

1 IN THE SUPREME COURT OF THE UNITED STATES

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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 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

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

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: But it's the -- Well, I think,
10 again, the -- the rules say that you look at the permit's
11 terms to 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: You might -- 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 other
25 smaller discharges. 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: I have one different
5 question. This is hypothetical. It's not in the case.
6 It's just for me to understand that.

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,

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 --

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 it 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 SOTOMAYOR: I'm sorry, you mean --

16 CHIEF JUSTICE ROBERTS: Justice Kennedy.

17 JUSTICE KENNEDY: Circuit's error -- was the
18 Ninth Circuit's error here a factual one, because it was
19 based on the location of the stations? Or was it a legal
20 one because it 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 -- 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: Okay.

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

4 CHIEF JUSTICE ROBERTS: Where -- where is
5 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

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

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 is --

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 Petitioners 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.

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

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: Well -- Looking at
25 109, it strikes me as a little bit circular to say - to

1 say they have the responsibility to carry out inspection
2 and 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, would you still
13 I'm not clear if you gave me an answer to how the
14 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.

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

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 SOTOMAYOR: Why wouldn't it
9 necessarily --

10 JUSTICE GINSBURG: That's because you're giving
11 up -- you're giving up on the two rivers, even though your
12 theory would work the same way with respect to them?

13 MR. COLANGELO: That's correct, Your Honor.
14 And that's consistent with the cross-petition rule. A
15 respondent who is satisfied with the result below and
16 does not seek to change the judgment does not need to
17 cross-petition. A cross-petition is only necessary --

18 JUSTICE GINSBURG: But do you think that the
19 trial court was wrong, the district court was wrong, and
20 the Ninth Circuit, both times, when they said, well, you
21 didn't prove -- there was no -- there was no proof that
22 the district was responsible for a given part. So, on
23 your theory, both the district court and the Ninth
24 Circuit were wrong on that?

25 MR. COLANGELO: On that legal question, Your

1 Honor, yes. But this Court can affirm on any basis
2 preserved below, and this was also preserved in our
3 brief in opposition at the jurisdictional stage, as long
4 as it would not change the judgment.

5 And here's why it would not. Let me
6 distinguish the Northwest Airlines v. County of Kent
7 case, which Petitioner cites. That case presents, in
8 fact, the opposite situation of what we have here. In
9 that case, Respondent's argument, had it been accepted,
10 would have required the district court to grant further
11 relief in continuing proceedings on a claim that no
12 longer existed because the Respondent's argument was
13 that there was no private right of action at all.

14 Our case is the opposite because, if the
15 Court accepts our position, we simply don't get any
16 further relief with respect to claims that are waived to
17 which we would have been entitled. And the two cases
18 that we've cited by letter last week both represent
19 exactly that situation.

20 JUSTICE SCALIA: Mr. Colangelo, did you
21 raise this argument in your brief in opposition?

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

23 JUSTICE SCALIA: Where is it in that? I was
24 looking for it.

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

1 brief in opposition, page 4 to 5, where we set out this
2 compliance monitoring framework, and page 18 to 19.

3 JUSTICE SCALIA: But that -- That may be,
4 but you don't support -- and page what?

5 MR. COLANGELO: Page 18 to 19.

6 And then, again, in our supplemental brief,
7 Your Honor.

8 JUSTICE SCALIA: But you don't --

9 MR. COLANGELO: At the cert stage.

10 JUSTICE SCALIA: -- you don't say that
11 that's the basis for supporting the decision below. I
12 certainly didn't interpret it.

13 MR. COLANGELO: We do -- let me just quote
14 what may be the most explicit thing, Your Honor, which
15 is at the very bottom of page 4 in our supplemental
16 brief at the cert stage. "The Court of Appeals' ruling
17 was both correct and equitable. Every Clean Water Act
18 permit must include monitoring provisions ensuring that
19 permit conditions are satisfied."

20 And we lay out the compliance monitoring.
21 That's 4 to 5 of our supplemental brief in opposition to
22 cert.

23 JUSTICE SCALIA: I don't have your
24 supplemental brief in front of me.

25 CHIEF JUSTICE ROBERTS: Where on 4 to 5?

1 MR. COLANGELO: At the very bottom of page
2 4, the last two lines, and the top of page 5.

3 Final -- now, most of our supplemental brief
4 and our brief in opposition were addressing why we did
5 not think Petitioner's question merited this Court's
6 review. This is the argument that we made in defense of
7 the judgment below, "The Court of Appeals ruling was
8 both correct and equitable. Every permit must include
9 sufficient monitoring to determine compliance."

