No. 04-1527

IN THE
Supreme Court of the United States

S.D. WARREN COMPANY,
Petitioner,

v.

MAINE DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Respondent

On Writ of Certiorari to the
Maine Supreme Judicial Court

BRIEF OF *AMICI CURIAE* HOOPA VALLEY TRIBE, KLAMATH TRIBES OF OREGON, LUMMI NATION, AND THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON ON BEHALF OF RESPONDENT MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

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The Hoopa Valley Tribe, Klamath Tribes of Oregon, Lummi Nation, and the Confederated Tribes of the Warm Springs Reservation of Oregon (the "Tribes") submit this *amici curiae* brief on behalf of the Respondent Maine Department of Environmental Protection seeking to affirm the judgment of the Maine Supreme Judicial Court. This brief emphasizes the unique interest of fishery-dependent tribal cultures in water quality protection, and the role that Indian tribes play under the Clean Water Act, 33 U.S.C. § 1251, *et. seq*., and specifically Section 401, 33 U.S.C. § 1341, to ensure federally licensed activities, including dams, do not contribute to violations of EPA-approved tribal water quality standards.

The brief also explains that many dams, such as those affecting the Tribes' reservations, cause pollution that contributes to violations of water quality standards. Limiting the authority of states and EPA-approved Indian tribes to regulate the pollution caused by dams would significantly interfere with the comprehensive and coordinated scheme of water pollution control created by Congress in the Clean Water Act and would jeopardize property rights reserved to Indian tribes in treaties and Executive Orders. Pursuant to Supreme Court Rule 37(3)(a), this brief is filed with the written consent of all parties.[1]

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[1] In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

INTERESTS OF THE AMICI CURIAE

The Hoopa Valley Tribe is a federally recognized sovereign Indian tribe. The ancestral home of the Hoopa Valley Tribe, established as an Indian reservation in 1864, is located in northwestern California between the Coast Ranges and the Salmon-Trinity Alps Wilderness Area. The Klamath and Trinity Rivers flow through the reservation.

The Hoopa Valley Tribe's reservation includes a reserved right to the fishery resources of the Klamath River basin (which includes the Trinity River as the largest tributary of the Klamath River). *Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996); *United States. v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986). The fishery resources of the Klamath River basin are the mainstay of the life and culture of the Indians residing there, and have been since prehistoric times. The fishery is "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

Protection of water quality is essential to the survival of the fishery in the Klamath River basin. The Hoopa Valley Tribe's reserved fishery right includes the right to certain conditions of water quality and flow to support all life stages of fish. *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir.), *cert. denied,* 444 U.S. 1252 (1984); *United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982), *aff'd in part & rev'd in part on other grounds,* 736 F.2d 1358 (9th Cir. 1984). The Hoopa Valley Tribe's Constitution in Art. IX, Sec. 1(e) encompasses the power to protect wildlife and natural resources. Congress ratified this constitutional

authority. *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (*en banc*), *cert. denied*, 535 U.S. 927 (2002).

The Hoopa Valley Tribe is authorized by the United States Environmental Protection Agency ("EPA"), pursuant to Clean Water Act Section 518, 33 U.S.C. § 1377, to establish water quality standards for the protection of water quality on the reservation. Pursuant to this authorization, and the certification authority of Section 401, the Tribe may condition federally licensed activities, including upstream dams, to avoid operations that cause or contribute to violations of EPA-approved tribal water quality standards.

Anadromous fish populations have suffered a precipitous decline in the Klamath River basin due to human caused factors that degrade habitat, alter stream flows, and pollute water, including the existence and operation of six federally licensed dams on the Klamath River (known collectively as the "Klamath Hydroelectric Project"). The owner of the Klamath Hydroelectric Project, located upstream of the Hoopa Valley Reservation, is currently seeking a new federal license from the Federal Energy Regulatory Commission ("FERC"). The continued existence of tribal and state authority to certify the Klamath Hydroelectric Project's compliance with applicable water quality standards is crucial to the health of the Klamath River and to the maintenance of the Hoopa Valley Tribe's federally reserved fishing rights over the next thirty to fifty years - the duration of a FERC license.

