No. 04-1527

In the Supreme Court of the United States

S.D. WARREN COMPANY, PETITIONER

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MAINE

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1), provides that an applicant for a federal license to conduct any activity "which may result in any discharge into the navigable waters" must obtain a certification from the State in which the discharge originates stating that the discharge will comply with applicable provisions of the Act and other appropriate requirements of state law. The question presented is whether petitioner's operation of its hydroelectric facilities, which are subject to Federal Energy Regulatory Commission licensing requirements under Section 4(e) of the Federal Power Act, see 16 U.S.C. 797(e), may result in a "discharge into the navigable waters" within the meaning of Section 401(a) of the Clean Water Act.

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INTEREST OF THE UNITED STATES

This case presents the question whether Section 401(a) of the Clean Water Act (CWA), 33 U.S.C. 1341(a), requires petitioner to obtain, as a prerequisite to issuance of federal licenses for its five hydroelectric facilities, a state certification that the water leaving those facilities complies with applicable federal and state water pollution control requirements. The Federal Energy Regulatory Commission (FERC), which licenses hydroelectric facilities under the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, and the Department of the Army, which administers permit programs respecting waters of the United States, see CWA § 404(a), 33 U.S.C. 1344(a); Rivers and Harbors Appropriation Act of 1899, ch. 425, § 10, 30 Stat. 1151 (33 U.S.C. 403), must implement and comply with the requirements of Section 401(a) in conducting their licensing and permitting programs. Section 401 also directs

the Environmental Protection Agency (EPA), which is generally responsible for administering the Clean Water Act, see 33 U.S.C. 1251(d), to provide the requisite water quality certifications when a State lacks authority to do so, 33 U.S.C. 1341(a)(1), and to provide compliance information upon request from any federal, state, or interstate department or agency, 33 U.S.C. 1341(b). The federal government therefore has a substantial regulatory interest in the resolution of the question presented.

STATEMENT

A. FERC Licensing Requirements

Congress enacted the Federal Power Act in 1920 to encourage, among other things, the development of water power. See ch. 285, 41 Stat. 1063. To promote the sound development of water resources, federal law has provided since 1935 that "[i]t shall be unlawful for any person * * * for the purpose of developing electric power * * * to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States" without a federal license granted pursuant to that Act. FPA § 23(b)(1), 16 U.S.C. 817(1); see Public Utility Act of 1935, ch. 687, § 210, 49 Stat. 846. Congress has authorized FERC, which has assumed the responsibilities of the Federal Power Commission (FPC), see FPA § 1, 16 U.S.C. 792, to grant such licenses for periods up to, but not exceeding, 50 years, FPA §§ 4(e), 6, 16 U.S.C. 797(e), 799.

When FERC reviews a license application for any new or existing project, the agency operates under a broad statutory mandate to ensure that the project is "adapted to a comprehensive plan for improving or developing a waterway" for multiple purposes, including: (a) "interstate or foreign commerce"; (b) "improvement and utilization of water power development"; (c) "adequate protection, mitigation, and en-

hancement of fish and wildlife"; and (d) "other beneficial public uses." See FPA § 10(a)(1), 16 U.S.C. 803(a)(1). FERC's authority is tempered, however, by other statutory provisions that mandate inclusion of terms prescribed by other agencies. See FPA § 4(e), 16 U.S.C. 797(e); FPA § 18, 16 U.S.C. 811; *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984).

Beginning in 1970, Congress subjected federal licensing proceedings, including Federal Power Act license proceedings, to a new requirement originating in the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 103, 84 Stat. 107, which amended the Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155. The 1948 Act, which had been amended numerous times between 1948 and 1970, gave the federal government only a limited role in water pollution control and encouraged States to develop and enforce "water quality standards." See 33 U.S.C. 466g(b) and (c) (Supp. V 1969); *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-203 (1976). The Water Quality Improvement Act of 1970 added a new Section 21(b) to the Federal Water Pollution Control Act. See § 103, 84 Stat. 108. Section 21(b) mandated that any applicant for a federal license to conduct an activity "which may result in a discharge into the navigable waters of the United States" must provide the licensing authority with a certification from the State in which the discharge would originate certifying that the activity would be conducted in a manner that would not violate the State's water quality standards. 33 U.S.C. 1171(b) (1970). Soon thereafter, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, which enlarged the federal government's role in water pollution control generally and established a framework for federal-state cooperation that is a central feature of the current Clean Water Act. See *California*, 426 U.S. at 202-208. The 1972 Amendments incorporated the relevant terms of the Water Quality Improvement Act of 1970, originally codified at

33 U.S.C. 1171(b) (1970), into Section 401(a)(1) of the current Clean Water Act, 33 U.S.C. 1341(a)(1).

B. The Clean Water Act

The Clean Water Act seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," CWA § 101(a), 33 U.S.C. 1251(a), through a comprehensive and multifaceted strategy that assigns distinct roles to the federal government and the States. That Act declares a "national goal" of eliminating "the discharge of pollutants into the navigable waters," CWA § 101(a)(1), 33 U.S.C. 1251(a)(1), and it specifically prohibits the "discharge of any pollutant by any person" except in compliance with prescribed statutory requirements, CWA § 301(a), 33 U.S.C. 1311(a). Those requirements include federal effluent limitations, CWA §§ 301-302, 33 U.S.C. 1311-1312, and federal standards of performance, CWA §§ 306-307, 33 U.S.C. 1316-1317, which place restrictions on the discharge of pollutants. See generally 40 C.F.R. Pts. 401-471. Those requirements also include two federal permit programs applicable to the discharge of pollutants: (1) the "National Pollutant Discharge Elimination System" (NPDES) program, CWA § 402, 33 U.S.C. 1342; and (2) a separate permit program for the discharge of "dredged or fill material," CWA § 404, 33 U.S.C. 1344.