10 JUSTICE SCALIA: Well -- but -- but that --
11 that's just to say you can rely on -- on the extant
12 monitors.

13 MR. COLANGELO: Absolutely, Your Honor. And
14 Petitioner's saying we're not --

15 JUSTICE SCALIA: So you say -- you know,
16 they were correct. You have to find some basis for
17 liability, and they use the monitors, and that's it. It
18 didn't -- it didn't say, in detail, that these people
19 had to go and -- and set up their own monitoring
20 under -- under the permit.

21 MR. COLANGELO: Your Honor, that was the --
22 that was our argument in the Ninth Circuit and at the
23 cert stage, and that -- we do lay out exactly how the
24 permit works. The point is that the permit imposes
25 liability on the multiple dischargers --

1 JUSTICE SCALIA: You -- you told this to the
2 Ninth Circuit, and the Ninth Circuit said no?

3 MR. COLANGELO: That's correct, Your Honor.
4 That's correct. But we can -- we can defend the
5 judgment on a basis, even one that the Ninth Circuit
6 rejected.

7 To go back --

8 JUSTICE KAGAN: Mr. Colangelo, suppose we did
9 what the Solicitor General says to do and vacated
10 this. Can you think of any reason why the Ninth Circuit
11 would change its mind? I mean, is there any connection
12 between these two issues that you can point to, such
13 that our making clear to the Ninth Circuit that they
14 made a mistake on one actually would affect their
15 analysis on the other?

16 MR. COLANGELO: There is one reason, Your
17 Honor, and that is that a permit is interpreted like a
18 contract, and it is a cardinal rule of contract
19 interpretation that a contract should be read where --
20 where possible to be both lawful and enforceable.

21 So the Ninth Circuit may go back down and
22 say, okay, with this corrected understanding of the
23 universe of law and facts that apply, we see that
24 Petitioner's reading of the permit would render it
25 unenforceable because none of the permittees can be held

1 liable and, therefore, unlawful because the Clean Water
2 Act requires all permits to include within it
3 self-monitoring and self-reporting to demonstrate a
4 violation.

5 So the Ninth Circuit -- now, it may just --
6 it may just say, we say what we said before. But it
7 could reconsider on that basis, and that would be a
8 legitimate basis for it to do so.

9 To go back to the earlier question about
10 where there is a discharge, there is no question that
11 Petitioner discharges these pollutants to these rivers,
12 so the only question for this enforcement proceeding is
13 where to measure Petitioner's discharges for purposes of
14 liability.

15 JUSTICE KENNEDY: Why is there no -- where
16 do I look to find out that the district is making a
17 discharge of polluted water, other than under the Ninth
18 Circuit's theory that it's in the river itself?

19 MR. COLANGELO: Two places, Your Honor.
20 First is that it's a premise for the permit itself. So
21 if you look at page JA 55, it says the Petitioner
22 discharges stormwater into these rivers. And then the
23 very next paragraph shows that the Petitioner has done
24 an assessment of the pollutants that are typically in
25 its discharges, and it lists the ones that are now in

1 violation here.

2 So the permit, it didn't -- it came out of
3 this administrative process, and one of the elements --

4 JUSTICE KENNEDY: So is your theory that, if
5 the district is permitted to -- on a scale of 1 to 10,
6 to discharge up to 2, but that if the monitoring station
7 in the river shows an 8, then it is automatically liable
8 for the increase, even though other dischargers might
9 have made this?

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

11 JUSTICE KENNEDY: I don't get that from what
12 you have read. I've looked at --

13 MR. COLANGELO: Your Honor, because --

14 JUSTICE KENNEDY: -- the text you've read and
15 it looks to me like it's permittee by permittee.

16 MR. COLANGELO: It says that the MS4 is in
17 violation, that's correct. But then it says each
18 permittee must, when an exceedance is detected, take
19 these steps. So here, what they have failed to do is
20 take the necessary steps to apportion responsibility
21 among the multiple contributors. The second place, just
22 to finish on the -- on the proof that they discharge --

23 JUSTICE SCALIA: Finish that. So what's the
24 consequence of that?

25 MR. COLANGELO: I'm sorry?

1 JUSTICE SCALIA: Therefore, each one of them
2 is liable for all of it?

3 MR. COLANGELO: No, no, Your Honor. No.
4 Each one is liable for what they put in and bears the
5 burden to demonstrate and limit what it puts in. That's
6 explicit in the permit.