The Klamath Tribes of Oregon are a federally recognized tribal government, party to the Treaty of 1864 with the United States. 16 Stat. 707. The importance of tribal fisheries was well known to both the Tribes and the United States at the time of the Treaty. *Adair*, 723 F.2d

1394, 1409, n.14. The Treaty reserved to the Tribes the fisheries that were, and continue to be, of enormous importance to their physical and spiritual well-being. *Kandra v. United States*, 145 F. Supp.2d 1192, 1201 (D. Or. 2001). Today the Tribes' most important fisheries are no longer available to sustain their people, due in part to water quality problems associated with dams on the Klamath River system.

Two examples illustrate the fact that dams on the Klamath River system are not benign structures insofar as tribal water quality is concerned. First, two species of fish known as c'wam and kuptu (and called "suckers" by non-Indians) are listed as "endangered" pursuant to the Endangered Species Act; contributing factors include dams and water quality problems in Upper Klamath Lake. 53 Fed. Reg. 27,130-32 (July 18, 1988). Water quality problems are exacerbated by dams that change the retention time, flushing time, and other characteristics of Upper Klamath Lake.[2] Second, the Tribes' efforts to recover Treaty-protected salmon fisheries are made difficult by dam reservoirs that (i) increase water temperatures for many miles downstream of the hydroelectric project, which stresses salmon and shifts their migration timing to less advantageous times, (ii) decrease dissolved oxygen concentrations below the dams, further stressing migrating salmon and (iii) generate massive

[2] Independent Multidisciplinary Science Team, *IMST Review of the USFWS and NMFS 2001 Biological Opinions on Management of the Klamath Reclamation Project and Related Reports*. Technical Report 2003-1 to the Oregon Plan for Salmon and Watersheds, Oregon Watershed Enhancement Board, Salem, Oregon, available at http://www.fsl.orst.edu/imst/reports/klamath.html.

algae blooms that release high concentrations of a toxin that compromises the ability of fish to return to their native habitat.[3]

The Lummi Nation is a federally recognized Tribe of American Indians that signed the Treaty of Point Elliott, 10 Stat. 1132 (1855). It governs the Lummi Reservation, located in the northwest corner of Washington State. The reservation is bounded on the east by the main stem and the mouth of the Nooksack River. Fishing has been central to Lummi culture, economy and diet since time immemorial. In the Treaty, Lummi reserved the right to take fish both on the reservation, and at off reservation "usual and accustomed grounds and stations." Lummi usual and accustomed fishing grounds and stations were confirmed in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), and include the marine waters of northern Puget Sound as well as the fresh waters of several rivers and streams draining into these marine waters. *Id*. at 360-61. One of the major salmon producing rivers contributing fish to the Lummi harvest is the Skagit River, upon which Seattle City Light owns and operates two hydroelectric dams. Other rivers, such as the Nooksack, have diversion dams and other obstructions that alter water quantity and quality of the free flowing stream.

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[3] Federal Energy Regulatory Commission, Klamath Hydroelectric Project (FERC Project No. 2082), ***PacifiCorp Response to FERC Additional Information Request dated February 17, 2005: AR-2***, available at http://www.ferc.gov (FERC e-library accession number 20051017-5019, AR2AppendixBPlotsOct2005.PDF).

The right of taking fish includes the right to protect tribal fisheries from interference by State regulation, *e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), federal regulation, *Parravano, supra*, or direct interference with a fishing opportunity, *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996).

Lummi has filed an application under the Clean Water Act for Treatment as a State ("TAS") which is pending with the Environmental Protection Agency.

