



The Ninth Circuit Court of Appeals got no love from either the U.S. Supreme Court or the advocates appearing before it today in *Los Angeles County Flood Control District v. Natural Resources Defense Counsel*. Nor did a previously-unheard-from government actor similarly absent from the Supreme Court chambers today.

Yesterday [Sean Hecht posted on the long and tortured history of the Los Angeles County Flood Control District case](#), and I won't repeat his exhaustive analysis here. But it was apparent from today's arguments that the Ninth Circuit opinion finding the District and Los Angeles County in violation of their NPDES stormwater permit had no support at the Supreme Court: not from the justices, the County and District, the U.S. Solicitor General who argued as amicus in the case (though not in support of either side) or even from the NRDC attorney who was attempting to preserve the environmentalists' hard-fought Ninth Circuit win before the justices.

According to counsel for the District and County, the decision below was legally flawed in a way that made reversal on the merits necessary and appropriate. The Solicitor General, by contrast, argued that the Ninth Circuit opinion was based on a fundamental *factual* error that warranted the case being vacated and remanded to the Court of Appeals. NRDC's lawyer began his argument by stressing that his organization was not relying on the reasoning of the Ninth Circuit panel in urging that the decision be sustained. At various points during the hour-long argument, the justices signaled agreement with the reservations about the Ninth Circuit decision expressed by all of the advocates. They did not reveal whether they will choose to reverse on the merits (as the District and County urge) or vacate and remand to the Ninth Circuit for further proceedings (per the recommendation of the Solicitor General). What is apparent is that the Supreme Court will not affirm the circuit court decision in favor of NRDC.

A surprise at today's arguments was the extent of abuse heaped upon the Los Angeles Regional Water Quality Control Board, which had issued the NPDES permit at issue in the

case but which was not a party to the litigation. In his argument the Solicitor General expressly characterized the Regional Board's permit as "poorly drafted," an opinion shared by Justice Scalia and several other justices.

Following on the heels of yesterday's equally odd Supreme Court arguments in *Decker* (previously summarized [here](#)), it's at least a distinct possibility that the Court will wind up not issuing a substantive decision in *either* of the Clean Water Act cases in which the justices granted review this Term. And so it goes...