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Facts Can Be Stubborn: The Importance of the Fact Section in Environmental Law,

I. Introduction

It is a wonder that this case found its way to the Supreme Court. In spite of some inconsistencies in the Ninth Circuit’s opinion, specifically in its application of *South Florida Water Management District v. Miccosukee Tribe of Indians*,¹ all sides were surprised when certiorari was granted on the Miccosukee question alone. Even before oral argument, this case was dubbed “A Clean Water Act question no one cares to debate.”²

But this belies the actual significance of this case. Beneath the Miccosukee issue (whether a “discharge of pollutants” occurs when polluted water flows from one portion of a river to another) 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 (District or petitioner) monitoring results proved, as a matter of law, that it was liable under its permit. The District argued that these results proved merely that there were permit exceedances, but did not prove who was responsible for them. Therefore, they could not be held liable. In short, the sides were arguing over the significance and enforceability of National Pollutant Discharge Elimination System (NPDES) permits, which is the backbone of the CWA.

¹ 541 U.S. 95 (2004).
Yet, that is not the question the Supreme Court granted certiorari to answer. Instead, they chose to hear a question in which all parties – petitioner, respondent, the United States as amicus – agreed the answer was “No.” As such, it is unclear why the Supreme Court got involved in this case in the first place.

The strategy, then, for the District and NRDC was figuring out how to argue within 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 Miccosukee to encompass a finding of no liability. Remand was not enough for the District, as they did not want the case back in the Ninth Circuit, giving NRDC another chance to re-explain a fairly damning, albeit confusing, set of facts. For NRDC the goal was to hem the Supreme Court’s decision as narrowly as possible, so as to either leave the Ninth Circuit’s favorable judgment undisturbed, or to remand the liability question back to the Ninth Circuit where NRDC would try to re-explain the facts to an obviously confused, though favorable panel of judges.

Taking their cue from the struggle the lower courts exhibited, a significant part of both sides’ strategy at the Supreme Court was in presenting the facts. The District attempted to capitalize on the complexities, while the NRDC went to great lengths to simplify. So while the Supreme Court case on the surface was a question of law, i.e. interpreting Miccosukee, the true battle was fought over presenting the facts.

In this way, L.A. County is a perfect example of a difficulty that underlies many environmental cases. The facts are often incredibly complex, and based on science that even the PhDs among us struggle to comprehend. And if this were not enough, the environmental laws that these facts are siphoned through are no walk in the park.
themselves. Quite the opposite, as should be expected from political compromises over intricate, ever-evolving science.

Environmental laws are rife with jargon and compound terms that are best left to acronyms like NAAQS and NPDES. This itself has become food for fodder, as these laws have been described as a “symphony of acronyms,”3 an “alphabet soup,”4 and “a feast of officialease”5 by the judges who, often with little scientific background, struggle to keep them straight. Symbolizing this state of affairs nicely, the Ninth Circuit once noted, “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.”6

While these judicial phrases can be taken tongue-in-cheek, there is a greater message here: this is a difficult field for judges, and advocates would be wise to remember that. As a clearly frustrated D.C. Circuit once reminded the litigants of an environmental case, “the first rule of advocacy is to make your argument understandable.”7

It is easy for litigants to forget this seemingly obvious rule, as they have likely worked on the case for months, if not years, before filing a complaint. They have steeped themselves in the intricacies of the facts and the law, and are likely specialists in the environmental field to begin with. But judges are not. They are charged with deciding numerous cases touching on a buffet of laws as quickly as possible.

3 North Shore Gas Co. v. EPA, 930 F.2d 1239, 1242 (7th Cir. 1991).
5 Id.
6 Sierra Club v. EPA, 995 F.2d 1478 n.1 (9th Cir. 1992).
In *L.A. County*, respondent NRDC was reminded of this when the Ninth Circuit handed down their decision, misapplying the law to a misunderstanding of the facts. While NRDC was surely pleased that it received a favorable judgment in the Ninth Circuit, this was a muted victory that spoke to a greater issue for environmental law advocates. Further, these mistakes paved the road for certiorari.

To be sure, the Ninth Circuit even admitted that it did not fully understand the facts (as much as a court admits this type of thing): “Plaintiffs have not endeavored to provide the Court with a map or cogent explanation of the inter-workings or connections of this complicated drainage system.”