The Confederated Tribes of the Warm Springs Reservation of Oregon ("CTWS") is a federally recognized Indian tribe and party to a Treaty with the United States, 12 Stat. 963. CTWS has "exclusive use" of the Warm Springs Reservation and its treaty-reserved fishing rights also include the right to fish at the usual and accustomed stations in common with the citizens of the United States. Treaty of 1855, Art. 1. As authorized under Section 518 of the Clean Water Act, 33 USC § 1377, CTWS has adopted water quality standards under Section 303 of the Clean Water Act, 33 U.S.C. § 1313, and has obtained TAS for issuing Section 401 water quality certifications, 33 U.S.C. § 1341. CTWS is also a party to *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), participates vigorously in co-management of the indigenous fishery throughout the Columbia River basin and was a party in *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) (holding that "discharge" as that term is used under Section 401 of the Clean Water Act "includes all releases from point sources, whether polluting or nonpolluting"), *cert. denied,* 528 U.S. 964 (1999).

CTWS also has a pecuniary interest as an owner in the operation of federally-licensed dams. CTWS is a co-licensee with Portland General Electric of the Pelton Project which is partially located on the Reservation. During recent FERC proceedings relicensing the Pelton Project, both CTWS and the state of Oregon exercised jurisdiction under Section 401 of the Clean Water Act to issue a Section 401 Water Quality Certification.[4] The Pelton Project causes adverse water quality changes in the Pelton Project area as well as in reaches of affected waterbodies in the Deschutes River basin. These include low dissolved oxygen and water temperature changes. Accordingly, the Pelton Project's operations significantly change the natural water quality conditions and cause "pollution" as that term is defined in 33 U.S.C. § 1362(19) that affect fisheries. The certifications require mitigation actions to achieve compliance with temperature and dissolved oxygen standards.[5]

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[4] On June 24, 2002, and on June 25, 2002, the Oregon Department of Environmental Quality ("ODEQ") and CTWS, respectively, issued the Pelton Project's Section 401 Water Quality Certifications.

[5] *See* State of Oregon Department of Environmental Quality posted Section 401 Water Quality Certification documents for the "Pelton Round Butte Hydroelectric Project (FERC Project No. 2030)" at http://www.deq.state.or.us/wq/401Cert/401CertHome.htm. The Section 401 Water Quality Certifications require the Pelton Project to construct a selective water withdrawal tower at the existing turbine intake at Round Butte Dam which can be operated to blend water from the reservoir's surface and at depth when necessary to meet applicable temperature standards in the lower Deschutes River and assist in meeting dissolved oxygen standards.

SUMMARY OF ARGUMENT

The Tribes urge the Court to affirm the judgment of the Maine Supreme Judicial Court and affirm the authority provided by Clean Water Act Section 401, 33 U.S.C. § 1341, that prevents federally licensed dams from causing or contributing to violations of EPA-approved water quality standards over the objections of affected states and EPA-approved tribal governments.

The Clean Water Act provides Indian tribes with authority to regulate and protect the waters of their reservations. Once approved by EPA, Indian tribes may develop water quality standards and object to proposed federal activities, such as dams, that threaten to impair tribal waters. The water quality certification process in Section 401 provides a critical tool in the protection of tribal waters from the adverse impacts of federally licensed dams.

Federally licensed dams result in significant impacts to water quality, interfering with Indian tribes' reserved property rights to water and fish. Hydroelectric dam operations, including those that directly affect the *amici curiae*, do result in a "discharge" and are properly subject to the certification authority of Section 401. The Court should reject Appellant's strained interpretation of the term "discharge" and affirm the judgment of the Maine Supreme Judicial Court.[6]

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[6] The Maine Supreme Judicial Court's decision was limited to situations that did not involve the addition of a pollutant. However, as discussed in Part III of this brief, the absence of a pollutant does not mean there are no ill effects on water quality. The proper interpretation of "discharge"

ARGUMENT

I. THE WATER QUALITY CERTIFICATION PROCESS IN SECTION 401 PROVIDES A CRITICAL TOOL FOR THE PROTECTION OF TRIBAL WATERS FROM THE ADVERSE IMPACTS OF FEDERALLY LICENSED DAMS.

