No. 04-1527

In The

Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE BOARD OF
ENVIRONMENTAL PROTECTION,

Respondent.

**On Writ Of Certiorari To The
Maine Supreme Judicial Court**

BRIEF FOR AMICUS CURIAE BY UNITED STATES SENATOR JAMES M. JEFFORDS IN SUPPORT OF RESPONDENT

JAMES M. JEFFORDS
United States Senator
Dirksen Senate Office Building
Washington, D.C. 20510
(202) 224-5141

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does this Court's holding last year in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), alter the requirement that the flow of water through an existing dam constitutes a "discharge" under Section 401, 33 U.S.C. § 1341, of the Clean Water Act?

LIST OF PARTIES AND CORPORATE DISCLOSURE

The parties to the appeal are the Petitioner S.D. Warren Company and the Respondent Maine Department of Environmental Protection and Intervenors American Rivers and Friends of the Presumpscot River.

Senator Jeffords represents the state of Vermont in the United States Senate and is neither a for-profit nor a not-for-profit non-governmental entity. Senator Jeffords received assistance in the preparation and printing of this brief from Jon Groveman, Esq., legal counsel for the Vermont Natural Resources Council (VNRC). VNRC is a 501(c)(3) not for profit entity incorporated in Vermont.

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INTEREST OF AMICUS CURIAE[1]

The Clean Water Act (Act), 33 U.S.C. § 1251 et seq., is a landmark statute that was adopted during a period of monumental change in our nation's legal environmental landscape. The National Environmental Policy Act, 42 U.S.C. § 4321 et seq., was passed in 1969 and the Clean Water Act quickly followed in 1972. The Act's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the Act regulated the discharge of pollutants into the waters of the United States and gave the federal government, through the Environmental Protection Agency (EPA), the authority to implement pollution control programs for wastewater treatment systems and to establish minimum standards for contaminants in surface waters and to regulate the impacts of federally licensed facilities on waters of the United States.

To understand the significance of the Clean Water Act, recall the contaminated state of our nation's waterways in the early 1970s. Our nation was faced with a water pollution crisis. The most vivid example was the Cuyahoga River in Ohio, which became so polluted with chemicals and industrial wastes that it burst into flames. Toxic materials were routinely dumped into pristine water bodies by industrial polluters. It was standard practice in municipalities to have underground pipes deliver raw

[1] The parties have consented to the filing of this brief.

Amicus Senator Jeffords received assistance in preparing the brief from John Groveman, Esq. of the Vermont National Resources Counsel (VNRC). In addition, VNRC paid for the printing of the brief.

sewage from homes directly into rivers and streams without any intervening treatment.

In Vermont, the state's growing support for environmental conservation was embodied in the local opposition to the planned construction of several large dams. Along the Moose River in the Northeast Kingdom, the White River at Gaysville, and the Saxtons River at Cambridgeport in southern Vermont, local awareness of the effect of large dams on native fish species, water quality, and woodland habitat led Vermonters to question the wisdom of constructing large flood control dams. During this period, there was very little legal precedent to rely upon to challenge the construction of dams for their effects on water quality, habitat or species.[2]

In 1970, Vermont responded to that void and passed Act 252, the toughest water pollution law in the country at the time. Act 252 gave the citizens of Vermont the basic tools to protect Vermont's waters at the state level. See 10 V.S.A. § 1263 et seq.

In 1972, the Congress passed the Federal Water Pollution Control Act, or the Clean Water Act. The Federal Water Pollution Control Act was originally adopted in 1948. The 1972 Clean Water Act, which was passed by

[2] Senator Jeffords was Vermont's Attorney General between 1968-1974. In 1970, he worked to pass landmark environmental statutes in Vermont such as Act 252, the state's first water quality statute. As Attorney General, Senator Jeffords championed clean water protection, taking strong enforcement actions against large industry and municipalities to prevent the discharge of pulp and paper sludge, untreated sewage, and warm water into Vermont's water resources. In addition, as Attorney General, Senator Jeffords dealt with many of the legal issues surrounding the construction of proposed dams in Vermont without much legal history in this area to rely on.

wide margins[3] in Congress to override a veto by President Nixon, completely revised the existing statute and created the clean water program that has been in place for 35 years.