7 JUSTICE SCALIA: But they haven't done so.
8 So what?

9 MR. COLANGELO: So that's a permit
10 violation, and result is that this pollution continues
11 year after year after year, when the point of the permit
12 and the point of the Clean Water Act was to eliminate
13 what everybody agrees is the biggest source of water
14 pollution in Southern California. And this --

15 JUSTICE KENNEDY: So if each permittee is
16 allowed to put in a 2, but one permittee puts in an 8;
17 then both permittees are liable?

18 MR. COLANGELO: Correct, Your Honor,
19 unless -- because those facts are not known at the time
20 the violation is detected.

21 JUSTICE KENNEDY: No, no, we now know the
22 facts because it's the hypothetical.

23 MR. COLANGELO: Okay. So if the permittee
24 has done its own monitoring, in addition to what the
25 permit requires, and can demonstrate that it did not put

1 anything in, then it is not liable. If not, then yes.
2 Two dischargers into the same river who agree in advance
3 to be measured by a single monitoring station in the
4 river are liable for what's measured there, and then
5 they sort it out.

6 And what -- Congress set up a regime that
7 would allow for system-wide and jurisdiction-wide
8 permits precisely because this problem was so
9 complicated.

10 CHIEF JUSTICE ROBERTS: Are the
11 provisions -- excuse me, the provisions we've been
12 talking about, the three that you cited and the one that
13 you're -- are they boilerplate? Do they show up in every
14 typical stormwater permit?

15 MR. COLANGELO: Well, 109 -- the fact that
16 the permittees must conduct all monitoring to
17 demonstrate compliance, if "boilerplate" means that they
18 are in all permits, then, yes, because that's a
19 requirement of EPA regulations.

20 CHIEF JUSTICE ROBERTS: Yes. What about the
21 one that says each permittee is responsible only for a
22 discharge for which it is the operator?

23 MR. COLANGELO: That's from a EPA
24 regulation, too, yes. That's in the definition of
25 "co-permittee" at 122.2; so, yes, that's also standard

1 in system-wide permits.

2 To go back to the earlier question about
3 where there is a discharge, the district court found,
4 and this is undisputed, at Petition Appendix 117, the
5 permit admits -- the permittee, Petitioner, admits that
6 it is discharging these pollutants, the ones measured in
7 violation, to these rivers. So what we have is no
8 question, no dispute that they discharged these
9 pollutants, a monitoring system included in the permit
10 that the State court upheld against Petitioner's
11 challenge, showing that those limits have been exceeded.

12 JUSTICE BREYER: Your basic argument is
13 this permit requires you, L.A. County, to do monitoring,
14 to decide if you're violating it. You chose this
15 system, then common sense suggests you're doing it. You
16 struck out twice with that argument --

17 MR. COLANGELO: Yes.

18 JUSTICE BREYER: -- in the other two rivers,
19 and now, you're going to go back if we permit it, and
20 we want to make the argument and tell the Ninth
21 Circuit, three times and you're out; in this case, hold
22 the opposite.

23 MR. COLANGELO: Well -- yes. I'm not sure I
24 would say we struck out, Your Honor; the --

25 JUSTICE BREYER: That's what you want us --

1 I understand it.

2 (Laughter.)

3 MR. COLANGELO: But correct, the lower court
4 did not -- neither lower court accepted this argument
5 fully. The Ninth Circuit did agree that all permits
6 must include compliance monitoring, but it said you need
7 a little more here. And we think that was improper
8 because you can't add terms to the permit once it's been
9 settled.

10 And there was an earlier question, Justice
11 Breyer, about could we sample from an individual
12 outfall, could we show more? The problem with that is
13 that it would prove nothing. The Petitioner has said,
14 just sample from one outfall, one of our outfalls. We
15 alleged 140 violations for a dozen different pollutants
16 over a 5-year period. So sampling from a single outfall
17 as an evidentiary matter would be utterly meaningless.