While Congress has established specific federal controls on the "discharge of pollutants," it also has continued the policy, reflected in the Federal Water Pollution Control Act of 1948, to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and to "plan the development and use * * * of * * * water resources." CWA § 101(b), 33 U.S.C. 1251(b); see 33 U.S.C. 466 (1964); see, *e.g.*, *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 166-167 (2001). Congress made explicit its understanding that the States retain authority to regulate water "pollution" that extends beyond the Clean Water Act's more

precisely targeted federal restrictions on the "discharge of pollutants." Compare CWA § 502(6), 33 U.S.C. 1362(6) (defining "pollutant" to mean specific substances), with CWA § 502(19), 33 U.S.C. 1362(19) (defining "pollution" more broadly to encompass any "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water").

Congress also recognized the need to coordinate federal and state efforts based on principles of cooperative federalism. See CWA § 101(b), 33 U.S.C. 1251(b). The Clean Water Act provides for federal funding of state initiatives, federal-state consultation on a variety of issues, and state enforcement of federal standards. See, *e.g.*, CWA §§ 106, 304, 510, 33 U.S.C. 1256, 1314, 1370. The Act expressly allows States to impose "standard[s] or limitation[s] respecting discharges of pollutants" or "abatement of pollution" that are more stringent than, or in addition to, those federal standards set out under the Act. See CWA § 510, 33 U.S.C. 1370. It also allows EPA to authorize States to administer portions of the federal permitting programs set out in Sections 402 and 404. See CWA §§ 101(b), 402(b), 404(g)-(h), 33 U.S.C. 1251(b), 1342(b), 1344(g)-(h); 40 C.F.R. Pt. 123; see generally *California*, 426 U.S. at 206-209.

As one important element of this strategy for federal-state cooperation, Congress retained, through Section 401 of the Clean Water Act, the state water quality certification program that Congress had initiated in the Water Quality Improvement Act of 1970. Section 401(a) provides, in pertinent part, that "[a]ny applicant for a Federal license or permit to conduct any activity * * * which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such

discharge will comply with the applicable provisions" of designated sections of the Act. 33 U.S.C. 1341(a).[1]

Section 401 ensures that, before federal licensing and permitting agencies authorize activities that "may result in any discharge" into the waters of the United States, the State in which the discharge originates will have the opportunity to determine whether the discharge would comply with applicable provisions of the Act, including Section 303 state water quality standards and other appropriate requirements of State law. See *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 704-708 (1994). The potential for "any discharge" into navigable waters triggers the requirements of Section 401, thereby allowing the State to impose appropriate conditions to ensure that the activity, and not just the discharge, complies with state water quality standards. See *id.* at 711-712. Under Section 401(d), any such state-specified, water-quality-related conditions "shall become" part of the federal license. 33 U.S.C. 1341(d). See *PUD No. 1,* 511 U.S. at 708, 711-713.

The Clean Water Act does not contain a delimited definition of the critical triggering term "discharge," but makes clear that "[t]he 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) (emphasis

[1] The designated provisions include Sections 301 and 302, which establish federal effluent limitations, see 33 U.S.C. 1311, 1312, and Sections 306 and 307, which establish federal standards of performance, see 33 U.S.C. 1316, 1317. The designated provisions also include Section 303, which requires States to establish water quality standards. 33 U.S.C. 1313. Congress first introduced the concept of water quality standards through the 1965 amendments to the Federal Water Pollution Control Act of 1948. See Water Quality Act of 1965, Pub. L. No. 89-234, § 5(a), 79 Stat. 907. Under the current provisions of the Clean Water Act, water quality standards "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses," CWA § 303(c)(2)(A), 33 U.S.C. 1313(c)(2)(A), and also require an "antidegradation policy," *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 704-705 (1994); see generally 40 C.F.R. Pt. 131.

added). The Act does contain a definition of those included activities: "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants' each means * * * any addition of any pollutant to navigable waters from any point source," CWA § 502(12), 33 U.S.C. 1362(12).

C. The Proceedings In This Case

Petitioner owns and operates six hydroelectric facilities on the Presumpscot River in southern Maine. The facilities provide power for petitioner's paper mill in Westbrook, Maine. Pet. App. A2. Anticipating the expiration of existing federal licenses for five of the projects, petitioner submitted coordinated applications to FERC in 1999 for a new license for each project. See *S.D. Warren Co.*, 105 F.E.R.C. ¶ 61,011, at 61,084 (Oct. 2, 2003). FERC regulations required petitioner, as an applicant for a new license, to consult with Maine's DEP, the state agency responsible for Section 401 certifications, see 18 C.F.R. 4.30(a)(2), 5.1(d), and to file with the State "a request for a water quality certification * * * as required by Section 401 of the Clean Water Act," 18 C.F.R. 4.34(b)(5)(i), 5.18(b)(3)(i).

As petitioner explains, its hydroelectric facilities generate power by diverting water from the channel of the Presumpscot River into a "power canal," through the generating turbines, and then back into the river channel through a "tailrace channel," thereby bypassing a section of the river channel where water not routed through the turbines continues to flow. Pet. Br. 3-4; see Pet. App. A75-A78; J.A. 9-17. In the course of the state certification proceedings, petitioner did not dispute that the Presumpscot River is part of the "navigable waters" subject to the requirements of Section 401(a) of the Clean Water Act. See Pet. Br. 9-10. Petitioner urged, however, that Section 401(a) does not apply to its operations because the facilities do not result in "any discharge into" the Presumpscot River. See *ibid.*; Pet. App. A6, A22, A38.

After considering extensive submissions, DEP issued a Section 401 certification. Pet. App. A74-A140. The certification included, among other things, conditions requiring petitioner to maintain minimum stream flows in the portions of the river bypassed by the projects and conditions requiring Warren to take measures to allow passage for various species of migratory fish. *Id.* at A121-A140. Petitioner appealed DEP's Section 401 certification to the state administrative appeals tribunal, the Maine Board of Environmental Protection (BEP), which affirmed the decision of DEP, *id.* at A35-A73, and rejected petitioner's contention that the facilities do not result in a discharge, *id.* at A40-A42. Petitioner then sought judicial review of the state agency action by initiating a state suit in the Cumberland County Superior Court, which affirmed the BEP determination, *id.* at A19-A34, including its conclusion that petitioner's facilities result in a discharge, *id.* at A22-A25. Petitioner appealed the superior court's decision to the Maine Supreme Judicial Court, which affirmed the superior court's judgment, *id.* at A1-A18, including its conclusion that petitioner's facilities result in a discharge that triggers Section 401's state certification requirement, *id.* at A6-A10.

