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I. Introduction

It is a wonder that *Los Angeles County Flood Control District v. Natural Resources Defense Council*[1] found its way to the Supreme Court. Despite some inconsistencies in the Ninth Circuit's opinion, specifically in its application of *South Florida Water Management District v. Miccosukee Tribe of Indians*,[2] all parties were surprised when the Court granted certiorari on the *Miccosukee* question alone. Even before oral argument, *Los Angeles County* was dubbed, "A Clean Water Act question no one cares to debate."[3]

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1. 133 S. Ct. 710 (2013).

2. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 103–05 (2004).

3. Kevin Russell, *Argument Preview: A Clean Water Act Question No One Cares to Debate*, SCOTUSBLOG (Dec. 3, 2012, 2:32 PM), http://www.scotusblog.com/2012/12/argument-preview-a-clean-water-act-question-no-one-cares-to-debate/.

This casual treatment, however, belies the actual significance of this case. Beneath the *Miccosukee* issue[4] was a broader question regarding liability under the Clean Water Act ("CWA"). In the lower courts, the Natural Resources Defense Council ("NRDC" or Respondent) argued that the Los Angeles County Flood Control District's (the "District" or Petitioner) monitoring results proved, as a matter of law, that the District was liable under its permit. The District argued that, although the monitoring results proved that pollutants had exceeded the permissible levels of the permit, the results did not establish who was responsible for the excess pollution and, therefore, the District could not be held liable. In short, the parties were arguing over the significance and enforceability of National Pollutant Discharge Elimination System ("NPDES") permits, which are the backbone of the CWA.

The Supreme Court was not interested in the significance and enforceability of NPDES permits. Instead, the Court chose to hear the *Miccosukee* issue, a question on which all parties—petitioner, respondent, and the United States, as *amicus curiae*—agreed.

Following this surprise, the District and NRDC were challenged to figure out a strategy that addressed the narrow question asked by the Supreme Court, yet still win on the liability issue that the Court declined to hear. For the District, the goal was to extend the Court's inevitably favorable ruling on the *Miccosukee* issue to include a finding of no liability. Remand was undesirable for the District. They did not want to give NRDC another opportunity to retell the confusing facts of the case, which were fairly damaging to the District. NRDC's goal was to direct the Supreme Court towards a narrow decision: either affirm the Ninth Circuit's favorable judgment or remand the liability question back to the Ninth Circuit, where they would have a favorable, though confused, panel of judges.

Both parties took their cue from the struggle the lower courts exhibited and centered their strategies on presenting the facts. The District attempted to capitalize on the complexities, while NRDC went to great lengths to simplify. On the surface, the case involved a question of law (i.e., interpreting *Miccosukee*), but the true battle was helping the justices understand the complex facts and science of the case.

In this way, *Los Angeles County* is a perfect example of a difficulty that underlies many environmental cases. Environmental facts are often incredibly complex and based on science that even the Ph.Ds among us struggle to comprehend. And if this were not enough, these facts are siphoned through environmental laws that are no walk in the park themselves.

4. The question in *Miccosukee* involved whether a "discharge of pollutants" occurs when polluted water flows from one portion of a river into another. *Miccosukee*, 541 U.S. at 105.

Environmental laws are rife with jargon and compound terms (e.g., acronyms such as NAAQS and NPDES).[5] Judges, who often have little scientific background and struggle with such terminology, have described these laws as a "symphony of acronyms,"[6] an "alphabet soup,"[7] and "a feast of officialese."[8] The Ninth Circuit appropriately captured this complexity when it wrote, "this case involves the FWPCA, that is, the CWA, and particularly ICSs, issued pursuant to WQSs, which may affect the NPDES permits issued to WTPs."[9]

While this judicial comment can be taken tongue in cheek, there is a greater message, which advocates would be wise to remember: environmental law is a difficult field for judges. As a clearly frustrated D.C. Circuit once reminded the litigants in an environmental case, "The first rule of advocacy is to make your argument understandable."[10]

It is easy for litigants to forget this obvious rule when they have internalized the issues after spending months, if not years, on the case. They have steeped in the intricacies of the facts and the law, and are likely specialists in the environmental field. In contrast, judges, who are charged with deciding numerous cases touching on a wide variety of legal issues as quickly as possible, are not similarly situated.