Congress clearly intended the 1972 Clean Water Act to be a comprehensive approach to solving our nation's water pollution problems. At that time, Senator Muskie (D-ME)[4] stated:

> *Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make life possible on this planet? Can we afford life itself? The answers are the same. Those questions were never asked as we destroyed the waters of our Nation, and they deserve no answers as we finally move to restore and renew them.*

118 Cong. Rec. 25, 33692 (1972), *reprinted in* Envtl. Policy Div. Cong. Research Serv. Library of Cong., 93rd Cong., A Legislative History of the Federal Water Pollution Control Act of 1972, at 164 (1973.) (*hereinafter*, A Legislative History.)

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[3] Senate vote on S. 2770, November 2, 1971, 86-0; House vote on H.R. 11896, March 29, 1972, 380-14; Senate vote on S. 2770 conference report, October 4, 1972, 74-0; House vote on S. 2770 conference report, October 4, 1972, 366-11; Senate vote to override President Nixon veto, October 17, 1972, 52-12; House vote to override President Nixon veto, October 18, 1972, 247-23.

[4] Senator Ed Muskie (D-ME) served as a state legislator and governor of Maine before coming to the U.S. Senate in 1959. He served on the Public Works Committee, where he chaired the Air and Water Pollution Subcommittee, which was created in 1963 at his request. In 1972, Senator Muskie was the primary sponsor of the Water Quality Improvement Act in the Senate, which became the Federal Water Pollution Control Act of 1972.

Representative Blatnik (D-MN),[5] stated during floor debate:

> *In this measure, we are totally restructuring the water pollution control program and making a far-reaching national commitment to clean water . . .*

118 Cong. Rec. 8, 10204 (1972), *reprinted in* A Legislative History, at 350.

Representative Dingell (D-MI),[6] stated during the same floor debate:

> *The legislation we are considering today – H.R. 11896 – is by far the most far-reaching and comprehensive bill of them all [of the 1965, 1966, and 1970 water pollution control statutes.] It is a complete revision of the Federal Water Pollution Control Act which was first enacted under the leadership of our distinguished colleague from Minnesota, Congressman John A. Blatnik.*

118 Cong. Rec. 8, 10248 (1972), *reprinted in* A Legislative History, at 467.

In addition, the 1972 Clean Water Act represented a "first of its kind" statute that created a federal regulatory

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[5] Representative John Blatnik (D-MN) served in Congress from 1947 to 1974. He was chairman of the Committee on Public Works from 1971-1974, and the Clean Water Act was passed under his leadership.

[6] Representative John Dingell (D-MI) served in the House of Representatives from 1955 to the present. In 1972, he participated actively in the floor debate on the Clean Water Act. Currently, he is the ranking member of the House Energy and Commerce Committee, where he served as chairman from 1981-1994.

program that relied on significant implementation responsibilities delegated to the states. The Committee report accompanying S. 2770, the Senate version of the Water Quality Improvement Act which became the Federal Water Pollution Control Act of 1972, states that:

> *For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: the States shall lead the national effort to prevent, control, and abate water pollution.*

S. Rep. No. 92-414, at 146 (1971), *reprinted in* A Legislative History, at 1679.

Throughout the legislative history, there is a clear tension between efforts to increase the Federal role and a desire to remain loyal to the principle of state implementation of the Act. During floor debate, Representative Jones (D-AL)[7] summarized this issue, stating:

> *All the weight of the evidence submitted to the committee during our extensive hearings confirmed our belief that an effective Federal-State partnership is absolutely indispensable to the*

[7] Representative Robert "Bob" E. Jones, Jr. (D-AL) served in Congress from 1947 to 1977. Jones served in the House Committee of Public Works from his first term in office in 1946 and for 30 years was either an active member or chairman of each of its subcommittees. In 1972, he was a principal sponsor of the Federal Water Pollution Control Act of 1972. In 1975, he was elected to Chairmanship of the newly renamed Committee of Public Works and Transportation, with added jurisdiction over civil aviation and the regulatory agencies for air, highway, and water transportation. In recognition of his work on water quality issues, he was named vice chairman of the National Commission of Water Pollution, which produced the 1976 Report to Congress on the state of efforts to improve U.S. water resources.