The Maine Supreme Judicial Court examined the Clean Water Act's description of the term "discharge," CWA § 502(16), 33 U.S.C. 1362(16), and observed that the Act does not "expressly define" the term. The court nevertheless expressed the view that an "addition" is a "fundamental characteristic of any discharge." Pet. App. A6. The court then determined that petitioner's hydroelectric generating facilities result in an "addition" because they "remove the water of the river from its natural course, exercise private control over the water and then *add* the water back into the river." *Id.* at A8. The court rejected petitioner's contention that the term "discharge" under Section 401 is limited to the "discharge of a pollutant" or "discharge of pollutants," observing that the

Clean Water Act defines "discharge" expansively to "include[]" those more limited phrases. *Id.* at A8-A10.

Petitioner proceeded with the FERC license proceedings while it pursued its state appeals. While the superior court action was pending, FERC issued new licenses for all five projects. See *S.D. Warren Co.*, 105 F.E.R.C. ¶¶ 61,009-61,013 (Oct. 2, 2003). In each license order, FERC stated that the license was "subject to the water quality certification conditions" that DEP had imposed, which were attached to each order. See, *e.g.*, 105 F.E.R.C. ¶ 61,013, at 61,144. Petitioner sought administrative rehearing, which FERC denied. *S.D. Warren Co.*, 106 F.E.R.C. ¶ 61,087 (Jan. 29, 2004). Petitioner then sought judicial review of FERC's license orders in the United States Court of Appeals for the D.C. Circuit. Petitioner did not pursue its present claim—that its dams do not result in discharges for Section 401 purposes—in either the proceedings before FERC or in the court of appeals. The court of appeals affirmed FERC's orders in an unpublished per curiam opinion. *S.D. Warren Co.* v. *FERC*, No. 04-1105 (D.C. Cir. May 6, 2005).[2]

[2] The completion of the federal licensing and judicial review proceedings does not appear to pose a significant obstacle to this Court's review of the federal question. The Maine Supreme Judicial Court's resolution of that question is final, see 28 U.S.C. 1257(a), and the issue was not litigated or decided in the now-completed federal proceedings. Although Section 401(d) envisions that FERC shall incorporate DEP's state water quality certification in its licensing order, 33 U.S.C. 1341(d), and FERC did precisely that in issuing licenses for petitioner's facilities, that fact does not render this Court's review of the state court's decision merely advisory or otherwise render the federal issue moot. FERC has discretion to consider new developments even after it issues a license; it may reopen and amend its license orders "upon mutual agreement between the licensee and [FERC] after thirty days' public notice." FPA § 6, 16 U.S.C. 799. Accordingly, if this Court were to accept petitioner's contention that its facilities do not result in any discharge triggering Section 401's state certification requirement, petitioner could petition FERC for appropriate relief.

SUMMARY OF ARGUMENT

The Clean Water Act requires an applicant for a federal license to obtain a state water quality certification if the licensed activity "may result in any discharge into the navigable waters." CWA § 401(a)(1), 33 U.S.C. 1341(a)(1). The pivotal issue in this case is whether petitioner's hydroelectric generating facilities, which require FERC licensing, may result in such a "discharge." Congress made clear that the term "discharge" *includes* but is not limited to a "discharge of pollutants"—a statutory term of art—but otherwise left the term "discharge" undefined. See CWA §§ 502(12) and (16), 33 U.S.C. 1362(12) and (16). Congress thereby indicated its intent that the ordinary meaning of the word discharge—"a flowing or issuing out" (*Webster's Third New International Dictionary* 644 (1993) (*Webster's Third*); *Webster's Second New International Dictionary* 742 (1958) (*Webster's Second*))—would determine the reach of that term.

Petitioner's hydroelectric generating facilities necessarily result in a "discharge" within the ordinary meaning of that term. It is common parlance to speak of a release of water from a dam and reservoir as a "discharge," and that usage accurately describes the water releases at issue here. Petitioner's facilities divert and impound Presumpscot River water for purposes of power generation, and then return the water into a different portion of the river channel. The impounded water, upon release, "flow[s] or issue[s] out" of the facility and into the concededly navigable river channel. Contrary to petitioner's primary contention (Pet. Br. 17), the Clean Water Act imposes no requirement that a "discharge" must result in the "addition" of "a pollutant or at least something similar to a pollutant." By providing that the term "discharge" "*includes,*" as opposed to "means," the "discharge of a pollutant"—*i.e.*, "any addition of any pollutant to navigable waters from any point source," CWA § 502(12), 33 U.S.C. 1362(12)—Congress necessarily rejected the narrow interpre-

tation proffered by petitioner, and instead manifested its intent that the term "discharge" would have its normal meaning, *i.e.*, any "flowing or issuing out" of water from the facility into the river channel, without regard to whether that "discharge" also results in an "addition" of pollutants or of anything else.

That conclusion is consistent with this Court's decision in *PUD No. 1* v. *Washington Department of Ecology*, 511 U.S. 700 (1994), which correctly assumed that a similar hydroelectric facility would result in a discharge for Section 401 purposes. It is also consistent with the Court's decision in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), which did not address the requirements of Section 401 but nevertheless suggests that there is a distinction between a "discharge" and an "addition." Construing the term "discharge" according to its ordinary meaning provides a clear rule and fulfills Congress's express objective of ensuring that federal licensing authorities are attentive to the rights that each State retains under the Clean Water Act to regulate not only the "discharge of pollutants," but also any "discharges" that may result in "pollution." See CWA §§ 101(b), 510, 33 U.S.C. 1251(b), 1370.