In *Los Angeles County*, the Ninth Circuit reminded NRDC of this disparity when its decision misapplied the law because the court misunderstood the facts. While the favorable judgment pleased NRDC, it was a muted victory that highlighted the challenges environmental law advocates face.

The Ninth Circuit even admitted that it did not fully understand the facts: "Plaintiffs have not endeavored to provide the Court with a map or cogent explanation of the interworkings or connections of this complicated drainage system."[11] NRDC took this comment seriously and repackaged its presentation of the facts to the Supreme Court, as well as on remand in the Ninth Circuit. On the other side, the District attempted to capitalize on the convoluted facts that the Ninth Circuit misunderstood.

The battle fought in the Supreme Court should never have occurred because the facts of the case were never in dispute and the parties agreed

5. *See* Richard Lazarus, *Complex Laws Can't Spell Judicial Respect*, ENVTL. F., Jan.-Feb. 2005, at 8.

6. N. Shore Gas Co. v. EPA, 930 F.2d 1239, 1242 (7th Cir. 1991).

7. McEvoy v. IEI Barge Servs., Inc., 622 F.3d 671, 674 (7th Cir. 2010).

8. Simmons v. U.S. Army Corps of Eng'rs., 120 F.3d 664, 666 (7th Cir. 1997).

9. Sierra Club v. EPA, 995 F.2d 1478, 1480 n.1 (9th Cir. 1993).

10. Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 990 (D.C. Cir. 1997).

11. Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles, 673 F.3d 880, 901 (9th Cir. 2011), *rev'd sub nom.*, Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc., 133 S. Ct. 710 (2013).

on the answer to the M*iccosukee* question. However, the case serves as a reminder to environmental advocates that the fact section is a critical first hurdle to achieving a favorable judgment.

II. Background Facts

L*os* A*ngeles* C*ounty* originally centered on liability for violating the NPDES permit of the municipal separate storm sewer system ("MS4"). An MS4 is a publicly owned collection of storm drains, pipes, outfalls, and other infrastructure that collects stormwater runoff and discharges it into navigable waters without treatment.[12] The MS4 operated by the District contained "thousands of discharge points, known as outfalls."[13] These outfalls discharge pollutants collected in stormwater (e.g., fecal bacteria, aluminum, mercury, and lead) into rivers that ultimately empty into the Pacific Ocean.[14]

Under the CWA, MS4s are "point sources"[15] and require the operator (in this case the District) to obtain an NPDES permit.[16] Any noncompliance with the terms of the NPDES permit is a violation of the CWA.[17] The parties in this case agreed: (1) the District's MS4s were point sources and (2) the MS4s did not discharge pollutants, as defined in the CWA,[18] into the rivers.[19] Rather, the argument in the lower courts was over the precise amount of, and liability for, pollutant levels at the outfalls.

The CAA allows municipalities to receive MS4 discharge permits on a system- or jurisdiction-wide basis when a number of entities operate in an interconnected sewer system.[20] This allows for a more efficient allocation of

12. 40 C.F.R. § 122.26(b)(8) (2012).

13. Brief for Respondents at 4, L*os* A*ngeles* C*nty.*, 133 S. Ct. 710 (2013) (No. 11-460), 2012 WL 5388769, at *4.

14. I*d.*; *see also* 64 Fed. Reg. 68,722, 68,725 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, 124).

15. 33 U.S.C. § 1362(14) (2012) (defining "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged").

16. 33 U.S.C. §§ 1342(a), (k); 40 C.F.R. § 122.26(a).

17. 33 U.S.C. § 1342(k).