> *success of this program . . . this legislation places the primary responsibility for administering the water pollution control program within the separate States, with the firm stipulation that each State must comply with the overriding Federal guidelines. . . .*

118 Cong. Rec. 8, 10207 (1972), *reprinted in* A Legislative History, at 358-359.

Amicus Senator Jeffords, as the former Chair and current Ranking Member of the Senate Environment and Public Works Committee (EPW), has a strong interest in ensuring that the intent of the Clean Water Act as reflected in the above quotations is upheld by the Supreme Court. Simply put, if the Petitioner's arguments are adopted by the Supreme Court, the Clean Water Act would be turned on its head. The Petitioner, through this appeal, seeks to rewrite Section 401 of the Act by altering the definition of discharge and by limiting the vital role of states in implementing the Act that my colleagues so articulately discussed above. Amicus Senator Jeffords submits this *amicus curiae* brief to provide assistance to the Supreme Court in understanding why supporting the Petitioner's claims runs counter to the legislative history of the Act, and to protect Congress's interest in ensuring that the goal of the Act – to restore the chemical, physical and biological integrity of our nation's waters – is achieved. 33 U.S.C. § 1251(a). All parties provided consent, including S.D. Warren Co., Maine Board of Environmental Protection, and American Rivers. Appendix 1.

SUMMARY OF ARGUMENT

I. The Petitioner's argument that Section 401 of the Act does not apply to hydroelectric dams because dams allegedly do not cause a discharge is contrary to the legislative history and the plain meaning of the Act. The meaning of the phrase "any discharge" as provided in Section 401 is distinguishable from the phrase "discharge of a pollutant" as provided in Section 402 of the Act. The Section 401 provision related to "any discharge" was intended by Congress to be broader and more inclusive than the Section 402 standard of a "discharge of a pollutant." Accordingly, the Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) that addressed the meaning of "discharge of pollutant" under Section 402 has no bearing on the application of Section 401 of the Act to hydroelectric facilities as the Petitioner argues.

II. The Petitioner seeks to rewrite Section 401 of the Act in a manner that would severely limit, if not remove completely, the authority of individual states to assure that federally licensed facilities comply with state water quality standards. Such an intrusion into the authority of states is in direct contravention of the intent and plain meaning of the Clean Water Act.

ARGUMENT

I. CONGRESS INTENDED THAT SECTION 401 OF THE ACT APPLY TO HYDROELECTRIC DAMS AND INTENTIONALLY CREATED A BROADER MORE INCLUSIVE DEFINITION OF DISCHARGE IN SECTION 401 THAN SECTION 402 OF THE ACT.

Sections 401 and 402 of the Act were clearly intended by Congress to serve different purposes. While Section 402 was intended to reduce pollution of the waters of the United States by establishing the National Pollution Discharge Elimination System (NPDES) permitting program for point sources that discharge pollutants, Section 401 was intended to address the impact that federally licensed facilities may have on water quality. To this end, Section 401 requires that certain facilities obtain state certifications assuring compliance with state water quality standards as a pre-requisite to obtaining a federal permit or license.

Congress expressed the distinction between Section 401 and 402 in the manner that the term discharge is used in each Section of the Act. Section 401(a)(1) of the Clean Water Act (Certification) states "[A]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in *any discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions . . . of this Act." 33 U.S.C. § 1341(a)(1) (emphasis added). In contrast, Section 402(a)(1) of the Clean Water Act states "[E]xcept as provided in Sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the

discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet . . . such conditions as the Administrator determines are necessary to carry out the provisions of this Act." 33 U.S.C. § 1342(a)(1) (emphasis added).

