where to measure Petitioner's discharges for purposes of

12   liability.

13   JUSTICE KENNEDY: Why is there no -- where

14   do I look to find out that the district is making a

15   discharge of polluted water, other than under the Ninth

16   Circuit's theory that it's in the river itself?

17   MR. COLANGELO: Two places, Your Honor.

18   First is that it's a premise for the permit itself. So

19   if you look at page JA 55, it says the Petitioner

20   discharges stormwater into these rivers. And then the

21   very next paragraph shows that the Petitioner has done

22   an assessment of the pollutants that are typically in

23   its discharges, and it lists the ones that are now in

24   violation here.

25   So the permit, it didn't -- it came out of

 1   this administrative process, and one of the elements --

 2   JUSTICE KENNEDY: So is your theory that, if

 3   the district is permitted to -- on a scale of 1 to 10,

 4   to discharge up to 2, but that if the monitoring station

 5   in the river shows an 8, then it is automatically liable

 6   for the increase, even though other dischargees might

 7   have made this?

 8   MR. COLANGELO: Yes, yes, because --

 9   JUSTICE KENNEDY: I don't get that from what

10   you have read. I've looked at --

11   MR. COLANGELO: Your Honor, because --

12   JUSTICE KENNEDY: -- the text you've read and

13   it looks to me like it's permittee by permittee.

14   MR. COLANGELO: It says that the MS4 is in

15   violation, that's correct. But then it says each

16   permittee must, when an exceedance is detected, take

17   these steps. So here, what they have failed to do is

18   take the necessary steps to apportion responsibility

19   among the multiple contributors. The second place, just

20   to finish on the -- on the proof that they discharge --

21   JUSTICE SCALIA: Finish that. So what's the

22   consequence of that?

23   MR. COLANGELO: I'm sorry?

24   JUSTICE SCALIA: Therefore, each one of them

25   is liable for all of it?

1   MR. COLANGELO: No, no, Your Honor. No.

2   Each one is liable for what they put in and bears the

3   burden to demonstrate and limit what it puts in. That's

4   explicit in the permit.

5   JUSTICE SCALIA: But they haven't done so.

6   So what?

7   MR. COLANGELO: So that's a permit

8   violation, and result is that this pollution continues

9   year after year after year, when the point of the permit

10   and the point of the Clean Water Act was to eliminate

11   what everybody agrees is the biggest source of water

12   pollution in Southern California. And this --

13   JUSTICE KENNEDY: So if each permittee is

14   allowed to put in a 2, but one permittee puts in an 8;

15   then both permittees are liable?

16   MR. COLANGELO: Correct, Your Honor,

17   unless -- because those facts are not known at the time

18   the violation is detected.

19   JUSTICE KENNEDY: No, no, we now know the

20   facts because it's the hypothetical.

21   MR. COLANGELO: Okay. So if the permittee

22   has done its own monitoring, in addition to what the

23   permit requires, and can demonstrate that it did not put

24   anything in, then it is not liable. If not, then yes.

25   Two dischargers into the same river who agree in advance

1   to be measured by a single monitoring station in the

2   river are liable for what's measured there, and then

3   they sort it out.

4   And what -- Congress set up a regime that

5   would allow for system-wide and jurisdiction-wide

6   permits precisely because this problem was so

7   complicated.

8   CHIEF JUSTICE ROBERTS: Are the

9   provisions -- excuse me, the provisions we've been

10   talking about, the three that you cited and the one that

11   your -- are they boilerplate? Do they show up in every

12   typical stormwater permit?

13   MR. COLANGELO: Well, 109 -- the fact that

14   the permittees must conduct all monitoring to

15   demonstrate compliance, if "boilerplate" means that they

16   are in all permits, then, yes, because that's a

17   requirement of EPA regulations.

18   CHIEF JUSTICE ROBERTS: Yes. What about the

19   one that says each permittee is responsible only for a

20   discharge for which it is the operator?

21   MR. COLANGELO: That's from a EPA

22   regulation, too, yes. That's in the definition of

23   "co-permittee" at 122.2; so, yes, that's also standard

24   in system-wide permits.

25   To go back to the earlier question about

1   where there is a discharge, the district court found,

2   and this is undisputed, at Petition Appendix 117, the

3   permit admits -- the permittee, Petitioner, admits that

4   it is discharging these pollutants, the ones measured in

5   violation, to these rivers. So what we have is no

6   question, no dispute that they discharged these

7   pollutants, a monitoring system included in the permit

8   that the State court upheld against Petitioner's

9   challenge, showing that those limits have been exceeded.

10   JUSTICE BREYER: So your basic argument is

11   this permit requires you, L.A. County, to do monitoring,

12   to decide if you're violating it. You chose this

13   system, then common sense suggests you're doing it. You

14   struck out twice with that argument --

15   MR. COLANGELO: Yes.

16   JUSTICE BREYER: -- in the other two rivers,

17   and now, you're going to go back if we permit it, and

18   you want to make the argument and tell the Ninth

19   Circuit, three times and you're out; in this case, hold

20   the opposite.