18. 33 U.S.C. § 1362(12) (defining "discharge of pollutants," in relevant part, as "any addition of any pollutant to navigable waters from any point source").

19. L*os* A*ngeles* C*nty.*, 133 S. Ct. at 712–13; Brief for Respondents, *supra* note 13, at 4.

20. 33 U.S.C. §§ 1342(p)(2)(c), (p)(3)(b)(i).

permits, as only one permit is needed for an interconnected MS4, rather than a permit for each municipality.[21] Considering that the District received its NPDES permit only after 80,000 pages of administrative records, testimony of twenty-nine witnesses, and over fifty public meetings,[22] it is clear that approving a permit is a complicated, time-consuming process. The District, the County of Los Angeles, and the eighty-four connected municipalities received a jurisdiction-wide permit.[23] However, the District operated more MS4s than all the other municipalities combined.[24]

Monitoring stations are distinct from the MS4s. In order to obtain a MS4 permit, a discharger must prove that it will monitor for compliance with the permit conditions.[25] The monitoring must be of a "representative" sample of the discharges being regulated.[26] This monitoring may be done at "instream stations," instead of at the MS4 outfalls.[27] In this case, the monitoring occurred at instream stations, where the river had been modified with a concrete channel for flood control reasons.[28]

III. Ninth Circuit Decision

The Ninth Circuit confused where the MS4 and the instream monitoring stations were located in relation to each other.[29] In reality, the MS4 discharge points were located upstream of the monitoring stations, which allowed them to sample pollutants discharged from the upstream MS4s. However, the Ninth Circuit believed that the MS4s discharge points were located downstream of the monitoring stations.

The Ninth Circuit's misunderstanding of the facts undoubtedly affected the outcome of the case. The court's confusion is plainly evidenced in its opinion: "[W]hen the pollutants were detected, they had *not* yet exited the point source [i.e., the MS4] into navigable water. . . . [T]here is no dispute

21. Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles, 673 F.3d 880, 894 (9th Cir. 2011) ("Congress put the NPDES permitting requirement at the municipal level to ease the burden of administering the program."). For example, the system-wide MS4 permit in question otherwise would have required eighty-six separate permits. *See* Brief of Petitioner at 10, *Los Angeles Cnty.*, 133 S. Ct. 710 (No. 11–460), 2012 WL 3945845, at *10.

22. Brief for Respondents, *supra* note 13, at 46–47.

23. *Natural Res. Def. Council*, 673 F.3d at 886.

24. Brief for Respondents, *supra* note 13, at 54.

25. 33 U.S.C. § 1311(h)(3).

26. *Id.*

27. *See* 40 C.F.R. § 122.26(d)(2)(iii)(D).

28. *Los Angeles Cnty.*, 133 S. Ct. at 712.

29. *See* Brief for Respondents, *supra* note 13, at 30.

that [the] MS4 eventually adds stormwater to [the rivers] . . . downstream from the Monitoring Stations."[30] In actuality, the pollutants were detected at the monitoring stations *after* they exited the MS4. Possibly compelled to hold the District responsible for the exceedances to which it at least partially contributed, the Ninth Circuit found the District liable for the discharges.[31]

If the locations of the monitoring stations were the only confusion, the Supreme Court most likely would not have granted certiorari. However, there has to be a "discharge" from a "point source" in order to find liability under the CWA. In holding that the District was liable for the exceedances, it reasoned that "[t]he discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located . . . and into the navigable waterways."[32] This strained attempt to apply the misunderstood facts within the CWA's framework led to a direct tension with *Miccosukee*, in which the Supreme Court held that merely transferring water from one portion of a water body into another does not constitute a discharge.[33]

IV. Advocacy Strategy

A. The District's Strategy

As all parties agreed, it was a foregone conclusion that the Supreme Court would find that the Ninth Circuit misapplied *Miccosukee*. Even though neither side truly cared about this issue, a favorable ruling for the District would cast doubt on the Ninth Circuit's entire decision, which had assigned liability for the discharges to the District. As such, the District's underlying strategy was to bootstrap its liability argument to the inevitable favorable decision on the *Miccosukee* question.