ARGUMENT

PETITIONER'S OPERATION OF ITS HYDROELECTRIC FACILITIES RESULTS IN A "DISCHARGE INTO THE NAVIGABLE WATERS" FOR PURPOSES OF SECTION 401(a) OF THE CLEAN WATER ACT

An applicant for a FERC license must obtain a state water quality certification if the licensed activity "may result in any discharge into the navigable waters." CWA § 401(a), 33 U.S.C. 1341(a). Congress expansively defined the crucial term "discharge" by inclusion, CWA § 502(16), 33 U.S.C. 1362(16), not limitation, manifesting its intent that the term should be construed in light of its ordinary meaning—"a flow-

ing or issuing out." *Webster's Third* 644; *Webster's Second* 742. Under that definition, the hydroelectric facilities at issue here, which release impounded water back into a river channel, clearly result in a discharge for purposes of Section 401. Contrary to petitioner's central submission, the discharge need not "add" pollutants, or anything else, to the river. This Court's decisions, as well as the structure and purposes of the Clean Water Act and its legislative history, all support interpreting the term "discharge" according to its ordinary meaning, which provides a clear administrative rule to guide federal and state agency proceedings.

A. The Term "Discharge" In Section 401(a) Should Be Interpreted In Light Of Its Ordinary Meaning

The Clean Water Act provides a series of carefully crafted definitions for purposes of applying the Act's complex, and in some cases highly technical, provisions. See CWA § 502, 33 U.S.C. 1362. Nearly all of the 23 definitions set forth precise meanings, and many are terms of art. The Clean Water Act's definition of "discharge" is distinctive, because that term is not comprehensively delineated but instead is defined only by inclusion: "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) (emphasis added).

That distinctive characteristic stands in sharp relief to the Act's more circumscribed definitions of the subsidiary terms: "The term 'discharge of a pollutant' and the term 'discharge of pollutants' each *means* * * * any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. 1362(12) (emphasis added). The Act similarly defines the key terms "pollutant," "navigable waters," and "point source" to "mean" particular things. See CWA § 502(6), (7), and (14), 33 U.S.C. 1362(6), (7), and (14).

The Clean Water Act's inclusive definition of "discharge" indicates that the term is not limited to—*i.e.*, does not "mean"

—the discharge of one or more pollutants. See, *e.g.*, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001) ("To 'include' is to 'contain' or 'comprise as part of a whole.'") (citation omitted). That singular and distinctive use of the word "includes" rather than "means" among the Act's 23 definitions demonstrates in bold relief Congress's unmistakable intent and understanding that the term "discharge" would encompass "discharges" beyond those that qualify as the "addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. 1362(12). See *Helvering* v. *Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934) ("The natural 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.").

The Clean Water Act's inclusive definition is also revealing in another central respect. That formulation expresses Congress's intention that the term "discharge" should be construed according to its ordinary meaning and not as a statutory term of art. Congress made clear that the term "discharge" describes a class of activities that "includes" two such statutory terms of art—the synonymous terms "discharge of a pollutant" and "discharge of pollutants"—but it otherwise left the membership of the class undefined. By so doing, Congress expressed its intention that the ordinary meaning of the term "discharge" would delimit the scope of that term. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994) (an undefined statutory term is construed "in accordance with its ordinary or natural meaning").

B. The Ordinary Meaning Of Discharge—"A Flowing Or Issuing Out"—Encompasses A Hydroelectric Facility's Release Of Diverted Water To A River Channel

The term "discharge" can have a variety of meanings depending on the context. But when the term "discharge" is used in the water-related context that Section 401(a) de-

scribes, it means "a flowing or issuing out." *Webster's Third* 644; *Webster's Second* 742. See, *e.g.*, 4 *The Oxford English Dictionary* 732 (2d ed. 1989) ("The act of sending out or pouring forth."); *Random House Dictionary of the English Language* 561-562 (2d ed. 1987) ("a sending or coming forth, as of water from a pipe"); *PUD No. 1*, 511 U.S. at 725 (Thomas, J., dissenting) ("The term 'discharge' is not defined in the [Clean Water Act,] but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.'") (quoting *Webster's Ninth New Collegiate Dictionary* 360 (1991)).

Hydroelectric dams, which typically impound water for power production, necessarily produce "a flowing or issuing out" of water when they return the diverted water to the river channel. Indeed, releases of water from dams and reservoirs are characteristically and routinely described as "discharges." See, *e.g.*, *United States* v. *James*, 478 U.S. 597, 599 (1986) ("Enormous underwater portals set within the Millwood Dam, called 'tainter gates,' allow the discharge of water from the Reservoir into a spilling basin below."); *Arizona* v. *California*, 373 U.S. 546, 619 n.25 (1963) (Harlan, J., dissenting in part) (referring to persons who may "take water out of the stream which has been discharged from the reservoir"); *United States* v. *Arizona*, 295 U.S. 174, 181 (1935) ("Parker Dam will intercept waters discharged at Boulder Dam."); *Wyoming* v. *Colorado*, 259 U.S. 419, 482 (table showing "Discharge of Laramie River at Pioneer Dam"), modified, 260 U.S. 1 (1922), vacated, 353 U.S. 953 (1957).[3]

[3] Indeed, in the Court's only previous case involving Section 401, the petitioner, a prospective owner-operator of a proposed hydroelectric facility, readily conceded that the facility would result in a "discharge" for purposes of that Section because the facility would release "water at the end of the tailrace [of the proposed dam] after the water has been used to generate electricity." See *PUD No. 1*, 511 U.S. at 711; note 10, *infra*. The Court embraced that incontestably reasonable concession, and held that the State of Washington could impose conditions under Section 401(d) that were not strictly tied to such project "discharges." *Id*. at 712. The Court expressed no doubt that, when a

Petitioner's hydroelectric generating facilities, which consist of a familiar arrangement of dams, impoundments, a "power" canal, turbines, and a by-pass channel, see J.A. 10-17, necessarily release impounded water into the channel of the Presumpscot River and therefore result in a "flowing or issuing out" of that water. As a matter of ordinary usage, the operation of petitioner's hydroelectric generating facilities results in a "discharge" of diverted water, used to power turbines, when the water is returned to the river channel. That discharge, in turn, triggers Section 401's state certification requirement, which ensures that the federal licensing authorities properly take account of the impact of those water releases on the State's "primary responsibilities" to regulate "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." CWA §§ 101(b), 502(19), 33 U.S.C. 1251(b), 1362(19).