In 1987, Congress gave Indian tribes a powerful new voice in the water quality certification process under Clean Water Act Section 401, 33 U.S.C. § 1341.[7] Congress authorized Indian tribes, upon approval by EPA, to develop and enforce standards for the protection of water quality on their reservations. 33 U.S.C. § 1377(e). Tribes with EPA-approved water quality standards have authority under Section 401 to certify that federally licensed activities within the reservation comply with the tribal standards. *Id.;* 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 131.4(c).

Approved tribes may also object under Section 401 and initiate a dispute resolution process if a State proposes to certify a federally licensed project upstream of the reservation that could violate the water quality standards of the downstream tribe. *See Wisconsin v. EPA,* 266 F.3d 741, 748-49 (7th Cir. 2001); 33 U.S.C. § 1341(a)(2); 33 U.S.C. § 1377(e); 40 C.F.R. §§ 121.11-121.16; 40 C.F.R. § 131.7. Congress promoted both the unique interest that Indian tribes

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for Section 401 purposes does not require that a pollutant be added.

[7] Congress amended the Clean Water Act to authorize EPA to treat tribes as states in the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended at 33 U.S.C. § 1377 (2000)).

have in water quality protection and the United States' trust obligation to tribes by authorizing tribes to formally object to activities, such as federally licensed dams, that could degrade water quality on the reservation.

Not every Indian tribe seeks, or is granted, authorization to regulate water quality on its reservation. EPA is authorized by Congress to treat an Indian tribe as a State for Clean Water Act purposes only if "the tribe has a governing body carrying out substantial governmental duties and powers" and if EPA reasonably expects the tribe to be able to regulate water quality in compliance with the Clean Water Act. 33 U.S.C. § 1377(e). EPA evaluates tribal requests for TAS status on a case by case basis in accordance with its application requirements found at 40 C.F.R. § 131.8(b).[8]

Once EPA approves an Indian tribe for TAS, the tribe, like states, may develop water quality standards to protect designated uses on the reservation. *See* 33 U.S.C. § 1313(c)(2)(A). Tribes may not implement their water quality standards until the standards are approved by EPA.

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[8] To qualify for TAS under EPA regulations, an Indian tribe must submit an application to the EPA which includes: a statement that the tribe is recognized by the Secretary of the Interior; a descriptive statement demonstrating that the tribal governing body is currently carrying out substantial government functions over a defined area; a description of the tribe's capability to administer an effective water quality standards program; and any additional documentation which the Administrator deems necessary to support a tribal application. 40 C.F.R. § 131.8; *City of Albuquerque v. Browner*, 97 F.3d 415, 422 n.8 (10th Cir. 1996).

See 33 U.S.C. § 1313 (c)(3); 40 C.F.R. § 131.5. Like water quality standards developed by states, tribal standards are authorized directly by the Clean Water Act and have the force of federal law. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (stating that water quality standards are part of the federal law of water pollution control). Tribes, like states, may also object under Section 401 when federally licensed activities, such as hydroelectric dams, could cause or contribute to violations of EPA-approved tribal water quality standards. 33 U.S.C. § 1341; 33 U.S.C. § 1377(e).

Tribal water quality standards, while often similar to state standards, sometimes seek specific safeguards of water on the reservation due to tribal cultures' unique reliance on water resources. *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996). Tribal standards may designate uses, such as for cultural or religious purposes, that are not specifically protected by state standards. *See id.* at 427 (discussing Isleta Pueblo tribe's "primary contact ceremonial use" standard). Like states, tribes retain some measure of control over activities that occur on non-tribal land within or upstream of the reservation, but which contribute to violations of water quality standards on the reservation. *Wisconsin*, 266 F.3d at 750 (noting "Since a state has the power to require upstream states to comply with its water quality standards, to interpret the [Clean Water Act] to deny that power to tribes because of some kind of formal view of sovereignty would treat tribes as second class citizens").