The District's strategy was not an easy task because the actual facts of the case did not implicate *Miccosukee*. The question of whether the MS4 contributed to the discharge of a pollutant became relevant only because the Ninth Circuit believed that the MS4s were downstream of the monitoring stations. Rather than clarifying this discrepancy, the District attempted to capitalize on it.

The District did not devote a single word in its briefs to explain that the Ninth Circuit misunderstood the facts. In fact, it repeatedly relied on the Ninth Circuit's mischaracterization of the facts to argue that the court

30. Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles, 673 F.3d 880, 899–900 (9th Cir. 2011) (emphasis added).

31. *See Id.* ("[T]he precise location of each outfall is ultimately irrelevant . . . .").

32. *Id.*

33. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 109 (2004).

misapplied the law.[34] By adopting the Ninth Circuit's version of the facts, the District implied that the court got the facts correct. The District continued this strategy at oral argument, repeatedly applying the Ninth Circuit's mistaken logic that the discharge took place at the monitoring site and not at the MS4.[35]

The District tried not only to confuse the facts but also to convolute the issue in the case. For example, in "Section D" of its brief, the District transitioned from the M*iccosukee* issue into the liability question mid-section. The section started a straight-forward M*iccosukee* argument: nothing in the legislative history of the CWA suggested that transferring water within the same water body constitutes an "addition" or "discharge."[36] Two paragraphs later, the argument pivoted to the liability issue, under the camouflage of congressional intent: "more fundamentally, in enacting the CWA, Congress generally intended that pollutants be controlled at the source whenever possible . . . . [I]mposition of liability on the entity maintaining the channel, does nothing to address the actual source of pollutants."[37] However the congressional intent referenced by the District was the general intent behind the entirety of the CWA, *not* the MS4 program specifically. At this point in its brief, the District abandoned its M*iccosukee* argument, spoke solely about liability, and rehashed its arguments from the lower courts.

Environmental cases are especially suitable for combining issues in such a manner. The complexity of the issues obscures the extent of the statutory text.[38] As such, the District went to great lengths to remind the Court that the issues were confusing.[39] In light of such complexity, the Court welcomed an easily digestible argument about congressional intent. While not all justices are eager to rely on congressional intent to understand a complex statute, such an argument was at least familiar to the Court. As the Supreme Court said in another Clean Water Act case, "[f]aced with such a

34. Brief of Petitioner, *supra* note 21, at 39 ("There is simply no support for the Ninth Circuit's statement that there may be a discharge from a point source under the CWA based solely on the fact that water has flowed from an improved 'man-made' portion of a river into a purportedly 'natural occurring' portion of the same river.").

35. Transcript of Oral Argument at 12–13, 19, Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc., 133 S. Ct. 710 (2013) (No. 11–460).

36. Brief of Petitioner, *supra* note 21, at 45.

37. I*d*. at 46–47.

38. S*ee*, *e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985) ("In determining the limits of its powers to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task . . . .").

39. Brief of Petitioner, *supra* note 21, at 50.

problem of defining the bounds of [an agency's] regulatory authority," it is appropriate to "look to the legislative history and underlying policies of its statutory grants of authority."[40]

The congressional intent argument essentially unmoored this case from a science-based factual dispute and brought it within the Court's comfort zone. Blending the *Miccosukee* argument with a liability argument based on congressional intent, the District painted the case as touching on liability in the hope that the Court would return an expansive ruling.

Similarly, the District devoted three pages of its opening brief to argue a broad theme of personal responsibility related to the liability issue.[41] The District portrayed itself as attempting to comply with a complicated permit and admitted to the Court that the permit stated, "Each Permittee is responsible . . . for a discharge for which it is the operator."[42] Yet, the monitoring results were simply too imprecise to apportion liability to any specific permittee. While NRDC could have engaged in more precise monitoring—as the district court requested[43]—to bolster its liability claim, the District lacked better information and simply could do no more.

