No. 04-1527

In The Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE BOARD OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF FOR RESPONDENT MAINE BOARD OF ENVIRONMENTAL PROTECTION

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QUESTION PRESENTED

Does the mere flow of the Presumpscot River through S.D. Warren Company's existing dams into the River below constitute "any discharge" under section 401 of the Clean Water Act?

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STATUTES INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. (CWA), are sections 101, 303, 304(f)(2)(F), 401, 402, 502(6), (12), (14), (16) and (19), and 511(a) and (c)(2), 33 U.S.C. §§ 1251, 1313, 1314(f)(2)(F), 1341, 1342, 1362(6), (12), (14), (16) and (19), and 1371(a) and (c)(2). Those not reproduced by Petitioner are set forth *infra* at A-1 to A-5.

STATEMENT OF THE CASE

On October 2, 2003, the Maine Board of Environmental Protection (BEP) affirmed an order of the Maine Department of Environmental Protection (DEP) issuing water quality certifications, pursuant to § 401 of the CWA, 33 U.S.C. § 1341, to Petitioner S.D. Warren Co. for the licensing by the Federal Energy Regulatory Commission (FERC) of five existing hydroelectric facilities on the Presumpscot River in Maine (the Facilities). Appendix to Petition for Writ of Certiorari (Pet. App.) A-35. The Facilities clearly induce pollution and prevent the attainment of water quality standards adopted by Maine and approved by the federal Environmental Protection Agency (EPA), pursuant to § 303, 33 U.S.C. § 1313, of the CWA, but do not specifically add pollutants to the River. Pet. App. A-42 – A-59, A-83 – A-139. The certifications contain conditions necessary to assure that the operations of the Facilities will comply with Maine's water quality standards, and FERC subsequently incorporated those conditions into its new licenses for the Facilities. *Id.* at A-121 – A-140. Petitioner challenged the authority of Maine to issue § 401 certifications for the operation of hydropower projects

licensed, pursuant to the Federal Power Act (FPA), 16 U.S.C. §§ 791a *et seq*., arguing that the Facilities do not "result in any discharge into the navigable waters." The Maine Supreme Judicial Court (SJC) rejected that challenge. Pet. App. A-1.

1. REGULATORY FRAMEWORK. The Court is again asked to resolve a dispute over the role of the states in the "statutory and regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities." *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). The Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, established "a comprehensive program for controlling and abating water pollution." *Train v. City of New York*, 420 U.S. 35, 37 (1975). The statute was "designed 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'" and "to attain 'water quality which provides for the protection and propagation of fish, shellfish and wildlife.'" *PUD No. 1*, 511 U.S. at 704 (quoting 33 U.S.C. § 1251(a)).

In establishing this regulatory framework, Congress was careful to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," CWA § 101(b), 33 U.S.C. § 1251(b), and this broad role is reflected in both the CWA's definitions and its delineation of regulatory responsibilities. Congress broadly defined "pollution" to "mean[] the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." CWA § 502(19), 33 U.S.C. § 1362(19). "Pollutant," however, is more narrowly defined to "mean[ ]" various listed materials and wastes as well as heat. CWA § 502(6), 33 U.S.C.

§ 1362(6). Therefore, the discharge of "pollutants" is one cause of "pollution," but does not cover all man-induced alterations of the water, such as in particular those generally related to the operation of dams.

The Administrator of the Environmental Protection Agency (EPA) must promulgate technology-based limitations on individual discharges of *pollutants* into navigable waters from point sources, pursuant to sections 301 and 304, 33 U.S.C. §§ 1311, 1314. A separate but complementary component of the CWA is found in § 303 dealing with the broader range of *pollution*, and requiring each State, subject to federal approval, to promulgate comprehensive water quality standards establishing water quality goals for all intrastate waters. 33 U.S.C. § 1313. These state water quality standards provide "a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976). Section 303 water quality standards "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act." 33 U.S.C. § 1313(c)(2)(A). Any such standards must take into account "their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also . . . their use and value for navigation." *Ibid*; 40 C.F.R. §§ 131.1 to 131.13. Acting in accordance with this mandate, in 1986, Maine revised and

strengthened its water quality standards to better protect its water resources.[1]

Pollutants and pollution are addressed by multilayered programs which are ultimately enforced through a variety of measures, including by § 401 certification and § 402 permits. State certification of federally-licensed activities "which may result in any discharge" was first established in § 21(b) of the Water Quality Improvement Act of 1970 (the 1970 Act), Pub. L. 91-224, § 103, 84 Stat. 91, 108.[2] In 1970, Congress did not include a definition of "discharge" for § 21(b). In 1972, Congress essentially reenacted § 21(b) as § 401(a)(1), 33 U.S.C. § 1341(a)(1), Pub. L. 92-500, 86 Stat. 816, 877. This provision addresses the broad range of pollution from federally-licensed facilities and is a primary mechanism for the states to attain water quality standards. Section 401(a)(1) presently requires that:

> Any 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

[1] Maine Public Laws 1985, c. 698, § 15, now found as amended at Me. Rev. Stat. Ann. tit. 38, §§ 464 *et seq.* (West 2001 & Supp. 2005).

[2] Section 21(b) provided:

> Any 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 of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that there is reasonable assurance, as determined by the State or interstate agency that such activity will be conducted in a manner which will not violate applicable water quality standards.

> agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of this Act.

In 1972, Congress provided in the CWA's definition section:

> The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

CWA § 502(16), 33 U.S.C. § 1362(16). A § 401 certification is required to set forth effluent and other limitations to assure that the Federal licensee complies with, *inter alia*, state water quality standards as well as "with any other appropriate requirement of State law"; such limitations "shall become a condition on any Federal license" and may be more stringent than those otherwise established by the EPA. CWA § 401(d), 33 U.S.C. § 1341(d); *see PUD No. 1*, 511 U.S. at 704-05, 711-14 (generally discussing § 401).

First enacted in 1972, § 402 deals exclusively with the discharge of *pollutants*. In order to enforce the technology-based limitations promulgated by the Administrator of the EPA under sections 301 and 304 noted above, § 402 established the National Pollutant Discharge Elimination System (NPDES) which requires "a permit for the discharge of any pollutant." 33 U.S.C. § 1342. "[D]ischarge of a pollutant" is specifically defined to "mean" the "*addition*" of any pollutant to navigable waters from a point source. CWA § 502(12), 33 U.S.C. § 1362(12) (emphasis added); *see South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 159, 162, *reh'g denied*, 541 U.S.

1057 (2004) (generally discussing NPDES program).[3] "[P]oint source" is defined to mean "any discernible, confined, and discrete conveyance," such as "any pipe, ditch, [or] channel." CWA, § 502(14), 33 U.S.C. § 1362(14). Section 402, therefore, creates a federal permit that is a subset of the array of federal licenses and permits requiring § 401 certification. A § 402 permit is fully subject to § 401 certification which, as noted above, can prescribe more stringent limitations on the "discharge of a pollutant" in order to attain the state's water quality standards. Operation of a dam generally does not involve the discharge of pollutants, thus not requiring a § 402 permit.

One category of federally licensed facilities that has long been subject to § 401 certification is hydropower projects.[4] Pursuant to the FPA, FERC issues licenses for hydropower projects on the nation's navigable waters. 16

[3] The NPDES permitting process can, and generally has, been delegated to the states. CWA § 402(b), 33 U.S.C. § 1342(b). Maine has been delegated this responsibility over its non-Indian territory. *Approval of Application by Maine to Administer the National Pollutant Discharge Elimination System (NPDES) Program,* 68 F.R. 65052 (Nov. 18, 2003).