21   MR. COLANGELO: Well -- yes. I'm not sure I

22   would say we struck out, Your Honor; the --

23   JUSTICE BREYER: I understand it.

24   (Laughter.)

25   MR. COLANGELO: But correct, the lower court

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1   did not -- neither lower court accepted this argument

2   fully. The Ninth Circuit did agree that all permits

3   must include compliance monitoring, but it said you need

4   a little more here. And we think that was improper

5   because you can't add terms to the permit once it's been

6   settled.

7   And there was an earlier question, Justice

8   Breyer, about could we sample from an individual

9   outfall, could we show more? The problem with that is

10   that it would prove nothing. The Petitioner has said,

11   just sample from one outfall, one of our outfalls. We

12   alleged 140 violations for a dozen different pollutants

13   over a 5-year period. So sampling from a single outfall

14   as an evidentiary matter would be utterly meaningless.

15   JUSTICE BREYER: Couldn't you get some

16   expert who --

17   MR. COLANGELO: Well, we did, Your Honor, in

18   district court as an alternative theory have an expert

19   who said all of this came from them. The district court

20   did not address that and we didn't appeal. The appeal

21   was limited just to this legal issue.

22   JUSTICE SCALIA: I don't understand why you

23   didn't cross-appeal on -- on this theory that -- that

24   the lower court rejected.

25   MR. COLANGELO: Because, Your Honor, we were

1   satisfied with the judgment; and that's the rule. A

2   respondent who is satisfied does not need to

3   cross-appeal, unless it is --

4   JUSTICE SCALIA: I didn't say you need to.

5   I didn't say you needed to. But I -- I would normally

6   have done it, just to be sure I had that arrow in my

7   quiver and that it would not be argued, as it will be

8   here, that this would be expanding the judgment below.

9   MR. COLANGELO: And the reason it would not

10   be expanding the judgment below is that we are on the

11   opposite side of what happened in Kent. To rule in our

12   favor on this argument would just leave untouched two

13   claims on which we didn't prevail.

14   We'd get no further relief on those. It's

15   like two co-plaintiffs in district court who both lose

16   identical claims. One appeals, and the other doesn't.

17   The one who appeals wins a reversal. That creates an

18   inconsistency, two similarly situated plaintiffs, one

19   has a valid claim, one no longer does. But that's the

20   consequence of our failing to cross-petition.

21   JUSTICE SOTOMAYOR: Do we have -- I just

22   don't remember now. Do we have a circuit split on this

23   issue of whether a permit in a situation like this would

24   impose liability on all permittees?

25   MR. COLANGELO: No. No. There is no -- I

1   don't know of any other circuit court who has

2   addressed -- that has addressed this question.

3   And let me speak to -- to the issue of

4   additional monitoring, putting the burden on plaintiffs

5   to conduct additional monitoring. The problem is it

6   creates a complicated factual dispute for district

7   courts resolve -- to resolve, when that was exactly what

8   Congress wanted to eliminate.

9   When Congress adopted this permit program in

10   the Clean Water Act and then amended it to bring

11   municipal stormwater discharges under the program,

12   Congress said, we do not want district courts to be the

13   forum for sorting out all of these complicated factual

14   issues.

15   JUSTICE BREYER: I see. What do you think

16   of the government's point? They are telling us, just

17   write what you usually write, and then you can go make

18   all your arguments, see what they do. Does that satisfy

19   you?

20   MR. COLANGELO: Your Honor, we would be most

21   satisfied with an affirmance on the grounds we have

22   presented. If the Court vacates, we would be satisfied

23   with that, too, and then we would go back to the

24   district --

25   JUSTICE SCALIA: What if this panel found --

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1   found for you on the ground that they used, they will

2   surely find for you on this other ground, which --

3   (Laughter.)

4   MR. COLANGELO: Yes. We expect they would.

5   JUSTICE SCALIA: -- which has at least an

6   inkling of plausibility.

7   MR. COLANGELO: Thank you, Your Honor.

8   (Laughter.)

9   CHIEF JUSTICE ROBERTS: Thank you, counsel.

10   Mr. Coates, you have 4 minutes remaining.

11   REBUTTAL ARGUMENT OF TIMOTHY T. COATES

12   ON BEHALF OF THE PETITIONER

13   MR. COATES: Thank you, Your Honor.

14   To the cross-appeal issue, the cases that we

15   cite talk about the Court's prudential limitation on

16   deciding questions that are not preserved by

17   cross-petition. And I depart from my learned opponent,

18   Mr. Colangelo, on that point as to what the Court's

19   cases say. We cite the Northwest Airlines v. County of

20   Kent case, and that is a case where, in fact, the

21   respondent was not seeking to change the judgment below.

22   They did not cross-petition. They were just trying to

23   keep what they had.

24   And the Court said we are not going to reach

25   that issue because, if we buy the fact that there is in

1   fact no private right of action, the effect of that is

2   to essentially change the underlying judgment --

3   JUSTICE BREYER: Let me ask a quick

4   question.