NRDC took this comment seriously, as it completely altered is presentation of the facts at the Supreme Court (as well as on remand in the Ninth Circuit). And for its part, petitioner spent a good deal of time trying to capitalize on the convoluted facts that the Ninth Circuit tripped up on.

Thus, the battle fought in the Supreme Court was one that should never have occurred since the facts of the case were never actually in dispute. This case serves as a reminder to environmental advocates that the fact section is a critical first hurdle to achieving a favorable, appeal-proof, judgment.

**II. Background Facts**

This case centered around (or at least was meant to) who was liable for the NPDES permit violations for a municipal separate storm sewer system (MS4) (see alphabet soup). In short, an MS4 is a publicly-owned collection of storm drains, pipes, outfalls, and other infrastructure that collects stormwater runoff and discharges it into

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8 Natural Res. Def. Council v. L.A. County Flood Control Dist., 673 F.3d 880, 901 (9th Cir. 2011).
navigable waters without treatment. Petitioner operates an MS4 with thousands of discharge points, known as outfalls. These outfalls discharge the pollutants collected in stormwater (e.g. fecal bacteria, aluminum, mercury, lead) into rivers that ultimately empty into the Pacific Ocean. The two rivers at issue in this case are the Los Angeles River and San Gabriel River.

The MS4s themselves are “point sources” as understood in the CWA. A “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” It is not disputed in this case that the District’s MS4s were point sources that discharged pollutants into the Los Angeles and San Gabriel Rivers. The argument in the lower courts was over the precise amount of pollutants that were being discharged at these outfalls and who was responsible for them.

As with almost all point source discharges, the operator of the MS4 (in this case the District) needs an NPDES permit to discharge legally. The District had a permit. A violation of the NPDES permit is a violation of the CWA.

Congress allows for municipalities to receive MS4 discharge permits on a system-or jurisdiction-wide basis when a number of entities operate an interconnected sewer system. This allows for a more efficient allocation of permits, as only one permit will be needed for an interconnected MS4, rather than a permit for each municipality (which in this case would have meant 86 separate permits). Considering that this permit was only accepted after 80,000 pages of an administrative record, testimony of twenty-nine witnesses, and over fifty public meetings, it is clear that passing a permit is a complicated, time-consuming process. The District here, as well as the 85 connected
municipalities, received a jurisdiction-wide permit. The District, though, operated more of the MS4s than all the other municipalities combined.

Distinct from the MS4 are the monitoring stations. In order to obtain an MS4 permit, a discharger must prove that it will monitor compliance and noncompliance with the permit conditions. The monitoring must be of a “representative” sample of the discharges being regulated. This monitoring may be done at “instream stations” instead of at the MS4 outfalls. In this particular case, the monitoring occurred at instream stations, where the river had been modified with a concrete channel for flood control reasons.

III. Ninth Circuit Decision

The Ninth Circuit was confused over where the MS4 and the instream monitoring stations were located in relation to each other. In reality, the MS4 discharge points were located upstream of the monitoring stations, so that when the water passed through a monitoring station, the sampling detected the level of pollutants discharged from the MS4. The Ninth Circuit, however, believed that the MS4s were located downstream of the monitoring station.

This led the court to explain, “when the pollutants were detected, they had not yet exited the point source [the MS4] into navigable water.”\(^9\) The court also said, “[T]he MS4 eventually adds stormwater to [the rivers] downstream from the Monitoring Stations.”\(^10\)

This was a misreading of the facts. The pollutants were actually detected at the monitoring stations after they exited the MS4. Seemingly compelled to hold the District

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\(^9\) NRDC v. L.A. County, 673 F.3d at 899.
\(^{10}\) Id. at 900.
responsible for the exceedances that it undoubtedly contributed to, the Ninth Circuit still found the District liable for the discharges.\footnote{Id. ("[T]he precise location of each outfall is ultimately irrelevant . . . ").}

If this were the only confusion, the case likely would not have made it to the Supreme Court. However, the Ninth Circuit’s phrase: “The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways,”\footnote{Id.} was its ultimate undoing.