[4] Maine has issued § 401 water quality certifications for the operation of numerous preexisting dams not involving the discharge of pollutants. *See, e.g., Ridgewood Maine Hydro Partners, L.P.* (Damariscotta Mills), 105 F.E.R.C. ¶ 62,137 (2003); *FPL Energy Maine Hydro LLC* (Upper & Middle Dams Storage), 101 F.E.R.C. ¶ 62,179 (2002); *Bangor Hydroelectric Company* (Medway), 86 F.E.R.C. ¶ 62,242 (1999); *Bangor Hydroelectric Company* (Stillwater), 83 F.E.R.C. ¶ 61,038 (1998); *Town of Madison* (Sandy River), 81 F.E.R.C. ¶ 61,252 (1997); *Central Maine Power Company* (Fort Halifax), 81 F.E.R.C. ¶ 61,249 (1997); *Central Maine Power Company* (North Gorham), 65 F.E.R.C. ¶ 62,154 (1993); *Maine Public Service Company* (Aroostook), 65 F.E.R.C. ¶ 62,215 (1993); *Central Maine Power Company* (Cataract), 47 F.E.R.C. ¶ 62,296 (1989); *Great Northern Paper Company* (Mattaceunk), 44 F.E.R.C. ¶ 62,368 (1988).

U.S.C. § 797. FERC is authorized to issue new licenses for the continued operation of a dam, as it did for the Facilities here.[5] The new license may be issued for a term of up to fifty years "upon such terms and conditions as may be authorized or required under the then existing laws and regulations," 16 U.S.C. §§ 808(a)(1), 808(e), such as the CWA. FERC's regulations require that either a § 401 certification or evidence of waiver thereof be submitted for all license applications. 18 C.F.R. §§ 4.34(b)(5), 16.8. But for § 401, the states would have no control over the water quality impacts of federally licensed hydropower facilities.[6]

2. THE PRESUMPSCOT RIVER. The word *"presumpscot"* derives from an Abenaki word that means "Rough-places River."[7] The Presumpscot River originates at the outlet of Sebago Lake in southern Maine and flows southerly approximately 25 miles to the ocean. Joint

[5] Under the FPA, licenses are required for both the original construction and operation of a dam, referred to as an "original" license, and for the continued operation of the dam after the original license expires, or a "new" license. 16 U.S.C. §§ 797, 808; 18 C.F.R. § 16.2. FERC has properly characterized the activities to be licensed here not as "the continuation of a preexisting discharge," but as "a new commitment of public resources for the term of the new license." *FPL Energy Maine Hydro LLC,* 111 F.E.R.C. ¶ 61,104 (2005).

[6] At certain points in Petitioner's brief, it suggests a conflict between the roles of FERC under the FPA and the states under § 401. Pet. Br. at 5-9. That issue, however, was the subject of Petitioner's second question in its petition for writ of *certiorari,* which the Court denied. In any case, there is no statutory language or legislative history exempting FERC licenses from § 401, and as discussed *infra*, the contrary is true. *See also*, *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians,* 466 U.S. 765, 772-77 (1984) (Congress has created a multilayered approach, wherein other agencies have authority to insist on conditions in FERC licenses).

[7] Fannie Hardy Eckstorm, *Indian Place-Names of the Penobscot Valley and the Maine Coast* (University Press, 1960) (1941), at 159-60.

Appendix (J.A.) at 9. At one time, it teemed with thriving populations of anadromous fish, including Atlantic salmon, American shad and alewife. Pet. App. A-89. It no longer does so. *Ibid.*

The history of Maine is the history of dams, and these "rough-places" became the focal points of development and controversy with the arrival of Europeans. The dam at Presumpscot Falls, initially constructed in 1735,[8] is said to be the first dam built on the River, and the effects of that dam and others that soon followed were of immediate concern to the Native Americans and the new settlers. In 1739, for example, Chief Polin traveled to Boston to obtain a letter from Governor Belcher requiring the installation of a fish passage at the Presumpscot Falls dam.[9]

Eight dams are located on the Presumpscot River today. (*See* Map at J.A. at 9.) Five of them, owned and operated as hydroelectric facilities by Petitioner, are the subject of this appeal. From upstream to downstream they are Dundee, Gambo, Little Falls, Mallison, and Saccarappa. *Ibid.* The Facilities were constructed or converted to hydroelectric production in the early 1900s, and are located back-to-back on a stretch of the River approximately 12 miles in length. Pet. App. A-74 – A-77; J.A. 9. None presently has fish passage, so that each creates a barrier to such passage. Pet. App. A-89.

The Facilities operate continuously to generate electricity used at Petitioner's paper mill. The dams' mode

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[8] William Willis, *History of Portland* (Maine Historical Society, 1972) (1865), at 449.

[9] Maine Historical Society, *Collections*, 23 Doc. Series 257-62 (1916).

of operation is known as "run-of-river," but that term is somewhat inexact. Pet. App. A-77 – A-78. While the input into each impoundment approximately equals output, and the impoundments are maintained at near constant levels, the flow is in fact manipulated by the operator. *Final Environmental Impact Statement for Presumpscot River Projects*, SJC Record (R.) 174, at 11. Petitioner maximizes power generation by manually controlling the projects in response, in part, to flows released from an upstream hydroelectric project, not the subject of this case but also owned by Petitioner. *Ibid.*

Each Facility operates generally in the same manner. Each has a dam, with an impoundment behind it that stretches to the Facility immediately upstream. J.A. 10 – 17; Pet. App. A-74 – A-77. Each Facility operates by diverting water from the man-made impoundment into a man-made "power canal" (Pet. Br. at 3) and then through turbines, from which the water is released into a man-made tailrace and finally discharged into the next segment of the river channel. *Ibid.* The stretches of river from which the water is diverted are bypass reaches that in the past have received no flows except leakage through and around dam structures (e.g. gates, flashboards) and occasional spillage over the spillway. Pet. App. A-94; *Final Environmental Impact Statement for Presumpscot River Projects*, R. 174, at 76. The essentially dewatered bypass reaches range from 300 to 1075 feet in length. Pet. App. A-94.

The "Rough-places River" has been transformed into a series of impoundments in the 12 miles occupied by the Facilities. Pet. App. A-74 – A-77, A-108. As is the case with scores of dams in Maine and hundreds of dams across the country, there is no dispute that these Facilities do not

discharge "pollutants" as that term is defined in § 502(6) of the CWA, and therefore do not require permits under § 402. There is also no dispute that each of these Facilities, like almost all other hydropower projects, contribute to "pollution" as that term is defined under § 502(19) because each alters the chemical, physical and biological integrity of the water, causing the River to fail to meet water quality standards. Specifically, the Facilities do this by (1) "reducing natural reaeration, increasing time of travel, increasing water temperature, and creating settling basins for sediments and nutrients," thus depleting dissolved oxygen in the River; (2) rendering the water relatively useless for aquatic life in the essentially dewatered bypass reaches; (3) blocking passage of fish to their spawning and nursery waters; and (4) impeding recreational access to and use of the River. Pet. App. A-49, A-89, A-114 – A-115; Pet. Br. at 23-24.

3. PROCEDURAL HISTORY. The Facilities were first licensed by FERC between 1979 and 1981. Pet. App. A-2. At that time, Maine waived the requirement for water quality certification under § 401.[10] As noted above, Maine's water quality standards were substantially strengthened in 1986.