Since rivers often flow through multiple state and tribal sovereigns, Congress established a federal mechanism to resolve disputes between upstream and downstream states, and between states and tribal governments where the water quality standards of the respective sovereigns differ. *Id*. at 748-49; 33 U.S.C. § 1341(a)(2); 33 U.S.C. § 1377(e); 40

C.F.R. §§ 121.11-121.16; 40 C.F.R. § 131.7. Therefore, if a federal license for an upstream activity could be certified under Section 401 in compliance with state water quality standards, but not tribal standards, the downstream tribe may initiate a dispute resolution process, with either EPA, or the federal licensing agency, serving as the ultimate arbiter. *Id.* This process gives affected tribes a meaningful role in protecting water quality from the impacts of federally licensed activities upstream of the reservation.

Appellant's characterization of the water quality certification process as a "power grab" is no more applicable to tribes than it is to states. Congress intended the Clean Water Act as a cooperative, multi-sovereign system for water pollution control, with the federal government, states, and approved Indian tribes all playing crucial roles. Under Congress' scheme, the substantive provisions of the Clean Water Act are implemented primarily by the sovereign states and tribes whose waters suffer the adverse impacts of pollution. *See* 33 U.S.C. § 1251(b). The Court should reject Appellant's attempt to narrow the state and tribal role in protecting the quality of waters that flow through the lands for which they have the responsibilities of sovereigns.

Congress' recognition of tribal authority to regulate the quality of water within reservation boundaries furthers the United States' trust responsibility to tribes by recognizing tribes' unique dependence on water and aquatic resources within the reservation. The federal government, as trustee to tribes, stays closely involved in the tribal regulation of water quality under the Clean Water Act. EPA must approve the regulatory authority of tribes, approve the water quality standards created by tribes, and resolve any disputes between upstream states and downstream tribal governments who share the authority to certify federal projects in compliance

with their respective water quality standards. 33 U.S.C. § 1377(e); 40 C.F.R. § 131.5; 40 C.F.R. § 131.7. Whether viewed as a delegation of authority to tribes by Congress, or as a Congressional reinvestment of tribal sovereignty,[9] the Clean Water Act recognizes that tribes are entitled to regulate activities that have the potential to degrade the quality of waters that flow through their reservations.

The water quality certification process in Section 401 provides a critical mechanism for EPA-approved Indian tribes, such as the *amici curiae* Tribes, to ensure that federally licensed activities do not degrade tribal water quality standards. The narrow interpretation of Section 401 advocated by Appellant would prevent tribal governments from protecting reservation water quality from the impacts of federally licensed dams that cause significant pollution and contribute to violations of tribal water quality standards.

II. FEDERALLY LICENSED DAMS HAVE SIGNIFICANT IMPACTS ON WATER QUALITY AND THE PROPERTY RIGHTS OF INDIAN TRIBES SUCH AS AMICI CURIAE.

Federally licensed dams have significant impacts on Indian tribes not only due to the fact that many dams are

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[9] *See* Anne E. Tweedy, *Using Plenary Power As A Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States v. Lara*, 35 ENVTL L. 471 (2005) (arguing that 33 U.S.C. § 1377 may be viewed as a reinvestment of tribal sovereignty for purposes of water quality regulation); David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations,* 23 ENVT. L. REP. 10579 (1993).

located on or near Indian reservations, but also because the dams create significant pollution that interferes with Indian tribes' reserved rights to water and fish. The Tribes ask the Court to look beyond the Appellant's narrowly tailored arguments and consider the broader implications of exempting federally licensed dams from the certification authority provided in Section 401.

The question presented in this case, as framed by Appellant, is whether the "mere flow of water" through a dam constitutes a "discharge" for purposes of Section 401. Appellant would have this Court imagine a dam to be nothing more than a bridge beneath which water is not obstructed or altered in any way, but "merely flows" through a porous structure in the riverbed. The dams that affect the *amici curiae* Tribes, like many of the large hydroelectric and storage dams in the Western United States, are not nearly so benign.