The District's argument struck the conservative "personal responsibility" chord.[44] More importantly, it depicted NRDC as advocating that larger entities should be responsible for more than their "fair share," a sentiment that has not garnered much sympathy from the Roberts Court.[45] Thus, this Court has shown that it sympathizes with arguments similar to that of the District.

40. *Riverside Bayview Homes, Inc.*, 474 U.S. at 132.

41. Brief of Petitioner, *supra* note 21, at 48–50.

42. *Id.* at 10.

43. Transcript of Oral Argument, *supra* note 35, at 18.

44. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("[The Second Amendment] surely elevates above all other interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home." (emphasis added)); Clarence Thomas, Assoc. J., U.S. Sup. Ct., Personal Responsibility, Speech at Regent University (Sept. 10, 1996) *in* 12 REGENT U. L. REV. 317 (2000); John D. Ashcroft, *Justice Clarence Thomas: Reviving Restraint and Personal Responsibility*, 12 REGENT U. L. REV. 313 (2000).

45. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that requiring corporations to provide contraceptives or pay a fine was a substantial burden on religious exercise); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589–91 (2012) (rejecting the individual mandate of the Affordable Care Act under the commerce clause); *see also* EPA v. EME Homer City Generation, L.P. 134 S. Ct. 1584, 1615 (2014) (Scalia, J., dissenting) (arguing that states should only have to reduce air pollution in proportion to their emissions).

The true strength of the District's argument was that it presented a digestible thematic argument, which the Court could relate to. As such, the Court had an alternative to mucking around in the complexities. Although courts are tasked with handling complex cases, policy arguments frame the issue for the Court and help the justices understand the facts in a particular light. Such advocacy can be especially effective in environmental cases due to the complexity of the issues involved.

B. NRDC's Strategy

NRDC had a lot stacked against it. It was an environmental group defending a Ninth Circuit decision, which was based on a misreading of the facts and a misapplication of the law. These substantive weaknesses would be hard for anyone to overcome. To add insult to injury, the Roberts Court is well known for a lack of hospitality to environmental groups, especially in cases on appeal from the Ninth Circuit.[46]

NRDC knew it would lose on the *Miccosukee* issue. However, NRDC wanted the Court to limit its holding to the *Miccosukee* issue, thereby leaving the liability issue untouched. NRDC knew that any Supreme Court ruling on liability would not be as friendly as one from the Ninth Circuit on remand.

There were two issues that NRDC needed to clarify in order to prevail. First, that the liability issue was separate from the *Miccosukee* issue. Second, NRDC needed to explain the general facts of the case, in order to convince the Court that the Ninth Circuit misunderstood the facts. With clarified facts, NRDC hoped that the Court would remand the case, rather than reverse it.

With these goals in mind, NRDC began its case in a fascinating way. The opening line of NRDC's brief read, "Respondents agree with petitioner and the United States on the answer to the question presented by the petition: the transfer of water through a concrete channel within a single river does not constitute a discharge of pollutants from a point source under

46. *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013), *rev'g* 640 F.3d 1063 (9th Cir. 2011); Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008), *rev'g* 518 F.3d 658 (9th Cir. 2008); Summers v. Earth Island Inst., 555 U.S. 488 (2009), *rev'g in part* 490 F.3d 687 (9th Cir. 2007); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009), *rev'g* 486 F.3d 638 (9th Cir. 2007); *see also* Stephen M. Johnson, *The Roberts Court and the Environment*, 37 B.C. ENVTL. AFF. L. REV. 317 (2010); Jonathan H. Alder, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009); Richard Frank, *In the Supreme Court's Crosshairs: The Ninth Circuit's Environmental Jurisprudence*, LEGALPLANET (June 19, 2012), http://legal-planet.org/2012/06/19/in-the-supreme-courts-crosshairs-the-ninth-circuits-environmental-jurisprudence.

the Clean Water Act."[47] In first sentence of the brief, NRDC had conceded the question presented in the case.