C. The Term "Discharge" Does Not Require An "Addition"

The Maine Supreme Judicial Court correctly concluded that petitioner's hydroelectric generating facilities result in a "discharge" for purposes of Section 401, but it did so on a mistaken rationale. The supreme judicial court asserted, without lexicographical reference, that "[a]n 'addition' is the fundamental characteristic of any discharge." Pet. App. A6. Applying that incorrect understanding, it then concluded that the release of water constituted a "discharge" because the waters impounded by petitioner's dams "have lost their status as *waters of the United States*" and thus an "addition" to navigable waters occurs when they are "redeposited into the natural course of the river." *Id.* at A8; see *id.* at A6-A8, A10. The court's reasoning was erroneous, but its ultimate conclusion was sound.

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dam releases impounded water through a tailrace, head-gate, sluice-gate, or other structure, a "discharge" occurs within the plain meaning of the term.

1. As an initial matter, the supreme judicial court erred in holding that the water impounded by petitioner's dams loses its status as navigable waters and is then "added" back to those waters after it passes through the dams. EPA has consistently construed the phrase "navigable waters" (*i.e.*, "the waters of the United States," CWA § 502(7), 33 U.S.C. 1362(7)) to include "impoundments of waters otherwise defined as waters of the United States." 40 C.F.R. 122.2. Accordingly, water impounded by and passing through a dam generally does not lose its character as "waters of the United States." See, *e.g.*, *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 586, 589 (6th Cir. 1988). That conclusion is supported by longstanding agency interpretation and is entitled to substantial deference.[4]

The supreme judicial court thus erred in concluding that water passing through a dam is "added" to the waters of the United States when it reenters the natural channel of the river. That error warrants correction, because the lower court's analysis of that issue is irreconcilable with the settled understanding, adopted by EPA in 1973 and consistently maintained thereafter, that dams generally do not "add[]" pollutants to the navigable waters "from the outside world" and are therefore not subject to NPDES permitting requirements, even though the water passing through the dams may

[4] See, *e.g.*, Memorandum from Ann R. Klee, EPA, et al., to Regional Administrators, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* 10 (Aug. 5, 2005) (*Agency Interp.*) <http://www.epa.gov/ogc/documents/water_transfers.pdf.> ("EPA's longstanding position has been that dams and hydropower facilities do not 'add' pollutants when they are merely moving water from one location to another within the same waterbody."); *id*. at 18 n.18 ("the dam merely conveys water from one location to another within the same waterbody"); U.S. Br. as *Amicus Curiae* at 28, 31, *National Wildlife Fed'n* v. *Consumers Power Co.*, No. 87-1441 (6th Cir.) (filed Sept. 1987) ("waters do not change their character as waters of the United States merely as a result of their manipulation" by a hydroelectric dam; "[t]he mere change in their movement, flow, or circulation does not change the character of these waters as waters of the United States").

itself contain pollutants. See *Consumers Power Co.*, 862 F.2d at 584-588; *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165, 168-169 & nn.39-40, 174-177 (D.C. Cir. 1982).[5]

2. More fundamentally, the supreme judicial court also erred in assuming that an "addition" is necessary in order for a "discharge" to occur for purposes of Section 401(a). When "discharge" is construed in light of its ordinary meaning, as it must be, an "addition" is *not* a fundamental characteristic of that term. The term "discharge," in the relevant context of water, refers to the physical release of the water from some confining source or location, *viz.*, "a flowing or issuing out." As demonstrated above, dictionaries uniformly define a "discharge" of water based on the characteristic of physical release from confinement and not on the basis of an "addition." See pp. 13-14, *supra*. A discharge may commonly *result* in an addition of some sort, but the ordinary meaning of "discharge" denotes the "flowing or issuing out" and not any consequent "addition," no matter how common that result may be.

3. Petitioner, consistent with the reasoning of the court below, does not suggest that the ordinary meaning of "discharge" requires an "addition." Rather, it derives that gloss from other provisions of the Clean Water Act. Petitioner

[5] See also *Agency Interp.* 10 ("EPA's longstanding position has been that dams and hydropower facilities do not 'add' pollutants when they are merely moving water from one location to another within the same waterbody."); Reply Br. for Fed. Appellant at 4 n.2, *National Wildlife Federation* v. *Gorsuch, Admin., EPA*, Nos. 82-1335 et al. (D.C. Cir.) (filed July 1982) ("EPA does not require an NPDES permit for discharges into navigable waters from navigable waters."); *id*. at 14 ("Since 1973, EPA has consistently maintained that the dam-induced water quality changes at issue here do not involve the discharge of pollutants from a point source."). Of course, when dams or other water diversion facilities add pollutants such as oil and grease to water passing through the diversion structure into the downstream water, or when water is removed from the waters of the United States and utilized for cooling or other industrial purposes before being returned, NPDES permits are required. *Consumers Power*, 862 F.2d at 588; *Gorsuch*, 693 F.2d at 165 n.22; *Agency Interp.* 10 n.12; see 40 C.F.R. 122.45(g)(4).

asserts that the Act's inclusive definition of "discharge" does not adequately identify the limits of that term. See Pet. App. A6; Pet. Br. 15; see also *North Carolina* v. *FERC*, 112 F.3d 1175, 1188 (D.C. Cir. 1997), cert. denied, 522 U.S. 1108 (1998). But instead of following the normal course of statutory construction and consulting a dictionary, see, *e.g.*, *FDIC*, 510 U.S. at 476, it extracts a limiting principle from the Clean Water Act's definition of a *different* term—"discharge of a pollutant." See CWA § 502(12), 33 U.S.C. 1362(12) (defining the term in relevant part as "any addition of any pollutant to navigable waters from any point source").