The Klamath Hydroelectric Project, built upstream of the Hoopa Valley Reservation in the early twentieth century, is representative of many hydroelectric projects in the western United States. The formerly free-flowing Klamath River is blocked by six separate dams, which form shallow reservoirs behind them. These reservoirs increase water temperature and provide optimal conditions for nutrient loading and outbreaks of algal blooms. On September 30, 2005, EPA, the State of California North Coast Regional Water Board and the Karuk Indian Tribe issued a joint public health alert due to an outbreak of the toxic algae *Microcystis aeruginosa* within and downstream of the Klamath

Hydroelectric Project.[10] Scientists recorded the toxic algae at levels that exceeded World Health Organization standards for recreational use by 468 times. As stated in the public health alert: "Warm and calm surface water created by Iron Gate and Copco Reservoirs [reservoirs within the Klamath Hydroelectric Project] provide an ideal environment for the growth of large algal blooms." These algal species, which bloom and thrive in the stagnant reservoirs behind the dams, pass through the dams polluting downstream waters and posing risks to human and aquatic health.

Combinations of stagnant water conditions, low dissolved oxygen, and increased water temperature caused, in part, by dams are also lethal to fish. In 2002, Klamath River communities witnessed the largest recorded adult fish kill in United States history. Approximately 33,000 chinook, coho, and steelhead salmon were found dead as a result of degraded water quality in the Klamath River between September 20 and 27, 2002. *See Pacific Coast Federation of Fishermen's Associations v. United States Bureau of Reclamation*, 426 F.3d 1082, 1089 (9th Cir. 2005) (citing fish kill).

The larger storage and hydroelectric dams of the West have additional pollution problems:

> Dams accumulate sediments, which over time may absorb other types of pollutants such as PCBs, pesticides, and heavy metals. Releases of water containing these sediments can inundate downstream habitats and shorelines with sediments harmful to

[10] The health alert is available on the EPA webpage at http://yosemite.epa.gov/r9/r9press.nsf/newsbyyear?ReadForm&year=2005 (Sept. 30, 2005 press release).

> humans and aquatic life. The sediments also contain toxic pollutants such as dioxins and heavy metals such as mercury, which can be re-suspended in the downstream waters upon discharge.

Alison M. Dornsife, *From A NonPollutant Into A Pollutant: Revising EPA's Interpretation Of The Phrase "Discharge Of Any Pollutant" In The Context Of NPDES Permits,* 35 ENVTL L. 175, 177 (2005) (citations omitted); *see also id.* at 180-82 (detailing the significant environmental impacts of dam discharges).

As a result of this collection of polluted sediment behind dams, the algae generated in the dams' reservoirs, and the thermal and chemical impacts of the reservoirs, water discharged out of dams carries pollutants and related water quality problems into the downstream water-body at a significantly higher concentration level than would otherwise exist without the dams in place.

A ruling in favor of Appellant may mean that the water quality impacts associated with the Klamath Hydroelectric Project, and the numerous other dams currently seeking re-licensing,[11] receive little attention. The Court should decline Appellant's invitation to issue a ruling that significantly sets back Congress' goal of attaining fishable

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[11] Forty-six federally licensed hydroelectric projects are undergoing or scheduled to undergo re-licensing in California between 1997 and 2016. *See* California Energy Commission Staff Report, *California Hydropower System: Energy and Environment Appendix D* (Oct. 2003), at p. D-19, *available at* http://www.energy.ca.gov/reports/2003-10-30_100-03-018.PDF.

and swimmable waters throughout the nation. *See* 33 U.S.C. § 1251(b). The Court should affirm state and tribal rights to regulate the quality of waters within their borders, as envisioned by Congress in the Clean Water Act.

III. HYDROELECTRIC DAM OPERATIONS RESULT IN A DISCHARGE AND ARE PROPERLY SUBJECT TO THE WATER QUALITY CERTIFICATION AUTHORITY IN SECTION 401.

Appellant's primary argument, that "discharge" should be interpreted synonymously with "discharge of a pollutant" strains the language of the Clean Water Act and should be rejected. The Clean Water Act distinguishes the terms "discharge" and "discharge of a pollutant." "The term 'discharge of a pollutant' . . . *means* any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). In contrast, "the term 'discharge' when used without qualification *includes* 'a discharge of a pollutant.'" 33 U.S.C. § 1362(16) (emphasis added).