Congress used the terms "any discharge" in Section 401 of the Act to convey a different meaning than the term "discharge of any pollutant" in Section 402 of the Act. The rules of statutory interpretation hold that the use of two different terms in the same statute is presumed intentional. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

A. The Legislative History of Sections 401 and 402 Indicate that the Terms "Discharge" and "Discharge of a Pollutant" Have Distinct Meanings.

Sections 401 and 402 of the Clean Water Act evolved from two separate and distinct pieces of legislation that were designed to address separate and distinct problems within the broader context of water pollution. Section 401's predecessor was Section 21(b) of the pre-1972 Amendments to the Federal Water Pollution Control Act, while Section 402 was an expansion and continuation of the permit program begun under the Refuse Act of 1899. H.R. Rep. No. 92-911, at 121 (1972), *reprinted in* A Legislative History of The Water Pollution Control Act Amendments of 1972, at 808; S. Rep. No. 92-1236, at 138 (1972), *reprinted in* A Legislative History, at 321.

The distinct purposes of these prior acts are reflected in the clearly and significantly different use and qualification of the term "discharge." In 1972 Section 21(b) read

"[A]ny applicant for a federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters shall provide the licensing or permitting agency a certification from the State . . . ", while the Refuse Act of 1899 prohibited the discharge of refuse into any navigable water without a permit H.R. Rep. No. 92-911, at 121 (1972), *reprinted in* A Legislative History, at 808; 33 U.S.C. § 407. It is clear from the language above that these statutes were designed to address separate means of discharging into the nation's waters.

Congress continued to distinguish between general discharges and discharges of refuse or pollutants when drafting Sections 401 and 402 of the Clean Water Act. Section 401 adopted the language of Section 21(b) verbatim (continuing to use "any discharge"), while the relevant part of Section 402 changed 'discharge of refuse' to the more modern "discharge of a pollutant." S. 2770, 92nd Cong. (1971), at 146, 152, *reprinted in* A Legislative History, at 1679, 1685. The use of these terms in these sections remained unchanged through both houses. See S. 2770, 92nd Cong. (1971), at 146, 152, *reprinted in* A Legislative History, at 1679, 1685; H.R. 11896, 92nd Cong. (1972), at 350, 356, *reprinted in* A Legislative History, at 1046, 1052. It is therefore clear that Congress intended "discharge" and "discharge of a pollutant" to remain distinct and separate terms when it replaced these prior acts with the more comprehensive Clean Water Act.

The following statement by Senator Muskie, the principal sponsor of the Senate version of the Water Quality Improvement Act which became the 1972 Federal Water Pollution Control Act, regarding Section 402 during the Senate Debate supports this conclusion:

> *This bill does not prohibit the discharge; it prohibits the discharge of any pollutant.*

117 Cong. Rec. 30, 38839 (1971), *reprinted in* A Legislative History, at 1348. A closer look at the context of this statement makes it even more clear that Congress considered "discharge" and "discharge of a pollutant" to be distinct concepts. The discharge Senator Muskie referred to was the dumping of fish entrails into the ocean from a vessel, and the issue was whether a permit was necessary for this practice under Section 402. See A Legislative History, at 1346-1348. As Senator Muskie indicated, the answer depends on whether the entrails constitute a pollutant. *Id*. at 1348. If the debris associated with the cleaning of fish is considered a pollutant then the activity is a "discharge of a pollutant" and Section 402 applies. If not, then in Senator Muskie's own words, there is simply a "discharge" which Section 402 does not address. Clearly the term "discharge" was intended to have broader meaning than "discharge of pollutant."

B. Changes in the Definition of "Discharge" During Consideration of the Bill Prove that Congress Intended "Discharge" to Have a Broader Meaning than "Discharge of Pollutants."

The original Senate bill defined "discharge" as meaning "(1) any addition of any pollutant to navigable waters from any point source." S. 2770, 92nd Cong. (1971), *reprinted in* A Legislative History, at 1699. "Discharge of a pollutant" was not defined in the Senate bill. The later House version of the bill broadened the definition of "discharge" and added a definition of "discharge of a pollutant". Section 502(18) of the House bill stated, "The

term discharge when used without qualification includes a discharge of a pollutant, a discharge of pollutants, and a thermal discharge." H.R. 11896, 92nd Cong. (1971), *reprinted in* A Legislative History, at 1071. "Discharge of a pollutant" was defined as "any addition of any pollutant to navigable waters from any point source." See A Legislative History, at 1069-1070. Clearly the term "discharge" was intended to have broader meaning than "discharge of pollutant".