The second sentence was no slouch either: "The answer to the question petitioner presents, however, has no bearing on petitioner's liability and does not resolve this case, because petitioner does not simply transfer water within a single river."[48] In two sentences, NRDC separated the *Miccosukee* issue from the liability issue, which the District had tried to combine.

NRDC placed both the *Miccosukee* issue and the liability issue in the "Questions Presented" section, even though the Court had granted certiorari on only one[49] and repeated this refrain throughout its brief. NRDC's strategy contrasted with the District's approach, which included only the *Miccosukee* question in their "Questions Presented" section but subtly weaved in the liability issue.[50]

Beyond clarifying that two issues were at play, NRDC emphasized the fact section. While it still had to slough through the MS4 and NPDES permitting explanation, NRDC placed these complicated facts in an understandable framework. NRDC started its statement of the case with the background on the necessity of MS4 permits: "Stormwater runoff . . . is now the principal source of water pollution in California. . . . [S]tormwater runoff harm[s] human health. Illness rates increase significantly among those who swim at beaches near stormwater discharge points."[51]

Opening the brief in this way, NRDC humanized an otherwise "mind-numbing"[52] topic. As the Court struggled to understand the inner-workings of the CWA, the MS4, the location of the discharge in relation to the monitoring stations, and whether the sampling at those stations was representative of the discharges' pollution levels, the justices could always fall back on the easily understandable and persuasive human health concerns.

Environmental groups often lose the forest for the trees. By focusing on the intricacies of the "legislative labyrinth" of environmental law,[53] advocates fail to emphasize what is truly important about the topic. Federal environmental laws were created in response to rivers on fire and silent

47. Brief for Respondents, *supra* note 13, at 1.

48. I*d*.

49. I*d*. at i.

50. Brief of Petitioner, *supra* note 21, at i.

51. Brief for Respondents, *supra* note 13, at 3 (citation omitted).

52. C*f*. Am. Mining Congress v. EPA, 824 F.2d 1177, 1189 (D.C. Cir. 1987) (describing an explanation of the Resource Conservation and Recovery Act as "mind-numbing").

53. S*ee* Citizens Coal Council v. EPA, 385 F.3d 969, 972 (6th Cir. 2004).

springs, not delivered from on high. By forgetting to put the facts in a context with which all sides can sympathize, environmental advocates lose their case amidst tortured explanations of complicated and unsettled science.

As the Ninth Circuit's decision reminded NRDC, advocates should always remember their audience. Beyond explaining the adverse human health and environmental effects of the pollution, NRDC explained to the Court that the associated high illness rates and beach closures cost the region "tens of millions of dollars."[54] Courts are better able to understand such real life implications of a proble, rather than the underlying science.

Simultaneously, NRDC's focus on the larger themes of environmental law undermined the District's "congressional intent" reasoning. To the degree that congressional intent can be gleaned from the ambiguous sections of environmental statutes, Congress' intent was more likely to protect the environment than to create loopholes for polluters to escape liability. As NRDC pointed out, when Congress intends to create exemptions, it does so explicitly.[55]

NRDC also heeded the Ninth Circuit's frustration and attached maps of the relevant MS4s to its brief in order to further clarify the facts.[56] These maps illustrated exactly where the MS4s were located in relation to the monitoring stations. The maps also showed that the MS4, which is literally thousands of miles long, was not a part of the rivers in question. By clearly illustrating that the discharges were coming from outside the rivers, NRDC was able to highlight that M*iccosukee* was not the answer to this case,

Clarification of the facts, with which it was unsuccessful in the lower courts, guided NRDC's substantive arguments. Even if NRDC's explanation of the facts to the lower courts was satisfactory, advocates should remember that sometimes, clear explanations of complex systems are not available. NRDC remembered the "first rule of advocacy"[57] and made its arguments understandable: first, by severing the two questions that the petitioner blended into one, attaching maps to its brief, and, second, by framing the case within the larger theme of human and economic health.

