Los Angeles River and 6th street viaduct.
Courtesy Flickr.

I attended the oral argument on Tuesday in L.A. Flood Control District v. NRDC. (See Sean's post for an in-depth background on the case, and Richard's initial reactions to the oral argument). The Justices were actively engaged and appeared to have a strong grasp of the underlying facts about the District's MS4. Much of the questioning focused on two issues: how liability is determined under the MS4 permit for water quality violations and what the Ninth Circuit might do with the case on remand or reversal.

This case was ostensibly about whether water that is transferred from a channelized to an un-channelized portion of a river could be considered a discharge, given the Court's prior *Miccosukee Tribe* opinion. Petitioner's counsel asserted at the beginning of his argument that everyone in this case would answer that question in the negative. *Miccosukee Tribe* was barely mentioned again.

Sean and I submitted an amicus brief arguing that, because this case doesn't seriously implicate Miccosukee Tribe, the Court should dismiss cert as improvidently granted. For better or worse, no one seemed particularly interested in limiting discussion to the question presented.

Instead, Justice Roberts dove into the permit terms by suggesting to the counsel for the District that "common sense" dictates that the District's MS4 is responsible for at least some of the pollution flowing into LA River. The counsel for the District disagreed with Justice Robert's "common sense." Then in response to Justice Kennedy's follow-up, the District said that even if 85% of discharge into LA River came from the District's MS4, such implicit evidence of responsibility for the pollution is "irrelevant " because the single monitoring station is inadequate to establish liability of any one discharger. Justice Scalia voiced some incredulity that the permit would regulate discharge from each permittee but fail to provide a method to hold permittees responsible.

> Justice Scalia: You say . . . that each alleged polluter is only responsible for his own pollution, but you also say that these monitors are so situated that it is impossible to tell from the monitor who is responsible for the pollution. . . . So whose fault is that?

Eventually Justice Breyer suggested a way out of this catch-22: NRDC could have either hired an expert to go do the necessary measurements or asked the Regional Board to come up with an enforcement mechanism. Unanswered was how either solution could work in practice to establish liability for five years of past water quality violations. But this develops into a key stumbling block for NRDC. At least a majority of the Justices seem uncomfortable with a permit that applies something like "severable liability" to the permittees and places the burden on those permittees to show that they were not responsible for the measured violations in the river.

NRDC's counsel, Aaron Colangelo, did an admirable job of trying to assuage these fears, mainly by emphasizing that permittees are liable if they "cause or contribute" to violations and reminding the court that the District previously argued fervently for this monitoring system in state court. But it was clear that for a majority of the justices, the answer to Justice Scalia's pointed question—who's at fault for this inadequate permitting scheme—lies with the Regional Board, not with the permittees. One small critique of the respondent's strategy here is that more emphasis could have been placed on the fact that the District could have applied for an individual permit but instead chose to join with other permittees for a general watershed permit. But the "you made your bed, now lie in it" argument for holding permittees liable seemed to hold little sway over the Justices.

> Justice Kennedy: [W]hat I'm taking away from [NRDC's] argument is that once there is a violation, all the permittees are liable. That just can't be.

This interest in the Permit liability structure leads to problems with the potential remedy. There is a rule of procedure that says that a respondent on appeal must cross-petition if the relief sought expands the judgment in the court below. The Ninth Circuit seemingly rejected NRDC's theory of severable liability, but NRDC did not cross-petition on that point. And this appeal to the Supreme Court concerns only two of the four rivers from the initial lawsuit. Now I am no expert on this procedural rule, but the basic idea is that if the Supreme Court vacates the Ninth Circuit decision and remands, it could allow the Ninth Circuit to find the District liable for violations in all four rivers based on NRDC's theory of severable liability. Alternatively, a Ninth Circuit ruling in favor of NRDC would be inconsistent if it held the District liable based on severable liability for two of the rivers, but rejects severable liability in the same permit for the other two rivers.

NRDC's response is that it has given up on the other two rivers and will not seek to change the judgment below, consistent with the cross-petition rule. This leaves the possibility of

inconsistent rulings of liability on the Permit but may be procedurally correct.

Technically, the Supreme Court could vacate and remand only as to the question presented: that *Miccosukee Tribe* means that flow between the channelized and unchannelized portion of the river is not the discharge point for the MS4. The Court could also give guidance to the Ninth Circuit on any of these other issues. But, as Justice Kagan noted, it is unclear why telling the Ninth Circuit that they made a mistake concerning the discharge point would affect their interpretation of liability under the permit.

> Justice Kagan: Suppose we did what the Solicitor General says to do and vacated this. Can you think of any reason why the Ninth Circuit would change its mind?

NRDC's counsel had a quick response: the Permit, like a contract, must be read where possible to be enforceable. If the Supreme Court rejects the Ninth Circuit's incorrect analysis of the discharge point, the Ninth Circuit is faced with a Permit that is altogether unenforceable unless it applies something like NRDC's severable liability theory, placing the burden on the permittees to show they did not cause or contribute to the water quality violations.

Justice Breyer nicely summed up NRDC's legal strategy moving forward:

> Justice Breyer: So your basic argument is this permit requires you, L.A. County, to do monitoring to decide if you're violating it. You [L.A. County] chose this system, then common sense suggests you're doing it. You [NRDC] struck out twice with that argument—
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> Mr. Colangelo: Yes.
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> Justice Breyer: —in the other two rivers, so now you're going to go back if we permit it, and you want to make the argument and tell the Ninth Circuit: Three times and you're out; in this case; hold the opposite.

We'll see if the Justices let NRDC do just that. In the end, it looks like a choice between 'vacate and remand' or 'reverse and remand.'