C. The Definitions of "Discharge" and "Discharge of a Pollutant" Were Not Amended Nor Were Amendments Proposed after Case Law Found them to Have Distinct Meanings.

In 1998 the Ninth Circuit Court of Appeals found that the definition of "discharge" was broader than "discharge of a pollutant" because "discharge" was defined as "including" "discharge of a pollutant." 33 U.S.C. § 1362(16); *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998), *cert. denied,* 528 U.S. 964 (1999). Essentially the court found that every "discharge of a pollutant" is a "discharge" but not every "discharge" is a "discharge of a pollutant." To date, Congress has not amended the Clean Water Act to reverse this Ninth Circuit decision with regard to hydroelectric dams.

D. Section 402 Addresses Discharges that Add Pollutants to the Nation's Waters and Section 401 Addresses Activities Harmful to Water Quality that Do Not Involve the Addition of Pollutants.

The rationale behind the distinctions in the definition of the term "discharge" in Sections 401 and 402 of the Act is that different types of activities have varying impacts on water quality. For example, facilities that add pollutants to the nation's waters through a pipe or conveyance are covered by Section 402 of the Act through the NPDES permit program. Section 401 is written more broadly than Section 402 in order to address water pollution that results not only from an addition of pollutants but also from "changes in movement, flow, or circulation of any navigable waters, . . . includes changes caused by the construction of dams." 33 U.S.C. § 1314(f)(F); See generally *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) (Water flows released through a dam, which may not involve the addition of pollutants, are "discharges" subject to Section 401 certification). According to the U.S. Environmental Protection Agency, these impacts can be extremely serious and include chemical, physical and biological impacts such as low dissolved oxygen levels, turbidity, inundation of habitat, stream volumes and fluctuations, filling of habitat, impacts on fish migration, loss or degradation of wetlands, and loss of aquatic species as a result of habitat alterations.[8]

The legislative history of the Act demonstrates the intent of Congress to address the type of impacts associated

[8] EPA website, http://www.epa.gov/owow/wetlands/facts/fact24.html.

with federally licensed facilities, such as hydroelectric dams. The House Report on the bill that led to Section 401 stated:

> *A wide variety of licenses and permits (construction operating and otherwise) are issued by various federal agencies. Many of them involve activities or operations potentially affecting water quality. The purpose of subsection 11(b) is to provide reasonable assurance (as determined by the affected State, States, or the Secretary of the Interior) that no license or permit will be issued by a federal agency for an activity that through inadequate planning or otherwise could in fact become a source of pollution.*

H.R. Rep. No. 91-127 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, RBA 6.

The House Report goes on to explain that Section 401 is intended to address the water quality impacts of all types of electric generating facilities:

> *The Chairman of the Joint Committee . . . was fearful that an undesirable competitive factor would be developed by virtue of the possibility that a significant fraction of all new electrical generating capacity (other than nuclear) would not be covered by subsection 11(b). The Committee believes that this concern is met by the fact that a federal license or permit of some kind is required for almost all electric generating plants, and a federal agency granting the relevant license can and should condition the grant upon compliance with applicable water quality standards.*

Id.

When Section 401's state certification was first enacted (as Section 21(b)), Senator Muskie, the primary sponsor of the Senate version of the Water Quality Improvement Act which became the 1972 Federal Water Pollution Control Act, called it "the most important section" of the Act.

He then said:

> *No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards.*

116 Cong. Rec. 7, 8984 (1970).

Likewise, Senator Cooper (R-KY),[9] described Section 401's predecessor as follows:

> *Indirectly, the Federal Government contributes to water pollution in its licensing activities over such things as nuclear power plants, hydroelectric power plants licensed by the Federal Power Commission [now FERC] and dredge and fill permits issued by the Army Corps of Engineers. S.7 will require, without exception, that all Federal activities that have any effect on water quality be conducted so that water quality standards will be maintained.*

115 Cong. Rec. 21, 28970 (1969).

[9] Senator Cooper (R-KY) served in the U.S. Senate from 1947 to 1973. In 1972, he was the Ranking Member of the Senate Public Works Committee.