According to petitioner, the definition of "discharge of a pollutant" indicates that "Congress equated the notion of a 'discharge' with the notion of 'any addition . . . from any point source.'" Pet. Br. 15. See *id.* at 16-17 ("Congress associated a 'discharge' with an 'addition' into the water of a pollutant or at least something like a pollutant."). That reasoning, however, does not withstand scrutiny. The Clean Water Act defines "discharge of a pollutant" as a statutory term of art. Congress's specification that the general term "discharge" *includes* that term of art makes clear that the latter is encompassed within the former, but it says nothing about the outer reach of the general term, which therefore must be construed according to its ordinary meaning.

Petitioner's error is especially evident when considered in light of the history of the Clean Water Act. Congress employed the undefined term "discharge" in the pre-1970 Federal Water Pollution Control Act and, by leaving that term completely undefined, necessarily used it in its ordinary sense. See 33 U.S.C. 466a (Supp. V. 1969) (authorizing joint investigations of "discharges of any sewage, industrial wastes, or substance which may adversely affect such waters"). Congress also employed the undefined term "discharge" in provisions of the 1970 version of the Federal Water Pollution Control Act, including the provision that later became Section

401(a) (see pp. 3-4, *supra*), again necessarily employing that term in its ordinary sense. See 33 U.S.C. 1171(b) (1970).[6]

When Congress enacted the Federal Water Pollution Control Act Amendments of 1972, it continued to employ the unadorned term "discharge" in Section 401(a). 33 U.S.C. 1341(a). But at the same time, Congress defined the phrase "discharge of a pollutant" as a statutory term of art for use in new provisions of the Act, where the specific and technical meaning of that defined term plays a crucial role in determining the reach of those provisions. See, *e.g.*, CWA § 301(a), 33 U.S.C. 1311(a) ("the discharge of any pollutant by any person shall be unlawful"); CWA § 402(a), 33 U.S.C. 1342(a) (EPA may "issue a permit for the discharge of any pollutant"). By so doing, Congress carefully limited the reach of those provisions to "discharges" that result in the "addition" to "navigable waters" of "pollutants" from a "point source." See, *e.g*, *California*, 426 U.S. at 203-205 (describing the operation of Section 301 and 402 with reference to the statutory definitions).

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[6] Congress did set out a specific definition of "discharge" for limited use in two other sections of the 1970 Act, those dealing with "Control of pollution by oil," 33 U.S.C. 1161 (1970), and "Control of sewage from vessels," 33 U.S.C. 1163 (1970). In each instance, Congress extended the term "discharge" to the limits of, and perhaps beyond, its ordinary meaning, stating that the term "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping." 33 U.S.C. 1161(a)(2), 1163(a)(9) (1970). See H.R. Rep. No. 940, 91st Cong., 2d Sess. 33 (1970) ("[t]he definition of 'discharge' is designed to cover by its broad terms all possible means of fouling the waters with oil"). That definition includes, for example, even the unanticipated passive seepage from an abandoned tank or drum. The Clean Water Act has retained those limited-use definitions. See CWA §§ 311(a)(2), 312(a)(9), 33 U.S.C. 1321(a)(2), 1322(a)(9). The inclusion of the phrase "not limited to" is, of course the draftsman's device to avoid any implication that canons such as *inclusio unius est exclusio alterius*, *noscitur a sociis*, and *ejusdem generis* should apply in light of the enumeration of seven related items. See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 432 (2d ed. 1995). Those canons are not an issue in the case of Section 502(16), which "includes" only a single term and its synonymous plural form. 33 U.S.C. 1362(16).

Congress specifically clarified the relationship between the terms "discharge" and "discharge of a pollutant," thereby eliminating any confusion that might otherwise have arisen from its use of "discharge" in its ordinary sense in some Clean Water Act provisions and its use of "discharge of a pollutant" as a statutory term of art in the Act's other provisions. In particular, Congress made clear that the broader and more expansive term "discharge" includes the more circumscribed term "discharge of a pollutant" as well as its synonymous plural "discharge of pollutants." CWA § 502(16), 33 U.S.C. 1362(16). That congressional determination is entirely consistent with the ordinary meaning of discharge—"a flowing or issuing out"—which necessarily includes "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. 1362(12).

It would be irrational, especially in light of the statutory evolution of those terms, to conclude that, because Congress clarified that a general term "includes" a more circumscribed term of art, the general term is somehow confined by the same limitations. If Congress had meant to say that a "discharge" is an "addition . . . from a point source" (Pet. Br. 15) or an "addition" of a "pollutant" or "something similar" (*id.* at 17), it could have, and would have, simply said so. Instead, Congress preserved the general term "discharge" for use in statutory provisions, such as Section 401, when it intended to convey the ordinary meaning of that term, and defined the term of art "discharge of a pollutant" for use in other provisions, such as Sections 301 and 402, when it intended to convey the more circumscribed meaning. "[W]here 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 purposely in

the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (citation omitted).[7]

4. Petitioner further argues that "[i]t stretches credulity to contend that Congress somehow envisioned a river flowing through a dam as a river 'discharging into' itself." Pet. Br. 17. But that argument ignores the role of the dam. A "flowing or issuing out" will always be "out" of something and "into" something, and this Court's own decisions confirm that it is common usage to say that a dam or reservoir "discharges into" the very river that it impounds. See *PUD No. 1*, 511 U.S. at 709 (the proposed Elkhorn Hydroelectric Project "may result in discharges into the Dosewallips River"). That usage accurately describes what physically takes place: The hydroelectric facility diverts water from the river channel, passes the water through turbines to generate power, and "then return[s] the water to the river below the bypass reach." *Ibid.* The facility thereby returns the water by "discharge into" the same river channel from which it was withdrawn. CWA § 401(a), 33 U.S.C. 1341(a).[8]

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[7] Petitioner obtains no support for a contrary conclusion from *Chickasaw Nation*, *supra*, or *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). See Pet. Br. 17. *Chickasaw Nation* recognizes, unhelpfully for petitioner, that to "include" is to "comprise *as part of* the whole," 534 U.S. at 89 (emphasis added), and goes on to hold that a provision that "included" an illustrative list did not extend, by virtue of one of the listed items, the reach of that provision further than its otherwise plain meaning would allow, *id.* at 89-91. Here, no such question is presented because the term "discharge" is obviously broader than the "discharge of a pollutant," and there is no illustrative list. In *Phelps Dodge Corp.*, the Court rejected the notion that Congress intended to limit a broad statutory phrase by "including" an illustration of its use, stating that such a construction would "shrivel a versatile principle to an illustrative application." 313 U.S. at 189. As the Court observed, "[t]he word 'including' does not lend itself to such destructive significance." *Ibid.*; see Garner, *supra*, at 431 ("including" should not "be used to introduce an exhaustive list, for it implies that the list is only partial").