The FERC licenses were scheduled to expire on January 26, 2001. On January 22, 1999, Petitioner filed applications for new licenses with FERC. As with other, similar projects in Maine and around the nation, FERC required § 401 certifications for the Facilities. SJC Appendix,

[10] *S.D. Warren Orders*, 16 F.E.R.C. ¶ 62,458 (1981); 11 F.E.R.C. ¶ 62,285 (1980); 11 F.E.R.C. ¶ 62,150 (1980); 11 F.E.R.C. ¶ 62,111 (1980); 9 F.E.R.C. ¶ 62,603 (1979).

at 119, 238. Petitioner applied for certifications from Maine, but took the position that none were required. Petitioner's application proposed, *inter alia*, increased stream flows into the bypass reaches at three of the dams but did not propose any fish passage facilities. Pet. App. A-78 – A-82, A-94.

On April 30, 2003, the DEP issued an order approving § 401 water quality certifications with conditions for the operation of Petitioner's Facilities. Pet. App. A-121 – A-140. Petitioner appealed the certifications to the BEP, which, on October 2, 2003, following *de novo* review, affirmed DEP's order. Pet. App. A-35 – A-73. These conditions include minimum flows at three of the Facilities into the bypass reaches greater than those proposed by Petitioner, additional spillage at two of the Facilities to increase dissolved oxygen, a contingent phased implementation for fish passage on the five dams to permit sea-run fish to access their natural spawning and nursery waters, and recreational access requirements. Pet. App. A-53 – A-54, A-121 – A-139. All of these conditions were necessary to assure compliance with the State's water quality standards approved by the EPA. Pet. App. A-83 – A-117.

Petitioner appealed the BEP's order to the Maine Superior Court (Pet. App. A-19), and then to the Maine Supreme Judicial Court (Pet. App. A-1). Both courts affirmed.

Applying § 401, FERC issued 40-year licenses for these Facilities, incorporating all conditions of Maine's certifications. *S.D. Warren Co.*, 105 F.E.R.C. ¶¶ 61,009 to 61,013 (2003). Petitioner appealed FERC's licensing orders to the Court of Appeals for the District of Columbia Circuit. That appeal did not challenge the need for § 401

certification. The court denied the petition for review on May 6, 2005. *S.D. Warren Co. v. Federal Energy Regulatory Commission*, No. 04-1105 (D.C. Cir., filed May 6, 2005).[11]

4. DECISION OF THE MAINE SUPREME JUDICIAL COURT. Utilizing an analysis not proffered by the BEP, the SJC found that an "'addition' is the fundamental characteristic of any discharge" because "discharge of pollutants" means any *addition* of pollutants, and "discharge of pollutants" is included in the definition of "discharge." Pet. App. A-6. The SJC went on to conclude that waters that run through the turbines lose their status as waters of the United States, and therefore are an "addition" when they return to the river. Pet. App. A-8, A-10. The SJC rejected Petitioner's argument that "discharge" is limited to "discharge of pollutants." Pet. App. A-8. The SJC, agreeing with the BEP, reasoned that the use of the word "includes" in the definition of "discharge" in § 502(16) as that term is utilized in § 401 "must be given its plain meaning. The common meaning of the word *includes* does not suggest it is a word of limitation." Pet. App. at A-9 (emphasis in original). The SJC concluded that "any discharge from a dam, whether polluting or not, is a 'discharge' for purposes of section 401(a)(1)." Pet. App. at A-8. The SJC did not discuss *Miccosukee.*

[11] Petitioner filed no petition for writ of certiorari regarding this denial.

SUMMARY OF ARGUMENT

The flow of water through dams is a discharge triggering § 401 review under the plain language of the CWA. "[A]ny discharge" under § 401 occurs when water, wherever it came from and whatever is in it, is *discharged* – that is, is emitted or flows – from the operation of a federally licensed facility into the navigable waters of the United States. The expansive words used in § 401(a)(1) mean what they plainly say, and there is no dispute that in fact water is emitted from the operation of these Facilities into navigable waters.

Section 502(16) provides that "discharge" "includes" "discharge of pollutants." The use of the word "includes" intends that the latter is simply a subset of, not a limitation on, the former. When Congress enacted two separate definitions – "discharge" and "discharge of pollutants" – Congress ascribed different meanings to the different definitions and did not enact redundant provisions whereby the two terms are simply coextensive. Moreover, Congress did not use the word "addition" to generally qualify "discharge," although in the same enactment in the same definitional section Congress used "addition" to define "discharge of pollutants." Thus, the concept of "addition" is not a limitation on the scope of "discharge."

Although the SJC properly found that "discharge" under § 401 is not limited to a discharge of "pollutants" and reached the correct result, the SJC's importation of notions of "addition" was erroneous. The BEP does not rely upon the SJC's "addition" reasoning for the affirmation of the BEP's assertion of § 401 authority over the Facilities.

Petitioner's theory is that a state lacks the authority to issue a § 401 certification because the flows from the

dam do not involve an "addition" of a "pollutant" or "something like" it. Pet. Br. at 34. Petitioner relies on the definition of "discharge of pollutant," as used in § 402, and cases construing it, including this Court's decision in *Miccosukee*. Section 401 on its face, however, covers a broader range of water quality impacts than § 402, and nothing in *Miccosukee* is to the contrary. Petitioner has not provided any support, either in the statute, or judicial or administrative interpretation thereof, for its overly narrow interpretation of § 401. Petitioner's reliance on sections 304(f)(2)(F) and 511(c)(2) is misplaced. The former simply mandates information-sharing by the EPA with the states, and the latter prevents review under the National Environmental Policy Act (NEPA) of CWA limitations dealing only with *pollutants*. Neither provision on its face or as intended exempts hydropower facilities from § 401 certification.

The purpose of the CWA, to restore the chemical, physical, and biological integrity of the Nation's waters, is furthered by BEP's interpretation, and seriously undermined by that of Petitioner. The hundreds of dams that are subject to FERC licensing but do not "add" "pollutants" are not covered by § 402, and therefore, under Petitioner's theory, would become exempt from the regulatory reach of the CWA, a result clearly at odds with the expressed intent of Congress to eliminate water pollution in all of its forms. The plain result of Petitioner's argument is that the states' primary role in reducing the effects of non-pollutant water pollution would be eliminated with respect to hydropower facilities, requiring the burden of attainment of water quality standards to be placed on other river dischargers.

The legislative record further demonstrates that § 401 was intended to cover FERC licenses generally and hydropower projects specifically. In contrast, the legislative record is barren of any hint that Congress intended certification to be limited to activities that involved the discharge of pollutants or "something like" pollutants.

Finally, EPA, FERC and even the hydropower industry have all interpreted "any discharge" in § 401 to include the flow of water through dams. Be it full *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference or persuasive respect, the EPA's interpretation of § 401 is compelling of the conclusion that the relicensing of dams through which water is discharged into navigable waters requires state certification under § 401.

ARGUMENT

THE FLOW OF THE PRESUMPSCOT RIVER THROUGH AND OUT OF PETITIONER'S HYDROPOWER FACILITIES INTO THE RIVER BELOW IS "ANY DISCHARGE" UNDER SECTION 401 OF THE CLEAN WATER ACT.

I. The Plain Language of the Clean Water Act Makes Clear that the Flow of Water Out of the Facilities Into the River Below is a Discharge under Section 401(a).

Section 401 on its face covers the broad array of federally licensed activities that affect a state's water quality standards, including dams. Limiting the broad reach of § 401 to those permits that involve a "discharge of pollutants" or "something like" pollutants finds no support in the words of the CWA. When interpreting a statute, the

Court "begin[s] with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

A. The language of sections 401 and 502(16) make plain that "any discharge" encompasses flows out of FERC-licensed dams.

The operative statutory clause of § 401(a)(1) – "any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters" – is written in the most broad and expansive of terms. "[A]ny activity" encompasses the full panoply of human endeavor, and there can be no reasonable dispute that the operations of the Facilities are federally licensed "activit[ies]" within the ambit of § 401(a)(1). "[M]ay result in" utilizes the permissive "may" which is "used to express possibility," Random House Unabridged Dictionary 1189 (2d ed. 1987), rather than "will," and therefore plainly covers "any activit[ies]" that have the chance of a discharge.