In order for there to be liability under the CWA, the Ninth Circuit needed to find a “discharge” from a “point source.” But this strained attempt to apply the misunderstood facts within the CWA’s framework led to a direct tension with \textit{Miccosukee}, which holds that merely transferring water from one portion of a water body into another does not constitute a discharge.\footnote{\textit{Miccosukee}, 541 U.S. at 109.}

\section*{Advocacy Strategy}

\subsection*{Petitioner’s Strategy}

All parties agreed that it was a foregone conclusion that the Supreme Court was going to find that the Ninth Circuit misapplied \textit{Miccosukee}. Even though neither side truly cared about this issue, this outcome would be more favorable to petitioner as it casted doubt on the Ninth Circuit’s entire decision, which found petitioner liable for the discharges. As such, petitioner’s underlying strategy was to bootstrap its liability argument to a favorable \textit{Miccosukee} decision.
But this was no easy task, as the actual facts do not implicate Miccosukee. This question was only raised because the Ninth Circuit believed that the MS4s were downstream of the monitoring stations. Rather than clarifying this fissure, petitioner attempted to capitalize on it.

Petitioner devoted not a word to explaining that the Ninth Circuit misunderstood the facts. In fact, petitioner repeatedly fell back on the Ninth Circuit’s characterization to explain that they misapplied the law. Implicit in the District’s adoption of the Ninth Circuit’s facts is that the court actually got the facts correct. Petitioner continues this strategy at oral argument, repeatedly applying the Ninth Circuit’s mistaken logic that the discharge is taking place at the monitoring site, not at the MS4.

Petitioner not only tries to confuse the facts, but also the issue in the case. In “Section D” of its brief, petitioner transitions from the Miccosukee argument into the liability one mid-section. Petitioner starts by arguing that nothing in the legislative history of the CWA suggests that transferring water within the same water body constitutes an “addition” or “discharge.” This is a straight Miccosukee argument. Two paragraphs later, petitioner says, “More fundamentally, in enacting the CWA, Congress generally intended that pollutants be controlled at the source whenever possible . . . . Imposition of liability on the entity maintaining the channel, does nothing to address the actual source of pollutants.” This was a pivot to liability, under the camouflage of “congressional intent.” The congressional intent petitioner speaks of, though, is the

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14 Brief for Petitioner (Petitioner Brief) 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.”).
16 Petitioner Brief at 45.
17 Id. at 46-47.
general intent behind the CWA as a whole, *not* the MS4 program specifically. Starting at this point in its brief, petitioner abandons its Miccosukee argument and speaks solely about liability, rehashing its arguments from the lower courts.

Environmental cases are especially ripe for combining issues like this. The complexity of these issues tends to blur the lines of how far the statutory text reaches.\(^\text{18}\) And petitioner goes to great lengths to remind the Court that the issues in front of it are confusing.\(^\text{19}\)

In light of this, a congressional intent argument is a welcome one for the Court. While not all the justices are eager to accept congressional intent as authoritative, it is at least an argument the Court is familiar with. As the Supreme Court said in a different environmental case, “Faced with such a 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.”\(^\text{20}\)

The congressional intent argument essentially unmoors this case from the science-based factual dispute, and brings it within the Court’s comfort zone. Blending the Miccosukee argument with the congressional intent one that reaches liability, petitioner tried to paint the case as touching on liability in the hope that the Court would return an expansive ruling. This was an intentional confusing of the facts and the issues.

Similarly, petitioner devotes three pages to arguing the broader theme of “personal responsibility” as it relates to the liability issue. The District portrays itself as

\(^{18}\) See, e.g., United States v. Riverside Bayview Homes, 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.”)

\(^{19}\) Petitioner Brief at 50 (“Permitting a ‘discharge’ to be premised on mere flow of water through a portion of a river improved for flood control purposes blurs the distinction between navigable waters and MS4s, creating confusion . . . .”).

\(^{20}\) Riverside Bayview Homes, 474 U.S. at 132.
attempting to comply with a complicated permit, and essentially agreeing with NRDC that “[e]ach Permittee is responsible . . . for a discharge for which it is the operator.”\textsuperscript{21} Yet, the monitoring results are simply too imprecise to apportion liability on anyone. NRDC could have been more reasonable and had specific monitoring done, just as the District Court asked.\textsuperscript{22} But lacking better information, the District simply can do no more.

