Today, the U.S. Supreme Court issued its opinion in *Los Angeles County Flood Control District v. Natural Resources Defense Council*. I've blogged about this case before, noting that the Supreme Court's grant of review in this case was based on a completely mistaken premise. (If you're unfamiliar with the case, the linked post explains in detail what the case is about, and may be useful for context. And Rick Frank posted his thoughts about the oral argument here.)

The Court compounded its error today, reversing the Ninth Circuit in a very short, unanimous opinion. The Court said that because of a legal holding in a prior Supreme Court case, *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Ninth Circuit's analysis in this case was wrong. But as I've noted before, that that holding has nothing to do with the current case. And, actually, the Court didn't even make that holding in the prior case. Along with Rhead Enion, I filed a brief in the Supreme Court explaining the first problem, and another law professor filed a brief explaining the second problem. Bottom line: even if the Ninth Circuit got its analysis wrong – and I think at this point most observers agree that the Ninth Circuit's opinion was flawed in some way – the ways in which the Ninth Circuit erred had nothing at all to do with the Supreme Court opinion here.

Here's a quick summary of the facts: The Los Angeles County Flood Control District manages a stormwater system that conveys urban runoff into the Los Angeles River (which is itself partially encased in concrete channels to facilitate flood control) and other local waterways, and ultimately into the Pacific Ocean. This runoff is responsible for a significant proportion of our water pollution. The District, along with more than 80 other municipalities, has a permit under the Clean Water Act that forbids it from causing or contributing to exceedances of water quality standards. But there is very little monitoring that would directly confirm any specific violations by particular dischargers; in fact, there's only one monitoring station in the Los Angeles River, and none at the outfalls flowing into the River from the stormwater system.

The monitoring has, however, confirmed pollution in the River in excess of the standards., and there's really no question that the District's pollution discharges contribute to that pollution. NRDC and Los Angeles Waterkeeper sued the District to hold it liable for causing or contributing to the exceedances. But the trial court found that there wasn't sufficient evidence to connect the exceedances with the District's discharges, given the location of the monitor and the presence of other possible contributors to the pollution. The Ninth Circuit reversed, holding that the District was liable. Unfortunately, the decision provided an ambiguous, inadequate, and likely incorrect description of the physical location of the monitors, and an ambiguous and convoluted rationale for why it believed the evidence was sufficient to support liability. The plaintiffs have contended all along that the permit, the

evidence of pollution, and the monitoring are all sufficient to establish the District's liability. (My earlier post goes into somewhat more detail about this, as does NRDC's brief.)

The District got the Supreme Court's attention with an argument that the Ninth Circuit actually held the District liable only because the judges believed, mistakenly, that there was a legal "discharge" of pollutants within the River itself, where channelized portions of the River flow into unchannelized portions of the River, near the monitoring station. By contrast, the Solicitor General argued (and I agree) that the Court most likely mistakenly believed the monitor to be located within the storm sewer pipes outside the River, and that the Court correctly understood that there was a "discharge" where the storm sewer flowed into the River.

The question on which the Supreme Court granted review was:

> When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

In today's opinion, the Court's conclusion was that:

> … [T]he flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA. Because the decision below cannot be squared with that holding, the Court of Appeals' judgment must be reversed.

But as I said in my prior blog post, this question (and the Court's conclusion) make no sense in the context of this case:

> In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Court was asked to determine whether a water transfer that arguably pumped pollutants from one part of a waterbody into another part of that same waterbody needed a permit to discharge pollutants. The defendant was pumping polluted water from one place to another, but if the start and end points of the pumping were actually in the same body of water, there would arguably have been nothing added to the water, and thus legally no basis to require a permit to add pollution to the water. Here, by contrast, there's no doubt that municipal storm sewers need permits to discharge into rivers, and also no doubt that the storm sewers took pollutants that started outside the rivers, and discharged them into rivers through outfalls. The two situations have nothing in common. The main feature defining the rule stated in the question presented – that no pollutants, and indeed, no water either, were added to federally-regulated waterways, in a "transfer of water within a single body of water" – is absent in the current case. There's no question that the District's storm sewer flows into the rivers from outside, and doesn't simply flow from one part of the river into another part of the same river.

There's simply no question that the municipal storm sewer discharged into the river, and not inside the river. In fact, that's the premise of requiring a permit for all storm sewer systems.

And the Court fails to explain how the Ninth Circuit's decision "cannot be squared with" the principle it articulates. The Court even notes in a footnote that the Solicitor General, representing the United States, had expressed the view that the question the Court decided was irrelevant because the Ninth Circuit made a factual, not legal, error: the Solicitor General argued (and I agree) that the Ninth Circuit most likely mistakenly believed the monitor to be located within the storm sewer pipes outside the River, and the judges correctly understood that there was a "discharge" where the storm sewer flowed into the River. Without refuting or even considering this argument, the Supreme Court responded: "Whatever the source of the Court of Appeals' error, all parties agree that the court's analysis was erroneous." But if the source of the Court of Appeal's error was what the Solicitor General said it was, the Supreme Court's opinion makes no sense, and the Ninth Circuit's decision can easily be squared with the Supreme Court's view of the law.

Nonetheless, the Court's opinion is narrow in its scope. In my view it's a good thing that the Court did not reach out and decide any of the myriad other questions urged upon it by dischargers who were hoping that the Court would somehow take up their issues and get

them off the hook for pollution. For example, municipal stormwater discharges still clearly need permits under Clean Water Act section 402(p), and there's every reason to think that these permits still must ensure that stormwater discharges don't cause or contribute to exceedances of water quality standards.

Offhand, I can think of two clear consequences of this decision for efforts to clean up the Los Angeles municipal stormwater system and to ensure that our local waterways are protected from pollution. First (and most obviously), the reversal of the Ninth Circuit's judgment against the Los Angeles County Flood Control District in the case means that our local water quality advocates are back to the drawing board in their years-long effort to hold the District liable for its stormwater pollution discharges. As a result, there will be more pressure on the regulator, the Regional Water Board, to ensure that the new municipal stormwater permit effectively cleans up the water. This permit, approved late in 2012 and currently on administrative appeal, has attracted controversy and criticism from both municipal dischargers and environmental advocates. Second (and more obscurely), the reversal of the judgment will eliminate the potential for mischief that the District's interpretation of the Ninth Circuit opinion had caused. The District had claimed that the Ninth Circuit had held that the Los Angeles River was somehow no longer a "navigable water" as determined by the U.S. EPA, despite the lack of any language in the decision saying this. That would, if accurate, have the potential to affect the River's protection under the federal Clean Water Act. But that no longer matters, now that the Ninth Circuit has been reversed. While I never bought the District's argument that the Ninth Circuit's decision had effected, or even implied, a reversal of that EPA determination (which, after all, was not even at issue in the case), the reversal of the Ninth Circuit's decision means that it will no longer cast a cloud over efforts to protect the River.

Overall, the narrow scope of the opinion, and the Court's refusal to engage with the complex issues raised by the case or to acknowledge the mistaken premise of the grant of certiorari, confirm to me that this was a poor choice of a case to review.