"[A]ny discharge" could not be more broadly written. The plain meaning of "any" is "one or more without specification or identification," "every," or "all." Random House Unabridged Dictionary 96 (2d ed. 1987); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'").

"Discharge" in § 502(16) is broadly described "when used without qualification" as "includ[ing]" "discharge of

pollutants," without any limitation. "The 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.' " *PUD No. 1*, 511 U.S. at 725 (Thomas, J., dissenting) (quoting Webster's Ninth New Collegiate Dictionary 360 (1991)). This "plain and ordinary meaning" encompasses anything emitted during the operation of the Facilities so long as it flows into navigable waters, whether or not the "discharge" is considered to be the waters of the Presumpscot River before or during the "emitting," and whether or not the "discharge" contains "pollutants" or "something like" them from the outside world. That is the clear, unlimited connotation of "*any* discharge." Simply put, under the language of sections 401 and 502(16), it does not matter where the water comes from before it pours forth from the "activity." There is no dispute that water is in fact emitted from – that is, discharged by – each Facility into navigable waters.[12]

The plain meaning of the words is that "discharge of pollutants" is a subset of "discharge," and the former does not circumscribe the latter. Congress employed "means" for every one of the 23 definitions listed in § 502, except the definition of "discharge" where it used the term "includes." 33 U.S.C. § 1362. "To 'include' is to 'contain' or 'comprise as part of a whole.' " *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) (quoting Webster's Ninth New Collegiate Dictionary 609 (1985)). "The natural

[12] Water must flow through the projects' turbines and be "discharged into" the river at the end of the tailrace in order for the project to produce electricity. Similarly, water is "discharged into" the river from other mechanisms associated with the dams, permitting their proper functioning, such as spillways and sluice-gates.

distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-126 n.1 (1934); *see also United States v. New York Tel. Co.*, 434 U.S. 159, 169 n.15 (1977) ("Where the definition of a term . . . was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include'"). The phrase following "including" does not limit the function before it. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 189 (1941).

The use of "includes" rather than "means" is significant. "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted)); *see* 2A Norman Singer, Statutes and Statutory Construction ("Singer"), § 46:06, at 192 (6th ed. 2000). Congress used the word "means" in all other definitions including "discharge of pollutants" but not in the definition of "discharge" – a difference in phrasing that must be presumed to have been done "intentionally" and "purposefully."

Section 401's requirement that the discharge be "into" navigable waters is a jurisdictional necessity to link the regulatory scheme to the Commerce Clause powers of Congress. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (generally discussing scope of "navigable waters.") The use of this simple preposition has no other significance, and certainly cannot be construed as

harboring a hidden exemption for hydropower projects from § 401, as Petitioner suggests – for Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Indeed, Petitioner's own description of the operation of each Facility – that water from the Facilities is "channeled" "back *into* the riverbed" – only supports this conclusion. Pet. Br. at 3 (emphasis added).

Given this expansive plain language, it is not surprising that this Court and both parties in *PUD No. 1* agreed that hydropower facilities require § 401 certifications. The Court stated:

> There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the [hydropower] project will result in two possible discharges – the release of dredged and fill material during the construction of the project, and *the discharge of water at the end of the tailrace after the water has been used to generate electricity*.

511 U.S. at 711 (emphasis added).[13]

[13] Because it has been understood that hydropower facilities require § 401 certification, there is limited discussion of this issue in the lower courts. *See Oregon Natural Desert Association. v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998), *cert. denied*, 528 U.S. 964 (1999) (finding that "discharge" as defined in § 502(16) was broader than "discharge of pollutants," but only included discharges from point sources, and stating in *dicta* that water released from the tailrace at dams is such a point source); *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1484 (D.C. Cir. 1990) ("discharge" for purposes of § 401 occurred "at the dam, where the flow of water would be blocked and consequently the water would be backed up"); *Power Authority of the State of New York v. Williams*, 475 N.Y.S. 2d 901, 904

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B. Petitioner's reading of the statute contravenes its plain meaning and established rules of construction.

Despite the two separate definitions for "discharge" and "discharge of pollutant," Petitioner argues they mean, or in its words "equate" to, the same thing. Pet. Br. at 15. On the contrary, "courts do not construe different terms within a statute to embody the same meaning." 2A Singer, § 46:06, at 193-94; *see also, United States v. Bean*, 537 U.S. 71, 76 n.4 (2002). Where, as here, both terms are used in a definitional section, the use of them to convey a different sense "seems clear." *Helvering*, 293 U.S. at 125-126 n.1.

Moreover, courts "will avoid a reading which renders some words altogether redundant." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574 (1995). Every word and clause is given effect if possible. *Chickasaw Nation*, 534 U.S. at 93. Petitioner's argument renders "discharge" when used "without qualification" to be wholly redundant of and the legal equivalent to "discharge of pollutant."[14] This result defeats the drafters' expressed emphasis on the particular importance of the law's definitions.[15]

(N.Y. App. Div. 1984) ("discharge" in § 401 "includes" and is broader than "discharge of pollutant.").

[14] Petitioner also relies upon the rule of *noscitur a sociis* – a "word is known by the company it keeps." Pet. Br. at 16-17. The application of that rule to this case is explained away by one of the decisions Petitioner relies upon, wherein the Court cautioned against a reading which "renders some words altogether redundant." *Gustafson v. Alloyd Co., Inc*., 513 U.S. 561, 574 (1995).

[15] "[I]t is necessary to recognize that certain terms used in the drafting . . . have very specific and technical meanings. The definitions of these terms are included in section 502 . . . and it is recommended that very special attention be accorded to section 502." H.Rep. No. 92-911 at

(Continued on following page)

If Congress had intended to limit "discharge" to "additions" of "pollutants,"[16] it presumably would have done so as it did in the nearby paragraph within the same section of the same enactment by simply writing in the word "addition." By not including "addition" as a general limitation on all "discharges" in § 502(16), Congress cannot be presumed to have intended to include it. *Barnhart v. Sigmon Coal Co.*, 534 U.S. at 452. Courts decline invitations to read a restrictive or limiting term – here "addition" – found in one provision into a section where Congress did not use that term. *See Russello*, 464 U.S. at 23; *United States v. Naftalin*, 441 U.S. 768, 772-773 (1979).

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75 (1972), *reprinted in* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1 ("*Legis. Hist.*") at 762. The drafters of the CWA specifically warned that "[t]o revise [the definitions] in a way so as to limit their coverage is to severely detract from the effectiveness of the bill." House Debate on H.R. 11896, March 27, 1972, 1 *Legis. Hist.* 356 (Statement of Rep. Blatnik, Chairman of the House Committee on Public Works).

[16] It should be noted that the importation of the concept of "addition" into § 401 appears to find its origin in two lower court cases that did not in fact involve the issue before this Court but rather the issue of whether a § 401 certification was required to amend an existing FERC license when the discharge changed. *Alabama Rivers Alliance v. Federal Energy Regulatory Commission*, 325 F.3d 290, 292 (D.C. Cir. 2003); *North Carolina v. Federal Energy Regulatory Commission*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998). Indeed, in *North Carolina* the parties apparently agreed that the project would require § 401 certification upon relicensing. 112 F.3d at 1195 (J. Wald, dissenting). In any event, neither case provided any detailed analysis dealing with the plain meaning, purpose, structure or legislative history of this provision, and in both cases the court assumed that water itself, regardless of pollutants, could be an "addition."