Petitioner seeks to rewrite Section 401 of the Act by limiting its application to only discharges covered by Section 402. Such a rewrite of the Act would reverse the protections that Congress put in place when the Clean Water Act was adopted to address the impacts of facilities like hydroelectric dams. Congress put these protections in place by distinguishing between the definition of "discharge" in Sections 401 and 402 of the Act.

Only Congress can change the distinct meaning of Section 401 and Section 402.

II. THE INTENT OF THE CLEAN WATER ACT IS TO ENABLE STATES TO ASSURE COMPLIANCE WITH THEIR DULY ADOPTED WATER QUALITY STANDARDS.

One of the bedrock principles of the Clean Water Act is that it vests significant responsibility in each individual state to implement the Act and to take action to enforce state water quality standards. The Committee report accompanying S. 2770 states that:

> *For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: the States shall lead the national effort to prevent, control, and abate water pollution.*

S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, RBA 2.

Throughout the legislative history, there is a clear tension between efforts to increase the Federal role and a desire to remain loyal to the principle that states should lead the effort to prevent, control, and abate water pollution.

During floor debate in the House on March 27, 1972, Representative Jones echoed this summary, stating:

> *All the weight of the evidence submitted to the committee during our extensive hearings confirmed our belief that an effective Federal-State partnership is absolutely indispensable to the success of this program . . . this legislation places the primary responsibility for administering the water pollution control program within the separate States, with the firm stipulation that each State must comply with the overriding Federal guidelines . . .*

118 Cong. Rec. 8, 10207 (1972), *reprinted in* A Legislative History, at 358-359.

The 1972 Clean Water Act consisted of three major parts – regulations on point sources of pollution designed to reach a goal of zero discharge, the authorization of federal financial assistance for wastewater treatment, and the establishment of water quality standards by the states. The states were provided the opportunity to obtain authority from the U.S. Environmental Protection Agency to operate their own Clean Water Act program, taking responsibility in most cases for the issuance of National Pollutant Discharge Elimination System (NPDES) permits. This approach has since been modeled in environmental statutes such as the Safe Drinking Water Act and the Clean Air Act.

Section 401 of the Clean Water Act, providing for state certification of Federal permits and licenses, embodies the intent of the Clean Water Act to delegate significant responsibilities to the states and rely on their expertise to implement clean water requirements. It is the primary

means by which states ensure that federally permitted activities comply with state-set water quality standards.

Congress clearly intended Section 401 to be a broad tool for use by the states, addressing all types of discharges into waters of the United States that occur within a state's boundaries. In the Committee report accompanying S. 2770, the Committee provides:

> *It should also be noted that the Committee continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State or jurisdiction of the interstate agency.*

S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, RBA 2.

The authority that the Committee report is referring to is found solely within Section 401 of the Clean Water Act. Petitioner's position, that Section 401 does not apply to federal licenses for hydroelectric dams, would strip the very authority and responsibility that the Committee report was highlighting as being vested in each individual state.

More fundamentally, the Petitioner's argument runs counter to the principle of state implementation of the Act cited above. Congress intended to continue to allow states to review the impact of certain federally licensed facilities for compliance with their water quality standards. If the Supreme Court were to deny states this right, vested in them by Congress, it would create an entire class of discharges that impact compliance with state water quality standards that states would have no independent authority to address. Specifically, it is conceivable that a

federally licensed facility could preclude a state from meeting its water quality standards if such facilities were exempt from Section 401. If Congress had intended such activities to be excluded from the determination as to whether water quality standards are met, Congress would have stated such an exclusion in the Act. No such exclusion appears in the Clean Water Act.

CONCLUSION

For the foregoing reasons, the judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted,

JAMES M. JEFFORDS
United States Senator
State of Vermont