[8] Section 401(a)'s reference to "navigable waters," which means "the waters of the United States," CWA § 502(7), 33 U.S.C. 1362(7), denotes that Section 401 applies only if the discharge flows into waters that are subject to federal

Even if there were any room for doubt about the applicability of Section 401(a) to hydroelectric facilities, such doubt would have to be resolved in favor of EPA's interpretation. EPA has consistently maintained that the licensing of hydroelectric facilities under the Federal Power Act is subject to the requirements of Section 401(a). EPA has taken that position in an agency guidance document, in communications with FERC, and in construing its own authority to issue certifications under Section 401(a) when no state agency has authority to do so.[9] That longstanding administrative construction of the Act is entitled to deference. See, *e.g.*, *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002).

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regulation. For example, Section 401 would not apply if a federally licensed facility withdrew water from a river and then discharged all of that water into a municipal water system. In this case, petitioner's facilities discharge water "into," as opposed to diverting water away from, the Presumpscot River, which are waters subject to federal regulation. Cf. *North Carolina*, 112 F.3d at 1189 (holding that a withdrawal "resulting in a decrease in the volume of a preexisting discharge is not an activity that 'results in any discharge'"). The fact that the diverted water remains, for purposes of federal regulation, part of "the waters of the United States," see note 4, *supra*, has no bearing on whether the release of the water from the facility is a "discharge into the navigable waters." Section 401 focuses on the *potential* of a "discharge" and not on *what* is being discharged.

[9] See, *e.g.*, EPA, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes* 20 (Apr. 1989) (EPA "has identified five federal permits and/or licenses which authorize activities which may result in a discharge to the waters," including "licenses required for hydroelectric projects issued under the Federal Power Act"); Letter from Jonathan Z. Cannon, EPA, et al., to Hon. Lois D. Cashell, FERC, re: *Virginia Electric and Power Co.*, at 4 (Oct. 24, 1996) (operation of hydroelectric dam "'may result,' and indeed, does result, in a 'discharge' of water over and through the dam" and thus "trigger[s] the requirement of a Section 401 certification from" the relevant State); Letter from David A. Fierra, EPA, to Dean Marriott, Maine Dep't of Envtl. Prot. at 1 (Jan. 24, 1991) ("it is the Region's position that EPA is the Section 401 certifying body for purposes of the hydro project relicensing").

D. This Court's Decisions Support Interpreting The Term "Discharge" According To Its Ordinary Meaning

Petitioner gives scant attention to this Court's decision in *PUD No. 1*, which held, in circumstances strikingly similar to this case, that a state-issued Section 401 certification for a hydroelectric project may properly impose conditions on the project as a whole—and not just its discharges. See 511 U.S. at 710-723. In that case, as here, the state-imposed conditions included minimum stream flows to ensure compliance with state water quality standards. See *ibid.* To be sure, the petitioner in that case did not dispute that the project resulted in a "discharge," see note 3, *supra*, but the petitioner also did not overlook that point.[10] The Court, in its "thorough analysis" (511 U.S. at 723 (Stevens, J. concurring)), expressed no doubt that the project resulted in a "discharge." The two dissenting Justices disagreed on the appropriateness of the minimum stream flow condition, but expressly recognized that the term "discharge" should be construed in light of its ordinary meaning as "a flowing or issuing out," *id.* at 725 (Thomas, J., dissenting). Against that backdrop, *PUD No. 1* stands as a substantial obstacle to any conclusion that a hydroelectric project does not result in a "discharge."

Rather than confronting *PUD No. 1*, petitioner focuses on this Court's decision in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), which did not address Section 401 and its use of the general

[10] The petitioner in that case urged that Congress had left the term "discharge" undefined and that it should therefore be interpreted in light of its "standard dictionary definition" of "to give outlet to: pour forth: emit (the river [*discharges*] its waters into the bay)." 92-1911 Pet. Br. at 22-23 (quoting *Webster's Third New International Dictionary* 649 (1971)). The United States advised in its brief amicus curiae that "when the operator of a dam releases water through [a release structure] it has caused a discharge within the meaning of Section 401," noting that "Congress employed the term 'discharge' * * * more broadly than the term 'discharge of a pollutant.'" 92-1911 U.S. Br. at 14-15 & n.4.

term "discharge," but instead addressed Section 402, which uses the more circumscribed term "discharge of a pollutant." The Court's decision in *Miccosukee* is relevant here only in two limited respects, neither of which is helpful to petitioner.

First, *Miccosukee* illustrates why Congress drew its definitional distinction. Section 401, which uses the broader term "discharge," directs that, whenever federal authorities license an activity that may result in any "flowing or issuing out" of anything into navigable waters, they obtain input from the State where the release takes place to ensure that the release will not interfere with the State's broad retained authority to regulate "the man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of water." CWA §§ 101(b), 502(19), 33 U.S.C. 1251(b), 1362(19). By contrast, Section 402—the provision at issue in *Miccosukee*—involves only the issuance of federally mandated NPDES permits for the "addition of [a] pollutant to navigable waters from [a] point source." CWA §§ 402(a), 502(12), 33 U.S.C. 1342(a), 1362(12). Section 401's broad and inclusive reach, requiring examination of any "discharge" that might lead to "pollution," thus ensures that federally licensed projects will comply with state water quality standards even when the more targeted and specific requirements of the NPDES program are not applicable.[11]

Second, the Court's decision in *Miccosukee* usefully illuminates the difference between a "discharge" and an "addition." In discussing "additions," the Court noted by analogy that

[11] As has been explained, EPA does not require NPDES permits for hydroelectric dams that merely discharge diverted water back into a navigable river channel, unless that discharge also involves the addition of a pollutant from the outside world. See note 5, *supra*. Section 401's state water quality certification process provides the appropriate means for addressing the broader problems associated with any "man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of water," CWA § 502(19), 33 U.S.C. 1362(19), that might result from the impoundment and release of diverted water. See *Gorsuch*, 693 F.2d at 161-174.