54. Brief for Respondents, *supra* note 13, at 3.

55. I*d*. at 40.

56. I*d*. at 17a, 18a.

57. S*ee supra* text accompanying note 9.

V. The Supreme Court's Decision

As one commentator noted, "The Court unanimously agrees with everyone else."[58] In an opinion that barely reached five pages, the unanimous Court held "that the parties correctly answered the sole question presented. . . . [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."[59] In short, the Court reiterated the *Miccosukee* holding.

More importantly, the Supreme Court, refusing to go into the liability issue, stated that "[i]t is not embraced within, or even touched by, the narrow question on which we granted certiorari. We therefore do not address, and indicate no opinion on, the issue the NRDC . . . seek[s] to substitute for the question we took up for review."[60]

While the Court's comment seems like an admonishment of NRDC for expressly arguing the liability question, it is also a recognition that NRDC's strategy won the day. NRDC successfully severed the two arguments, showing the Court that it did not need to reach further than a simple restatement of *Miccosukee*. NRDC's intense focus on the facts and inclusion of maps in its brief proved to be a strong strategy that helped the Court recognize that the Ninth Circuit got the facts wrong.[61]

VI. Lessons Learned

An old adage, which is perhaps most accurate for environmental law, states that many more cases are lost than won. Spending fifty pages parsing the minutiae of applying difficult law to complex science is not an effective strategy. Rather, shifting the focus—from the complex, small details to the comprehensible, big picture—is a strategy that will hold a court's attention and may even win its favor.

Lawyers and judges do not enter the field of law to engage in technical discussions over statutory construction. Many would rather answer the larger theoretical questions that form the foundation of the legal profession, such as the role that laws and government should play in society. Environmental law, which asks society to balance its interests in human and

58. Kevin Russell, *Opinion Analysis: The Court Unanimously Agrees with Everyone Else*, SCOTUSBLOG (Jan. 10, 2013, 10:14 AM), http://www.scotusblog.com/2013/01/opinion-analysis-the-court-unanimously-agrees-with-everyone-else/.

59. Los Angeles Cnty. Flood Dist. v. Natural Res. Def. Council, Inc., 133 S. Ct. 710, 712–13 (2013).

60. *Id.* at 714.

61. *See id* at 713 n.1 ("Whatever the source of the Court of Appeals' error, all parties agree that the court's analysis was erroneous.").

environmental health against encouraging development and the free market, is at the forefront of such questions.

Environmental advocates would be wise to anchor their complex facts in the underlying purpose of the law. It is just as important to point out the ten percent increase in asthma rates nationwide in the past decade[62] as it is to argue how the term "modification" should be understood in the context of regulating polluting facilities under the Clean Air Act.[63] In truth, society only cares about the latter issue because of the former. Advocates should not forget what animates our laws and what gives them meaning.

Similarly, advocates should remember that judges are not scientists. They do not have a firm handle on whether certain types of wetlands will impact navigable waters. Leaving their decision solely to statutory construction is a disservice to the argument, to the judge, to the environment, and to the law itself.

NRDC's advocacy before the Supreme Court in *Los Angeles County* is a great example of an environmental group breathing life into an otherwise "mind-numbing" topic. Strategies such as including maps and figures in an appendix should be utilized more often. In the context of environmental law cases, the best way to win a complex argument is to make it simple.

62. JEANNE E. MOORMAN ET AL., U.S. DEP'T OF HEALTH & HUMAN SERV. NATIONAL SURVEILLANCE OF ASTHMA: UNITED STATES, 2001–2010, at 23 (2012), http://www.cdc.gov/nchs/data/series/sr_03/sr03_035.pdf.

63. *See* Envtl. Def. v. Duke Energy Corp., 549 U.S. 561 (2007).