5   MR. COATES: Sure.

6   JUSTICE BREYER: Does it satisfy you if we

7   just write in the judgment what you -- we usually write,

8   and then you all can argue what it means below? What

9   about that? Does that satisfy? Or do you want us to

10   write something special?

11   (Laughter.)

12   MR. COATES: It -- it's -- it's acceptable

13   because a reversal is always better than an affirmance.

14   But talking about what the Court decides and what's left

15   in the case, I think it is a case where the Court

16   reviews what the Ninth Circuit actually decided, what is

17   actually before it, and what is properly remaining in

18   the case because we don't believe the cross-appeal issue

19   is here.

20   And that leads, I think, to reversing the

21   Ninth Circuit because the district is entitled to

22   summary judgment on these two river claims. And I think

23   that is all that's left in the case.

24   And I call the Court's attention to another

25   case we cited on the cross-appeal issue. It's one of

 1   the NLRB cases, the -- the Express Publication case.

 2   And it makes it very clear there, that the respondent

 3   was just trying to hang on so much of what was good

 4   about the order as he could keep and was not seeking to

 5   change anything. And, again, the Court said no.

 6   It basically undermines the entire basis for

 7   the --

 8   JUSTICE SCALIA: Did we use our usual

 9   language, and did it go back, and the -- and the court

10   of appeals considered --

11   MR. COATES: I think, in one of the cases,

12   the Court --

13   JUSTICE SCALIA: -- considered the issue we

14   had refused to consider?

15   MR. COATES: In one of the cases, the Court

16   simply affirmed, and so it didn't go anywhere.

17   JUSTICE SCALIA: Okay.

18   MR. COATES: But --

19   JUSTICE SCALIA: Don't we have two -- I

20   don't know that we do this all the time. When we expect

21   them to keep the case and do something different, don't

22   we usually vacate and remand, rather than reverse?

23   MR. COATES: Well, I do know that, in the

24   context of a lot of the Court's opinions, the Court will

25   specify that judgment be granted in terms of a party.

1   I know the qualified immunity cases, you

2   find someone's entitled to qualified immunity, and it

3   comes up on a summary judgment, the reversal is -- to

4   the Ninth Circuit. And I've seen both languages used,

5   but it's plain, from the text of the opinion, the

6   judgment is to be entered in favor of that party.

7   And, again, I think that's appropriate here.

8   My opponent suggests and the government suggests, again,

9   that, let's go back to the Ninth Circuit and let them

10 consider this monitoring argument. They considered it.

11 In fact, they even considered the use of contract terms

12 that -- that they urged them to consider again.

13   It's already rejected that claim with

14 respect to these two rivers that are in front of the

15 Court. It's rejected it with respect to Malibu Creek

16 and Santa Clara River, which is not in front of the

17 Court. They even accepted it with respect to an entire

18 different party with County of Los Angeles --

19   JUSTICE SCALIA: But they might change their

20 mind now. They might change their mind.

21   MR. COATES: It would be a very odd judgment

22 because you'd have two claims that are -- continue to be

23 dismissed that are not properly before any court. Those

24 close -- those are closed. And you have another party

25 out of the case on the very ground that the Ninth

 1   Circuit rejected in the initial opinion.

 2   A sort of remand for some consideration of

 3   an issue that's already spoken on just doesn't seem to

 4   make sense and invites the very sort of kind of

 5   jurisdictional confusion that, I think, leads the Court,

 6   for prudential reasons, not to consider these things

 7   unless there's a cross-petition.

 8   I think that's why this is kind of a great

 9   example of why prudential reasons say you should not

10   consider it.

11   CHIEF JUSTICE ROBERTS: Well, I understand,

12   and you do cite a lot of cases for that, but I can't

13   figure out what sense it makes. I mean, if you're

14   willing to give up Santa Clara and Malibu, you're --

15   you're safe there, and that's the only thing you've won.

16   Why does it -- how does that make sense?

17   MR. COATES: Well, the Court does it for two

18   reasons. It does it as a prudential matter because it

19   does look odd to affirm on -- to make a decision in this

20   Court on a ground that essentially repudiates the lower

21   court decision. It does it for prudential reasons.

22   And, in fact, the case they cite, LeTulle,

23   which basically says the Court has the jurisdiction to

24   do that -- when someone abandons the piecemeal claim --

25   is cited only once in this context after that, and

1   that's in the United States v. ITT Continental Baking

2   case, 420 U.S. 223, footnote 2.

3   And the court gives it a "but-see" for the

4   proposition that you have the jurisdiction to do it.

5   But then describes this exact situation and says, for

6   prudential reasons, we don't do it because it undermines

7   our cert jurisdiction, particularly if resolution of

8   that issue is highly fact-specific -- the one they are

9   trying to bring up -- and it would really foreclose

10   having to even decide this cert issue because you

11   wouldn't get to it.

12   CHIEF JUSTICE ROBERTS: Thank you, counsel.

13   The case is submitted.

14   (Whereupon, at 12:12 p.m., the case in the

15   above-entitled matter was submitted.)

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