18 JUSTICE BREYER: Couldn't you get some
19 expert who understands --

20 MR. COLANGELO: Well, we did, Your Honor, in
21 district court as an alternative theory have an expert
22 who said all of this came from them. The district court
23 did not address that and we didn't appeal. The appeal
24 was limited just to this legal issue.

25 JUSTICE SCALIA: I don't understand why you

1 didn't cross-appeal on -- on this theory that -- that
2 the lower court rejected.

3 MR. COLANGELO: Because, Your Honor, we were
4 satisfied with the judgment; and that's the rule. A
5 respondent who is satisfied does not need to
6 cross-appeal, unless it is --

7 JUSTICE SCALIA: I didn't say you need to.
8 I didn't say you needed to. But I -- I would normally
9 have done it, just to be sure I had that arrow in my
10 quiver and that it would not be argued, as it will be
11 here, that this would be expanding the judgment below.

12 MR. COLANGELO: And the reason it would not
13 be expanding the judgment below is that we are on the
14 opposite side of what happened in Kent. To rule in our
15 favor on this argument would just leave untouched two
16 claims on which we didn't prevail.

17 We'd get no further relief on those. It's
18 like two co-plaintiffs in district court who both lose
19 identical claims. One appeals, and the other doesn't.
20 The one who appeals wins a reversal. That creates an
21 inconsistency, two similarly situated plaintiffs, one
22 has a valid claim, one no longer does. But that's the
23 consequence of our failing to cross-petition.

24 JUSTICE SOTOMAYOR: Do we have -- I just
25 don't remember now. Do we have a circuit split on thi

1 issue of whether a permit in a situation like this would
2 impose liability on all permittees?

3 MR. COLANGELO: No. No. There is no - I
4 don't know of any other circuit court who has
5 addressed -- that has addressed this question.

6 And let me speak to -- to the issue of
7 additional monitoring, putting the burden on plaintiffs
8 to conduct additional monitoring. The problem is it
9 creates a complicated factual dispute for district
10 courts resolve -- to resolve, when that was exactly what
11 Congress wanted to eliminate.

12 When Congress adopted this permit program in
13 the Clean Water Act and then amended it to bring
14 municipal stormwater discharges under the program,
15 Congress said, we do not want district courts to be the
16 forum for sorting out all of these complicated factual
17 issues.

18 JUSTICE BREYER: I see. What do you think
19 of the government's point? They are telling us, just
20 write what you usually write, and then you can go make
21 all your arguments, see what they do. Does that satisfy
22 you?

23 MR. COLANGELO: Your Honor, we would be most
24 satisfied with an affirmance on the grounds we have
25 presented. If the Court vacates, we would be satisfied

1 with that, too, and then we would go back to the
2 district --

3 JUSTICE SCALIA: What if this panel found -
4 found for you on the ground that they used, they will
5 surely find for you on this other ground, which --

6 (Laughter.)

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

8 JUSTICE SCALIA: -- which has at least an
9 inkling of plausibility.

10 MR. COLANGELO: Thank you, Your Honor.

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Coates, you have 4 minutes remaining.

14 REBUTTAL ARGUMENT OF TIMOTHY T. COATES

15 ON BEHALF OF THE PETITIONER

16 MR. COATES: Thank you, Your Honor.

17 To the cross-appeal issue, the cases that we
18 cite talk about the Court's prudential limitation on
19 deciding questions that are not preserved by
20 cross-petition. And I depart from my learned opponent,
21 Mr. Colangelo, on that point as to what the Court's
22 cases say. We cite the Northwest Airlines v. County of
23 Kent case, and that is a case where, in fact, the
24 respondent was not seeking to change the judgment below.
25 They did not cross-petition. They were just trying to

1 keep what they had.

2 And the Court said we are not going to reach
3 that issue because, if we buy the fact that there is in
4 fact no private right of action, the effect of that is
5 to essentially change the underlying judgment --

6 JUSTICE BREYER: Let me ask a quick
7 question.

8 MR. COATES: Sure.

9 JUSTICE BREYER: Does it satisfy you if we
10 just write in the judgment what you -- we usually write,
11 and then you all can argue what it means below? What
12 about that? Does that satisfy? Or do you want us to
13 write something special?

14 (Laughter.)

15 MR. COATES: It -- it's -- it's acceptable
16 because a reversal is always better than an affirmance.
17 But talking about what the Court decides and what's left
18 in the case, I think it is a case where the Court
19 reviews what the Ninth Circuit actually decided, what is
20 actually before it, and what is properly remaining in
21 the case because we don't believe the cross-appeal issue
22 is here.