The language "any discharge" first appeared in § 21(b) of the 1970 Act. It was not until 1972 that Congress first incorporated the concept of "addition" into § 402 through the definition of "discharge of pollutant." Congress chose not to change the scope of state certification when it reenacted § 21(b) from the 1970 Act as § 401. To achieve the aim sought by Petitioner, in 1972 Congress easily could have written § 401 to read "may result in a discharge *of pollutants*" or even drafted § 502(16) to read that "'discharge' *means* the discharge of pollutants *or the addition of any other material.*" But "[t]he short answer is that Congress did not write the statute that way." *Naftalin*, 441 U.S. at 773. The fact that Congress did not do so is strong evidence of contrary intent. *Ibid.*

Petitioner suggests that BEP's reading of the statute results in an absurdity because "a river flowing through a dam" cannot be "a river 'discharging into' itself." Pet. Br. at 17. Of course, the Presumpscot is not simply discharging into itself; the water flows into each Facility – including its impoundment, power canal, turbines and tailrace – out of which the water is emitted, *i.e.* is discharged, "into" the River. Petitioner chooses to ignore the nature of the "flowing" process, which is interrupted by the Facilities' use and pollution of the water.

Petitioner can find no comfort in the soup-and-ladle analogy of *Miccosukee*: "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it *back into* the pot, one has not 'added' soup or anything else to the pot." 541 U.S. at 110 (citation omitted) (emphasis added). Because, according to Petitioner, the operation of a Facility "channel[s]" the water "back into" the River (Pet. Br. at 3), under the plain meaning of "any discharge," this activity is covered by § 401. Whether "soup or anything else" has

been "added" to the River may be relevant to NPDES coverage under *Miccosuskee*, which construes only the scope of the NPDES permit requirements of § 402, but not to state certification under § 401.

The SJC's importation of "addition" into "discharge" and § 401, therefore, was erroneous, and the SJC's loss-of-status reasoning to find an "addition" was unnecessary.[17] The CWA renders the status of the water as it enters, is used by and then is discharged from the Facilities irrelevant to § 401 certification, so long as that discharge is emitted into navigable waters.

II. The Purposes and Structure of the Clean Water Act Reinforce the Plain Meaning that "Any Discharge" Does Not Require the Addition of Something From Outside of the Presumpscot River.

A. The broad role reserved to the states "to prevent, reduce, and eliminate pollution" confirms that "any discharge" in section 401 is not limited by the definition of "discharge of pollutant," and encompasses flows of water through hydropower facilities.

A statute should be interpreted so that its manifest purpose, policy or object can be accomplished. *John Hancock Mut. Life. Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94 (1993); 3 Singer, § 58.6, at 107. If two reasonable constructions are possible, one that will carry

[17] *But see Dubois v. United States Dep't of Agric.,* 102 F.3d 1273, 1297 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997) (when "water leaves the domain of nature and is subject to private control rather than purely natural processes . . . it has lost its status as waters of the United States.").

out and the other defeat the object of the statute, the former construction prevails. 2A Singer, § 46.05, at 174-75 (footnote omitted); *see also Walton v. Cotton*, 60 U.S. (19 How.) 355, 358 (1856).

Congress intended the CWA to comprehensively prevent, reduce and eliminate water *pollution* in all its forms and to preserve the states' responsibilities and rights to do so within their bounds. CWA § 101, 33 U.S.C. § 1251. "Pollution" could not be more broadly defined – any "man-made or man-induced alteration" of the "integrity of water." CWA § 502(19), 33 U.S.C. § 1362(19). The CWA "expressly recognizes that water 'pollution' may result from 'changes in the movement, flow, or circulation of any navigable waters . . . including changes caused by the construction of dams.'" *PUD 1*, 511 U.S. at 719-20 (quoting 33 U.S.C. § 1314(f)(2)(F)). The states are the "prime bulwark in the effort to abate water *pollution*," and "[o]ne of the primary mechanisms through which the States may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act." *Keating v. Federal Energy Regulatory Commission*, 927 F.2d 616, 622 (D.C. Cir. 1991) (citation omitted) (emphasis added). The discharge of "pollutants," defined to mean certain material as well as heat, clearly does not include all man-induced alterations such as the lowering of dissolved oxygen by impoundment. *Compare* CWA § 502(6) *with* § 502(19), 33 U.S.C. §§ 1362(6) and (19). The discharge of *pollutants* is thus a subset within the broader problem of *pollution*.

The operation of dams affects water quality by obstructing the river and thereby creating or contributing to pollution (*see* Pet. Br. at 23), but not by the addition of pollutants requiring a NPDES permit under § 402. "[A]ny

discharge" must be understood to include the discharge of flows through hydropower facilities, regardless of the "addition" of pollutants or, in Petitioner's words, "something like" them (Pet. Br. at 34). Otherwise, FERC-licensed dams would be outside any regulatory authority under the CWA, and in particular outside the states' authority to enforce their water quality standards. *California v. Federal Energy Regulatory Commission*, 495 U.S. 490 (1990).

Congress should not be presumed to have failed to provide the responsible governmental entity – here the state – "with the authority needed to achieve the statutory goals." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 133 (1977). This is particularly so where Congress has created a legislative scheme where the federal and state governments are pursuing a "common purpose" to protect the public health. *Pharmaceutical Research & Mfrs. of America v. Walsh*, 538 U.S. 644, 666 (2003).

Moreover, reducing the broad concept of "discharge" to the narrower concept of "discharge of pollutants" would render § 401 internally inconsistent. In *PUD No. 1*, the Court held that the states' conditioning authority under § 401 extended to measures that would protect designated uses, including the establishment of minimum flows for the protection of fish. 511 U.S. at 719-21. It would make no sense for Congress to require the States to establish such designated uses of their waters, give them broad conditioning authority under § 401(d) to protect those uses, and then restrict the use of this authority to the limited range of facilities that discharge pollutants.

If Petitioner were to be correct, the burden to attain water quality standards after years of being shared would

now suddenly fall on the other users of the River, upsetting long-held expectations[18] and presenting serious practical difficulties. Petitioner's Facilities – and hundreds of dams like them – indisputably create pollution and contribute to the non-attainment of water quality standards. An exemption for hydropower facilities would produce harsh results for other users of the River, such as municipal treatment plants and industrial facilities. To attain standards, states would be forced to impose more stringent limits on other users in order to account not only for their own impacts but for those of exempt dams. This inequitable result is not contemplated anywhere in the CWA and should not be lightly inferred.

B. The conclusion that "any discharge" includes flows out of hydropower facilities is reflected in the structure of the CWA.

The Court also examines the statutory scheme to ensure the disputed provision is interpreted in a manner consistent with other parts of the statute. *John Hancock Mut. Life*, 510 U.S. at 94; *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997); 2A Singer, § 46:05, at 154. Not only does BEP's interpretation of sections 401 and 502(16)

[18] Indeed, at least one of the *amici* supporting Petitioner has expressed its understanding to Congress that § 401 applies to hydropower projects. *See, e.g.,* Capitol Hill Hearing Testimony, Fed. Doc. Clearing House Cong. Testimony (Aug. 5, 1993) (Testimony of Roger Woodworth, National Hydropower Assoc., on Reauthorization of the Federal Water Pollution Control Act before Senate Subcommittee on Clean Water, Fisheries and Wildlife) ("Although hydropower introduces no pollutants into our waterways," it is "subject to . . . the Section 401 water quality certification process."), *available in* LEXIS, U.S. Congress Library, Committee Hearing Transcripts.

further the objectives of the CWA as discussed above, but it is fully consistent with the structure and other provisions of that Act. By contrast, Petitioner's suggested theory leaves a gap in the regulatory framework of the CWA.