This argument likely plays well with the Roberts’ Court. Not only does it strike the conservative “personal responsibility” chord, but it also depicts NRDC as a group arguing that larger entities should be responsible for more than their “fair share.” This Court has proven time and again, within and without the environmental law context, that it sympathizes with arguments like petitioner’s.

But the true strength of this argument is that it is a more digestible thematic argument that the Court can latch onto. This offers the Court an alternative to mucking around in the complexities. And while courts are tasked to handle complexities, policy arguments like this one frame the entire issue for the Court, helping persuade the justices to understand the facts in a particular light. This type of advocacy can be especially effective in environmental cases because of the difficult facts at play.

\textbf{B. Respondent’s Strategy}

To start, NRDC has a lot of things going against it. It is an environmental group, defending a decision that came out of the Ninth Circuit, 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. The Roberts’ Court’s well known lack of hospitality for

\textsuperscript{21} Petitioner Brief at 10.  
\textsuperscript{22} Oral Argument at 18.
environmental groups, especially those coming to it from the Ninth Circuit, just adds insult to injury.

NRDC also knows it’s going to lose on the Miccosukee issue. Its main goal is simply not to lose big. It does not want the Supreme Court to extend its holding beyond Miccosukee. Specifically, it does not want the Supreme Court to touch liability, as any Supreme Court ruling will likely not be as friendly as one from the Ninth Circuit on remand.

There are two things NRDC needs to clarify in order to prevail. First, the liability issue is separate from the Miccosukee one. And second, NRDC needs to explain the general facts of this case, in the hope of convincing the Court that the Ninth Circuit simply misunderstood. This, respondent hopes, will lead to a remand, rather than a reversal.

With this in mind, NRDC begins its case in a fascinating way. Its opening line reads: “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 the Clean Water Act.” One sentence in, NRDC has already conceded the question presented in this case.

The second sentence is 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.” Within the first two lines, NRDC has severed the two issues petitioner tried to blend together.

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23 Brief for Respondent (Respondent Brief) at 1.
24 Id.
NRDC repeats this refrain throughout their brief, even putting two questions in their “Questions Presented” section – one being the Miccosukee one, the other being on liability – even though the Court only granted cert on one.25 This is in contrast to petitioner’s strategy, where they only included the Miccosukee question in their “Questions Presented” section, but then subtly weaved in the liability issue.26

Beyond clarifying that two issues are at play in this case, NRDC puts a lot of emphasis on their fact section. While they still have to slough through the MS4 and NPDES permitting explanation, NRDC places these complicated facts in an understandable framework. NRDC starts its statement of the case with the background of why these MS4 permits are necessary. “Stormwater runoff,” NRDC explains, “is now the principal source of water pollution in California . . . . Toxic plumes from stormwater runoff persist for days and are detected miles off the coast of Los Angeles County in the open ocean.”27 This “stormwater runoff harm[s] human health. Illness rates increase significantly among those who swim at beaches near stormwater discharge points.”28

Leading their brief this way, NRDC humanizes an otherwise “mind-numbing”29 topic. As the Court struggles to understand the inner-workings of the CWA, the maze that is the L.A. County MS4, whether or not the discharge is actually upstream or downstream from the monitoring stations, and whether or not the sampling at those stations is actually representative, the Court can fall back on the easily understandable and persuasive human health concerns.

25 Id. at i.
26 Petitioner Brief at i.
27 Respondent Brief at 3.
28 Id. at 3.
Often time environmental groups lose the forest for the trees (a topical phrase if there ever was one). Focusing on the intricacies of the “legislative labyrinth” that is our environmental law regime, advocates fail to emphasize what is truly important about the topic. Our environmental laws were not delivered from on high. Rather, they were created in response to rivers on fire and silent springs. Forgetting to place the facts in this context – a context that all sides of the aisle can sympathize with – environmental advocates lose their case amidst tortured explanations of complicated and unsettled science.

Advocates should always remember their audience, and the Ninth Circuit’s decision seemed to remind NRDC of this. Beyond stating the human and environmental health impacts of this pollution, NRDC also explains to the Court that the consequences of high illness rates and beach closures costs the region “tens of millions of dollars.”

Courts are better able to understand the real life implications of these cases than the underlying science, and the economics argument likely plays well in the Roberts’ Court.