23 And that leads, I think, to reversing the
24 Ninth Circuit because the district is entitled to
25 summary judgment on these two river claims. And I think

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

2 And I call the Court's attention to another
3 case we cited on the cross-appeal issue. It's one of
4 the NLRB cases, the -- the Express Publication case.
5 And it makes it very clear there, that the respondent
6 was just trying to hang on so much of what was good
7 about the order as he could keep and was not seeking to
8 change anything. And, again, the Court said no.

9 It basically undermines the entire basis for
10 the --

11 JUSTICE SCALIA: Did we use our usual
12 language, and did it go back, and the -- and the court
13 of appeals considered --

14 MR. COATES: I think, in one of the cases,
15 the Court --

16 JUSTICE SCALIA: -- considered the issue we
17 had refused to consider?

18 MR. COATES: In one of the cases, the Court
19 simply affirmed, and so it didn't go anywhere.

20 JUSTICE SCALIA: Okay.

21 MR. COATES: But --

22 JUSTICE SCALIA: Don't we have two -- I
23 don't know that we do this all the time. When we expect
24 them to keep the case and do something different, don't
25 we usually vacate and remand, rather than reverse?

1 MR. COATES: Well, I do know that, in the
2 context of a lot of the Court's opinions, the Court will
3 specify that judgment be granted in terms of a party.

4 I know the qualified immunity cases, you
5 find someone's entitled to qualified immunity, and it
6 comes up on a summary judgment, the reversal is -- to
7 the Ninth Circuit. And I've seen both languages used,
8 but it's plain, from the text of the opinion, the
9 judgment is to be entered in favor of that party.

10 And, again, I think that's appropriate here.
11 My opponent suggests and the government suggests, again,
12 that, let's go back to the Ninth Circuit and let them
13 consider this monitoring argument. They considered it.
14 In fact, they even considered the use of contract terms
15 that -- that they urged them to consider again.

16 It's already rejected that claim with
17 respect to these two rivers that are in front of the
18 Court. It's rejected it with respect to Malibu Creek
19 and Santa Clara River, which is not in front of the
20 Court. They even accepted it with respect to an entire
21 different party with County of Los Angeles --

22 JUSTICE SCALIA: But they might change their
23 mind now. They might change their mind.

24 MR. COATES: It would be a very odd judgment
25 because you'd have two claims that are -- continue to be

1 dismissed that are not properly before any court. Those
2 close -- those are closed. And you have another party
3 out of the case on the very ground that the Ninth
4 Circuit rejected in the initial opinion.

5 A sort of remand for some consideration of
6 an issue that's already spoken on just doesn't seem to
7 make sense and invites the very sort of kind of
8 jurisdictional confusion that, I think, leads the Court,
9 for prudential reasons, not to consider these things
10 unless there's a cross-petition.

11 I think that's why this is kind of a great
12 example of why prudential reasons say you should not
13 consider it.

14 CHIEF JUSTICE ROBERTS: Well, I understand,
15 and you do cite a lot of cases for that, but I can't
16 figure out what sense it makes. I mean, if you're
17 willing to give up Santa Clara and Malibu, you're --
18 you're safe there, and that's the only thing you've won.
19 Why does it -- how does that make sense?

20 MR. COATES: Well, the Court does it for two
21 reasons. It does it as a prudential matter because it
22 does look odd to affirm on -- to make a decision in this
23 Court on a ground that essentially repudiates the lower
24 court decision. It does it for prudential reasons.

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

1 which basically says the Court has the jurisdiction to
2 do that -- when someone abandons the piecemeal claim --
3 is cited only once in this context after that, and
4 that's in the United States v. ITT Continental Baking
5 case, 420 U.S. 223, footnote 2.

6 And the court gives it a "but-see" for the
7 proposition that you have the jurisdiction to do it.
8 But then describes this exact situation and says, for
9 prudential reasons, we don't do it because it undermines
10 our cert jurisdiction, particularly if resolution of
11 that issue is highly fact-specific -- the one they are
12 trying to bring up -- and it would really foreclose
13 having to even decide this cert issue because you
14 wouldn't get to it.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

17 (Whereupon, at 12:12 p.m., the case in the
18 above-entitled matter was submitted.)

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