1. Sections 401 and 402. Sections 401 and 402 are different provisions serving different functions. Section 402 was added in 1972 to implement a system of permits for nationwide minimum effluent limitations on the discharge of pollutants. Section 402 on its face deals only with actual *additions of pollutants*. On the other hand, § 401, retained from § 21(b) of the 1970 Act, operates to allow a state to protect navigable waters from *pollution* by regulating any and all discharges from any federally-licensed activities in conformance with the full spectrum of CWA requirements, and, in particular, to allow a state to attain its water quality standards. Specifically, the operation of hydropower projects results in man-induced alteration of the water (Pet. Br. at 23-24), and § 401 is the tool the state has to control the effects of those alterations on its water quality. Section 402 does not address such dam pollution and Petitioner nowhere suggests it does.

Petitioner's primary argument is that "discharge" under § 401 should be read the same way "discharge of pollutants" was interpreted under § 402 by this Court in *Miccosukee*. This argument disregards the separate functions sections 401 and 402 play in the comprehensive scheme established by the CWA. Nothing in *Miccosukee* hints that "discharge" "equate[s]" to "discharge of pollutants." That case dealt exclusively with § 402 and the meaning of "addition" as utilized in the definition of "discharge of

pollutants," not § 401 or the scope of "discharge" as used therein.[19] Just as "discharge of pollutants" is a subset of "discharge," certifications issued in connection with pollutant discharge permits under § 402 are a subset of the array of certifications the states are authorized to issue under § 401.

2. Section 304(f)(2)(F). Section 304 requires EPA to provide information to governmental agencies, including the states, to use in the exercise of their regulatory authority.[20] This Court in *PUD No. 1*, viewed § 304(f)(2)(F) as recognizing that dams cause "pollution" by their effect on "the movement, flow, or circulation of any navigable waters," without any reference to *pollutants*. 511 U.S. at 719-720.

Petitioner argues, however, that the discussion of dams in § 304 is incompatible with the states' assertion of certification authority over dams under § 401. Pet. Br. at 23-25. On the contrary, this Court has already explicitly

[19] Similarly, Petitioner's reliance on lower court decisions dealing with § 402 is misplaced. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481, 492 (2d Cir. 2001) (transfer of pollutants is an addition under § 402); *Dubois,* 102 F.3d at 1299 (transfer of water from a river to a pond is an addition under § 402); *National Wildlife Federation v. Consumers Power Co*., 862 F.2d 580, 585 (6th Cir. 1988) (release of water from a dam containing entrained fish does not constitute the addition of a pollutant under § 402); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (§ 402 permit not required for dam-induced pollution).

[20] Section 304(f)(2)(F) requires the EPA to provide governmental agencies, including states, with information regarding "processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters . . . including changes caused by the construction of dams." 33 U.S.C. § 1314(f)(2)(F).

held that the pollution described in § 304(f)(2)(F) was properly the subject of the states' § 401 conditioning authority. *PUD No. 1*, 511 U.S. at 719-20. There is no language in § 304 that suggests that dams are exempt from § 401. Section 304(f)(2) on its face directs EPA to supply the states the information they need to exercise their regulatory responsibilities, including under § 401, and does not purport to limit § 401 authority. Section 304 is therefore informational only, and the CWA provides no mechanism other than § 401 for states to regulate the operation of FERC-licensed dams.

Petitioner further suggests that dam-caused pollution described in § 304(f)(2)(F) is non-point source pollution and should be addressed through the CWA's non-point source controls rather than § 401 certification. Pet. Br. 24-25. To the extent the "point source" – "non-point source" distinction informs this discussion at all, *see* Pet. Br. at 15, these Facilities are point sources under § 502(14), 33 U.S.C. § 1362(14), because they clearly are "discrete conveyance[s]" of water. *See Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998) (distinguishing non-point runoff from a release of water through a dam's tailrace which would involve a "conveyance" and is therefore a "point source"); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165, 182 (D.C. Cir. 1982) (a dam's pipes or spillways fall within the definition of point source); *cf. Miccosukee*, 541 U.S. at 106 (sources listed in § 304(f)(2)(F) may fall within the definition of "point source"). Nothing in § 304 describes changes in flows as "non-point source" pollution, and Petitioner's own description of these Facilities as conveying water by means of a "canal" and "channel" (Pet. Br. at 3-4), acknowledges these Facilities to be "point sources."

3. Section 511(c)(2). The National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. (NEPA), is a procedural mandate that requires "a federal agency contemplating a major action [to] prepare . . . an environmental impact statement . . . [to] ensure[ ] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Section 511(c)(2) of the CWA addresses one narrow aspect of NEPA review. It provides that NEPA does not authorize a federal agency to alter the controls imposed on the "discharge of a pollutant" in a NPDES permit or a state § 401 certification.[21] Its manifest purpose is to clarify that federal agencies may not use NEPA to act in an area – the establishment of effluent limitations and other limits on the "discharge of pollutants" – that Congress intended to be within the sole authority of EPA and state environmental agencies.[22]

[21] Section 511(c)(2)(A) provides that NEPA does not authorize other federal agencies that issue licenses that may result in the discharge of pollutants to engage in NEPA review of "any effluent limitation or other requirement established pursuant to [the CWA] or the adequacy of any certification under" § 401. 33 U.S.C. § 1371(c)(2)(A). Section 511(c)(2)(B) establishes that NEPA does not allow a federal agency to impose "any effluent limitation other than any such limitation established under" the CWA. 33 U.S.C. § 1371(c)(2)(B).

[22] Nonetheless, as explained by Senator Muskie, "nothing in section 511(c)(2) should in any way be construed to discharge any Federal licensing or permitting agency . . . from its full range of NEPA obligations to make a systematic balancing," only that for the purposes of that balancing, federal agencies must accept effluent limitations established by EPA or the states, under § 401. Prepared comments of Senator Muskie, Exhibit 1 (Oct. 4, 1972), 1 *Legis. Hist.* 183.

Petitioner argues that the use of the term "discharge of a pollutant" in § 511(c)(2), rather than "any discharge," shows that Congress assumed that § 401 certification authority was limited to the discharge of pollutants. Pet. Br. at 25. Petitioner asserts that the purpose of § 511(c)(2) is to avoid "duplicative review" under NEPA of certified activities, and that this purpose would not be accomplished if activities involving a "discharge of a pollutant" did not make up the entire universe of activities covered under § 401. Pet. Br. at 27-28. This strained argument ignores the evident meaning and effect of § 511(c)(2).

While the purpose of § 511(c)(2) may have been to prevent duplication, it is only targeted at a limited area that Congress sought to assign to the sole authority of EPA and the states, namely controls on the discharge of pollutants. This is evidenced in the legislative history of § 511(c)(2):

> EPA is the sole Federal agency specifically charged with comprehensive responsibility to regulate the discharge of pollutants . . . [other] agencies shall accept as dispositive the determinations of EPA and the States (under Section 401 . . .).