"The use of the term 'includes' in a statutory definition indicates that the definition that follows is a non-exclusive list that can be enlarged, and that items not clearly listed in the definition may nonetheless be covered by the term." Alia S. Miles, *Searching for the Definition of "Discharge": Section 401 Of The Clean Water Act*, 28 ENVTL L. 191, 212 (1998), *citing Helvering v. Morgan's Inc.,* 293 U.S. 121, 125 n.1 (1934) (holding that "the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition"); *Chemehuvi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1054 (9th Cir. 1985) (holding that "includes" is a term

of enlargement, not of limitation), *rev'd on other grounds,* 474 U.S. 9 (1985).

Appellant's merging of the terms "discharge" and "discharge of a pollutant" contradicts the definitional guidance provided by Congress in the Clean Water Act. Congress intended "discharge," when standing alone, to be broader and more inclusive than the defined term "discharge of a pollutant." *See Oregon Natural Desert Ass'n* at 1098 (stating the term "discharge" is broader than "discharge of a pollutant" because "discharge" includes "all releases from point sources, whether polluting or nonpolluting").

Appellant's argument also abuses the plain and ordinary meaning of the term "discharge." "Discharge," as defined by Webster's Dictionary means "a flowing or issuing out; something that is emitted." Webster's Ninth New Collegiate Dictionary 360 (1991); *see also PUD No. 1 of Jefferson County v. Washington Dep't of Ecology,* 511 U.S. 700, 725 (1994) (Thomas, J., dissenting) (stating "[t]he term 'discharge' is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted'").

The operation of hydroelectric dams results in a "discharge" into waters of the United States, triggering certification authority under Section 401.[12] Dams, such as

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[12] *See PUD No. 1 of Jefferson County*, 511 U.S. at 711 (assuming that the release of water at the end of a dam's tailrace after water has been used to generate electricity constitutes a "discharge" under section 401); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296 (D.C. Cir. 2003) (holding that increased flow of water, and particularly of low dissolved oxygen water passing through dam turbines

those in the Klamath Hydroelectric Project, block free-flowing water, store it temporarily in reservoirs (accumulating sediment, removing dissolved oxygen, and generating toxic algal blooms), divert the water into a power canal which extends for hundreds of yards, send the water down penstocks and through turbines to generate electricity, and then discharge used water back into the river downstream of the dam. Moreover, since power production is not continuous, the volume, intensity, and timing of these discharges varies, sending large amounts of water downstream at times, while storing water for future power production at other times. This operational aspect of hydroelectric dams, known as "peaking," results in additional harm to aquatic habitat by altering traditional river flows, and alternately flooding and de-watering habitat in the downstream riverbed.

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constituted a "discharge"); *State of North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (assuming *arguendo* that the flow of water through dam turbines is a "discharge" as defined by Section 401, but holding that the "withdrawal" of water is not a "discharge"); *National Wildlife Fed'n v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990) (stating "common sense supports FERC's conclusion that the discharge in this case would occur at the dam, where the flow of water would be blocked and consequently the water would be backed up"); *In re City of Fort Smith*, 42 F.E.R.C. ¶ 61,362, at 62,047 (1988) (finding a "discharge" to occur over the dam and from the powerhouse tailrace), *on reh'g* 44 F.E.R.C. ¶ 61,160 at 61,513 (1988), *aff'd*, 912 F.2d 1471 (D.C. Cir. 1990).

The Court should reject Appellant's attempt to merge the water quality certification authority of Section 401 with the permitting authority of Clean Water Act Section 402, 33 U.S.C. § 1342. Those authorities have different origins, different purposes, and contain different statutory language. Judicial interpretations of Section 402 and the expressly-defined phrase "discharge of a pollutant" do not determine the proper interpretation of Section 401 and the broader, more inclusive, term "discharge."

CONCLUSION

The Court should affirm the judgment of the Maine Supreme Judicial Court and affirm state and tribal authority under Clean Water Act Section 401, 33 U.S.C. § 1341, to protect their waters from federally-licensed dams that threaten to impair them.

Respectfully submitted,

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January 5, 2006

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