Simultaneously, by focusing on the larger themes of environmental law, NRDC undermines petitioner’s “congressional intent” reasoning. To the degree that we can glean congressional intent from the ambiguous sections of our environmental laws, Congress’s intent was surely to protect the environment, not create loopholes for polluters to escape liability. As NRDC points out, when exemptions are meant, Congress knows how to make them.

30 Cf. Lazarus, supra note 4 at 3.
31 Respondent Brief at 3.
32 Id. at 40 (“Congress could have exempted municipal stormwater discharges from the Clean Water Act entirely, as it has for other sources of water pollution.”).
Perhaps heeding the frustration expressed by the Ninth Circuit, NRDC further clarified the facts by attaching maps of the relevant MS4s to its brief. These maps help demarcate exactly where the MS4s are located in relation to the monitoring stations, as well as illustrate an otherwise incomprehensible scheme. It also shows that the MS4, which is literally thousands of miles long, is not a part of the rivers in question. As such, Miccosukee is not the answer to this case, as the discharges are coming from outside the rivers.

Underlying all of NRDC’s more substantive arguments is an attempt to clarify the facts in a way that it failed to do in the lower courts. To be sure, NRDC likely explained the facts to the District Court and Ninth Circuit in fully satisfactory ways. However, advocates should remember that sometimes there is no clear explanation of a complex system. Severing the two questions that petitioner blended into one, framing this case in a larger theme of human and economic health that underlies our environmental laws, and attaching maps to its brief were all attempts by respondent to meet “the first rule of advocacy,” and make its argument understandable.

V. Supreme Court Decision

As one commentator put it, “The Court unanimously agrees with everyone else.” In a brief that barely reached five pages, the Supreme Court held in a 9-0 decision “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

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33 Id. at 17a, 18a.
very same waterway does not qualify as a discharge of pollutants under the CWA.” In short, the Court reiterated the Miccosukee holding.

More important than the actual holding, the Supreme Court explicitly refused to go into the liability issue, stating, “It 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.”

While this comment seems like an admonishment of NRDC for expressly arguing the liability question, it is also recognition that respondent’s strategy won the day. NRDC successfully severed the arguments, showing the Supreme Court that it need reach no further than a simple restatement of Miccosukee.

NRDC’s intense focus on the facts, and inclusion of maps in its brief, also proved to be a strong strategy, as the Court implicitly recognized that the Ninth Circuit simply got the facts wrong.

VI. Lessons Learned

An old adage is that many more cases are lost than won. There is perhaps no field this is truer in than environmental law. Spending 50 pages parsing the minutiae of applying difficult law to difficult science is not an effective strategy. Rather, shifting the focus from the complex to the comprehensible, from the small details to the big picture, is a strategy that not only will hold a court’s attention, but may even win its vote.

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35 L.A. County, 133 S. Ct. at 711, 713 (2013).
36 Id. at 714.
37 Id. at 712 (“Based on this impression, the Court of Appeals held . . .”), 713 n.1 (“Whatever the source of the Court of Appeals’ error, all parties agree that the court’s analysis was erroneous.”).
Neither lawyers nor judges are driven into law so as to engage in technical statutory construction. Most would much rather answer the larger, theoretical questions that form the foundation of the profession, such as what role should laws and government play in ordering our society. Environmental law is at the forefront of such questions, asking us to balance our interests in human and environmental health against encouraging development and the free market (though certainly these values can live in harmony).

Environmental advocates would be wise to anchor their complex facts in the underlying purpose of the law itself. It is just as important to point out the 10% increase in asthma rates nationwide in the past decade, as it is to argue how we should understand the term “modification” in the Clean Air Act so as to regulate polluting facilities. In truth, we only care about the later issue because of the former. Advocates should not forget what animates our laws, because that is what gives them meaning.

In this same way, advocates should remember that judges are not scientists. They do not have a firm handle on what types of wetlands will or will not impact our navigable waters. Leaving their decision solely to statutory construction is doing a disservice to the argument, to the judge, and to the law itself.

NRDC’s advocacy in front of the Supreme Court in L.A. County is a great example of an environmental group breathing life into an otherwise “mind-numbing” topic. Strategies such as including maps and figures as an appendix should be utilized more often. At least in environmental law’s case, the best way to win a complex argument is to make it simple.

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