Comments of Senator Muskie, Exhibit 1 (Oct. 4, 1972), reprinted in 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1 ("*Legis. Hist.*") 183. Section 511(c)(2) does not speak to (and, thus, does not limit) other statutes that may address water quality impacts, such as the FPA. Thus, the authority of federal agencies is left intact with regard to areas that are properly within their statutory mandates, including "pollution"

caused by factors other than the "discharge of a pollutant."[23] When read fairly, this section evinces the reasonable legislative intent to leave undisturbed those statutory requirements, as well as the procedural requirements of NEPA, insofar as they address non-pollutant water quality issues that also may be of concern to a state acting under § 401. This is not duplicative of the state certification process, as Petitioner claims, as it involves the application of wholly separate statutory regimes and their separate purposes.[24] Rather, it is the type of multilayered approach towards pollution envisioned by Congress. *See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-77 (1984).[25]

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[23] Federal agencies must nonetheless incorporate the conditions of a state-issued certification in any license or permit, 33 U.S.C. § 1341(d), and cannot review the substance of state-imposed certification conditions, *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 107-112 (2nd Cir. 1997). Nothing in § 401 or § 511, however, prevents a federal agency from requiring more stringent controls on discharges, other than discharges of pollutants, as long as they are not inconsistent with the CWA, including a water quality certification. 33 U.S.C. § 1371(a).

[24] This has also been the understanding of the hydropower industry. *See, e.g.,* Capitol Hill Hearing Testimony, Fed. Doc. Clearing House Cong. Testimony (August 5, 1993) (Testimony of Roger Woodworth, National Hydropower Assoc., on Reauthorization of the Federal Water Pollution Control Act before Senate Subcommittee on Clean Water, Fisheries and Wildlife) ("water quality certification review serves to supplement the comprehensive review of any proposed new or existing project conducted by FERC under" NEPA), *available in* LEXIS, U.S. Congress Library, Committee Hearing Transcripts.

[25] It is no surprise, therefore, that FERC's regulations call for NEPA review, 18 C.F.R. §§ 380.1-380.15, and FERC's practice is to engage in NEPA review of its licensing of hydropower projects – just as it did in the present case. *Final Environmental Impact Statement for Presumpscot River Projects*, R. 174.

III. The Plain Meaning of the Statute is Fully Confirmed by the History and Evolution of the Clean Water Act.

Through broad descriptions of § 401's scope and reference to FERC-licensed hydroelectric plants – activities that create pollution but do not add "pollutants" – the history of § 401 shows that "any discharge" is broader than "discharge of pollutants," and includes flows of water through dams. *See Russello*, 464 U.S. at 23 (the evolution and history of the statute supplies further support for its plain meaning).

A. The 1970 Act. The provision creating certification rights in states for activities which "may result in any discharge" was first enacted as § 21(b) of the Water Quality Improvement Act of 1970, Pub. L. 91-224, § 103, 84 Stat. 91, 108. There was no definition of "discharge" for § 21(b), leaving us to its common, broad meaning.

Congress expressed its intent to have the states issue certifications for a "wide variety of licenses and permits (construction, operating and otherwise) . . . issued by various Federal agencies" that involve "activities or operations potentially affecting water quality." H.R. Rep. No. 127 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2697. The purpose of the provision that was to become § 21(b) was to:

> [P]rovide reasonable assurance . . . 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.

Ibid. (emphasis added).[26]

The House Report explained that "a Federal license or permit of some kind is required for almost all electric generating plants, and any Federal agency granting the relevant license can and should condition the grant upon compliance with applicable water quality standards." H.R. Rep. No. 127 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2698. Senator Cooper, a member of the Public Works Committee, explained:

> Indirectly, the Federal Government contributes to water pollution in its licensing activities over such things as . . . *hydroelectric power plants licensed by the Federal Power Commission*. . . . 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 . . . section 16 [which later became section 21(b)] makes no exception for any licensed or permitted activity from its operative principle of State certification.

115 Cong. Rec. 28,971 (Oct. 7, 1969) (emphasis added).

B. The 1972 Amendments. In 1972, Congress reenacted § 21(b) as § 401(a). Pub. L. 92-500, 86 Stat. 816, 877. The major conceptual change in 1972 was the addition of the NPDES program under § 402. There is no evidence in the legislative history that Congress intended to limit the broad certification authority granted the states

[26] *See also* 116 Cong. Rec. 9,325 (Mar. 25, 1970) (Statement of Rep. Blatnick (House Manager)) (the provision covers "those who seek a license or permit from a Federal agency for the use of our Nation's waters whether it be to build nuclear power plants, steam powerplants *or any other uses*") (emphasis added).

in § 21(b) to new permits addressing discharge of pollutants. The opposite is true – the scope of state certification was expanded to encompass compliance not only with water quality standards but also, *inter alia*, controls on the discharge of pollutants under the NPDES program.[27] "Section 401 is substantially § 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act." H.R. Rep. No. 92-911, at 121 (1972), 1 *Legis. Hist.* 808.[28] As explained in the Senate Report:

> The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements. 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. Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the . . . *Federal Power Commission*, or the

[27] This understanding was communicated to Congress by EPA. Statement of William Ruckelshaus, Administrator, EPA, Hearings on H.R. 11896, House Committee on Public Works, Dec. 7, 1971, 2 *Legis. Hist.* 1188 ("Water quality standards need to be strengthened and expanded to cover all waters . . . Effluent limitations are a means for achievement. They should not become an end in themselves. . . .").

[28] *See also,* Letter, William Ruckelshaus, Administrator, EPA, to Sen. Blatnik, Dec. 12, 1971, 1 *Legis. Hist.* 834, 852 ("Section 401 is essentially the same as the present section 21(b)"); Senate Debate on S-2770, Nov. 2, 1971, 2 *Legis. Hist.* 1394 ("Section 21(b), with minor changes, appears as section 401 of the pending bill S. 2770").

> Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction.

S. Rep. No. 92-414, 2 *Legis. Hist.* 1487 (emphasis added).[29] Notably, Congress expressly continued the policy regarding the primacy of the states in the control of pollution within their boundaries. CWA § 101(b), 33 U.S.C. § 1251(b).

Petitioner misapprehends the drafting history of § 502(16) by suggesting that this provision was intended to contain an exclusive list of what constitutes a "discharge." Pet. Br. at 29-33. The BEP agrees that the House bill was the first to provide a separate definition for the term "discharge." H.R. 11896, § 502(13), (18), 1 *Legis. Hist.* 1069-71. The BEP also agrees that the bill was drafted so that certain thermal discharges were exempted from the definition of "pollutants," but were included in the term "discharge" in an apparent effort to ensure those discharges were subject to § 401 certification. Pet. Br. at 31; *see* H.R. 11896, § 502(6), 1 *Legis. Hist.* 1068. This does not, however, demonstrate that Congress enacted the separate definition of "discharge" in order to limit its prior broad meaning only to thermal discharges or pollutants. Such a sentiment is nowhere found in the legislative record.

Indeed, the fact remains that the drafters of the definition chose the non-exclusive term "includes" for

[29] "[W]hat we are talking about is subjecting every activity in the private and public sector . . . to this kind of scrutiny." Senate Debate on S-2770, Nov. 2, 1971, 2 *Legis. Hist.* 1390 (Statement of Sen. Muskie).

"discharge" rather than the restrictive term "means" used for every other definition. The more obvious intent expressed by the language, history and purpose of the CWA is that Congress mandated that states be given an opportunity to apply their water quality standards to the broad range of federally licensed activities that could affect their water quality, including the new subjects of NPDES regulation. This is underscored by the dearth of any history suggesting that Congress intended the list in § 502(16) to be exclusive or complete. *See Chickasaw Nation*, 534 U.S. at 89.

In the final version, thermal discharges were removed from the definition of "discharge" because they were subsumed under "discharge of pollutants" which itself was "include[d]" in "discharge." Congress at the same time retained the separate term of "discharge," only confirming that "discharge" is not limited to "discharge of pollutants." If the only reason to include a separate term for "discharge" was to ensure thermal discharges were covered by § 401, Congress would have deleted § 502(16) in its entirety rather than retaining it. The drafters then could have replaced "discharge" in § 401 with the narrower term "discharge of pollutants," but clearly did not do so. The sloppy drafting that must be presumed for Petitioner's reading of the legislative history to be accepted simply finds no place in the record.

C. Congressional Acquiescence. A record of Congressional acquiescence to administrative interpretation, although not conclusive of legislative intent, can inform the Court's decision. *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 846 (1986); *Bob Jones Univ.*

v. United States, 461 U.S. 574, 600 (1983). Since 1970, Congress has both amended[30] and declined to amend the CWA several times, cognizant of the agency interpretation and application of § 401, and has not altered the statute's structure as it has been applied to FERC-licensed hydropower facilities. For example, in 1995, there was an effort to amend the CWA in response to this Court's decision in *PUD No. 1*, by making FERC rather than states the final arbiter on water quality issues regarding dams. 141 Cong. Rec. H4,860-61 (May 11, 1995). From the debate on the bill, which did not survive committee, it is clear that those on all sides of the issue understood that "states currently have the right to condition hydroelectric power licenses issued by FERC to protect their bona fide interest in maintaining the water quality of their rivers and streams." *Id.* at H4,860 (Statement of Rep. Rahall). The Congressmen also understood this right covered relicensing of "hundreds" of hydropower projects. *Id.* at H4,860 (Statement of Rep. Bachus). The failure of this legislation shows that Congress is comfortable with the historical interpretation and implementation of § 401 by EPA, FERC and the states.

IV. Federal Agencies Have Interpreted and Applied "Any Discharge" as Including Flows through Hydropower Facilities.

Assuming *arguendo* any ambiguity, deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*

[30] *See, e.g.,* Water Quality Act of 1987, Pub. L. 100-4, 101 Stat. 7; Federal Water Pollution Control Act Amendments of 1983, Pub. L. 97-440, 96 Stat. 2289; Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566.

Inc., 467 U.S. 837, 865-66 (1984), or at the very least persuasive respect, *Alaska Dep't of Envt'l Conservation v. Environmental Protection Agency*, 540 U.S. 461, 487-88 (2004), should be accorded the longstanding views of the federal government and its agencies that flows of water through dams constitute "any discharge" under § 401.

The EPA is the agency charged with implementing the CWA. The EPA has consistently taken the position in guidance documents that § 401 certification is required for FERC licenses of hydroelectric projects. Environmental Protection Agency, *Water Quality Standards Handbook* (1994), § 1.4, at p. 1-2 – 1-3 (Section 401 "applies to all Federal agencies that grant a license or permit. (For example, . . . licenses required for hydroelectric projects issued under the Federal Power Act.)"), and § 7.6.3, at pp. 7-10 – 7-11 (under § 401(a)(1), "EPA has identified five federal permits and/or licenses that authorize activities that may result in a discharge to the waters," including NPDES permits and "licenses required for hydroelectric projects issued under the Federal Power Act."); Environmental Protection Agency, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes*, at 20-23 (1989) (Section 401 certification required for hydroelectric projects licensed under the FPA).

Additionally, in briefs before this Court, the Solicitor General on behalf of EPA as well as other agencies, has explained that "when the operator of the dam releases water through a crest-gate, sluice-gate, release valve, or other similar device, it has caused a discharge within the meaning of Section 401." *Brief for the United States as Amicus Curiae Supporting Affirmance*, *PUD No. 1 of Jefferson County v. State of Washington*, *available in* 1993

U.S. S.Ct. Briefs LEXIS 573, at *23. As succinctly noted in that brief, "Congress employed the term 'discharge' when used without qualification (as in § 401(a)) more broadly than the term 'discharge of any pollutant,' which is used in a number of provisions" including under § 402. *Id.* at *23 n.4. Significantly, in the brief filed in *Miccosukee*, the United States explained that water control projects that "merely convey or connect navigable waters," and therefore do not need a § 402 NPDES permit, may nonetheless need a § 401 water quality certification. *Brief for the United States as Amicus Curiae Supporting Petitioner*, *South Florida Water Management District v. Miccosukee Tribe of Indians*, *available in* 2003 U.S. S.Ct. Briefs LEXIS 760, at **25, **46.[31] These consistent statements are reasonable and reflect the agency's "fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (legal briefs entitled to deference); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944).

The EPA memorandum, referred to by Petitioner in its brief at 22-23, creates no inconsistency. That memorandum on its face dealt exclusively with § 402, and indeed noted that § 401 and other provisions addressed problems beyond the scope of § 402. Memorandum from Ann R. Klee, EPA General Counsel, *et al.*, "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to

[31] *See also, Brief for the Federal Respondent in Opposition to Petition for Writ of Certiorari, Oregon Natural Desert Association v. Dombeck*, No. 99-153, at 10, *available in* http://www.usdoj.gov/osg/briefs/1999/0responses/99-0153.resp.pdf ("water flows released through a dam . . . are 'discharges' within the meaning of the Clean Water Act" even though they "do not involve the 'addition' of pollutants. . . . [S]uch 'discharges' are subject to Section 401 certification.").

Water Transfers," at 8 (Aug. 5, 2005), *available in* http://www.epa.gov/ogc/documents/water_transfers.pdf.

FERC is not the agency that oversees the CWA directly but it does administer the FPA. Like EPA, FERC has interpreted and applied § 401 within the context of the FPA as requiring certifications for hydropower projects, without regard to whether there is any "addition" of a pollutant. 18 C.F.R. §§ 4.34(b)(5), 16.8; Federal Energy Regulatory Commission, *Handbook for Hydroelectric Project Licensing and 5 MW Exemptions from Licensing*, at B-2 & D-3 (2004). FERC has reiterated that position before this Court. *Brief for Federal Energy Regulatory Commission in Opposition to Petition for a Writ of Certiorari, North Carolina v. FERC*, *available in* 1998 W.L. 34112238, at *14 ("operation of the [hydropower] project results in a discharge – the flow of water back into the waterway after leaving the project impoundment or bypass facilities – that could not lawfully exist without the license. Therefore, such new licenses require certification from the State in which the water flows back into the river. . . . [T]he license applicant will require a Section 401(a)(1) certification from [the state] when [the] current license expires in 2001.").

To the same effect, FERC has consistently included DEP's § 401 conditions in its Maine hydropower licenses. *See* note 4, *supra.* Indeed, in relicensing another Maine hydropower project, FERC recently and explicitly rejected the same arguments made by the Petitioner here, finding that a "discharge" does not require the addition of some substance to the water being discharged. *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104, at ¶¶ 17-25 (2005). *See also City of Augusta, Georgia*, 109 F.E.R.C. ¶ 61,210, ¶¶ 10-11 (2004) (rejecting argument that under

Miccosukee, § 401 certification cannot be required where water "is flowing continuously in the same river.").

CONCLUSION

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

Respectfully submitted,

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APPENDIX

Statutory Provisions Involved

33 U.S.C. § 1251 Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

* * *

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress

that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

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33 U.S.C. § 1313 Water quality standards and implementation plans

* * *

(c) Review; revised standards; publication

* * *

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

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33 U.S.C. § 1362 Definitions

* * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

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33 U.S.C. § 1371. Authority under other laws and regulations

(a) Impairment of authority or functions of officials and agencies; treaty provisions

This chapter shall not be construed as

> **(1)** limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter;
>
> * * *

(c) Action of the Administrator deemed major Federal action; construction of the National Environmental Policy Act of 1969.

> **(1)** Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83

Stat. 852); and **(2)** Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to –

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.