> [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 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *New York*, 273 F.3d 481, 492 (2d Cir. 2001)). Though not an "addition," the act of "pour[ing the soup] back into the pot" is plainly a "discharge" within the ordinary meaning of that term.[12]

E. The Clean Water Act's Purpose and Legislative History Support The Conclusion That Petitioner's Facilities Result In A "Discharge Into the Navigable Waters"

Section 401 is one part of the Clean Water Act's comprehensive water pollution control program, which seeks to coordinate federal and state efforts to ensure clean water. The Act places federal limitations on the "discharge of *pollutants*," while continuing a policy recognizing "the *primary* responsibilities and rights of States to prevent, reduce, and eliminate *pollution*." See CWA § 101(a)(1) and (b), 33 U.S.C. 1251(a)(1) and (b) (emphasis added). The Act preserves the broad power of a State to develop its own more stringent standards and limitations, stating that nothing in the Act's provisions shall preclude or deny the right of any State "to adopt or enforce (A) any standard or limitation respecting *discharges of pollutants*, or (B) any requirement respecting control or *abatement of pollution*," in addition to or more

[12] Petitioner's reference to EPA's regulatory guidance document respecting water transfers (Pet. Br. 22-23) is inapposite because that document does not address the scope of Section 401. Rather, that document explains EPA's view that Section 402's NPDES permitting program is not applicable to water control facilities that merely convey or connect navigable waters but do not involve an addition of any pollutants from a point source. See *Agency Interp.*, *supra*. That view is consistent with EPA's position on dams and its position here. See *id.* at 8, 10-12; notes 4-5, *supra*.

stringent than what the federal law requires. See CWA § 510, 33 U.S.C. 1370 (emphasis added).

Congress clearly understood that activities that do not result in discharges of pollutants may nevertheless contribute to pollution. Congress also knew that, in the absence of congressional direction, principles of federal preemption might well exempt many federally licensed activities—including the generation of hydroelectric power—from state environmental regulation. See *California* v. *FERC*, 495 U.S. 490, 506-507 (1990); *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 175-176 (1946). Congress accordingly adopted Section 401 to ensure that federally licensed activities would not escape state regulation. Section 401 expressly enables a State to apply its federally mandated water-pollution-control program to those activities. See *Alabama Rivers Alliance* v. *FERC*, 325 F.3d 290, 292-293 (D.C. Cir. 2003); *American Rivers, Inc.* v. *FERC*, 129 F.3d 99, 111 (2d Cir. 1997).

As petitioner appears to acknowledge (Pet. Br. 4, 23), even if a hydroelectric generating facility does not add pollutants to navigable waters, the discharge of diverted or impounded water may cause "pollution" by producing a "man-made or man-induced alteration" of water quality. CWA § 502(19), 33 U.S.C. 1362(19). See generally *Gorsuch*, 693 F.2d at 161-174. Among other things, the diversion and impoundment of water "can lower dissolved oxygen concentrations by reducing natural reaeration, increasing time of travel, increasing water temperature, and creating settling basins for sediment and nutrients." Pet. App. A114 (DEP findings). In the present case, it is undisputed that reaches of Presumpscot River do not meet Maine's dissolved-oxygen standards and that petitioner's facilities "cause or contribute to the violation[s]." *Id.* at A114-A115 (DEP findings); *id.* at A56-A57 (BEP findings).

Section 401 squarely addresses the need for federal licensing authorities to take account of a State's important interest in abating pollution that might arise in exactly these circumstances. If petitioner's facilities are not subject to Section

401, the State would be without an important mechanism to regulate the pollution caused by those facilities and their discharges. That result would be contrary to Congress's express policy "to recognize, preserve, and protect" the rights of each State "to prevent, reduce, and eliminate pollution." CWA § 101(b), 33 U.S.C. 1251(b).[13]

The legislative history of the Clean Water Act fully supports Congress's textually evident objectives. Senator Cooper, a principal sponsor of the initial legislation that imposed the requirement now included in Section 401(a), spoke of the need for state certification during the floor debate. He observed that "the Federal Government contributes to water pollution in its licensing activities over such things as nuclear power plants, [and] *hydroelectric power plants licensed by the Federal Power Commission*." See 115 Cong. Rec. 28,971 (1969) (emphasis added). Senator Cooper stated that the legislation would require, "*without exception*, that all Federal activities that have any effect on water quality be conducted

[13] Contrary to petitioner's suggestions (Pet. Br. 23-28), neither Section 304(f)(2)(F) nor Section 511(c)(2) of the Clean Water Act, 33 U.S.C. 1314(f)(2)(F), 1371(c)(2), suggests anything to the contrary. Section 304(f) directs EPA to provide guidance for "identifying and evaluating the nature and extent of nonpoint sources of pollutants, and * * * processes, procedures, and methods to control pollution resulting from," among other activities, "the construction of dams." 33 U.S.C. 1314(f). The fact that the "construction of dams," as well as "all construction activity" (33 U.S.C. 1314(f)(2)(C) and (F)), may result in nonpoint source pollution provides no basis for exempting the operation of those dams from Section 401's express requirements. Section 511(c)(2) provides that nothing in the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, authorizes federal licensing agencies to: (a) review the "adequacy" of state water quality certifications or other requirements established under the Act; or (b) impose effluent limitations beyond those established in the Act as a condition of licensing. See 33 U.S.C. 1371(c)(2). A determination that Section 401 applies to discharges from federally licensed dams in no way suggests that NEPA authorizes or requires FERC to evaluate the "adequacy" of state-imposed water quality conditions or to second-guess applicable effluent limitations.

so that water quality standards will be maintained." *Ibid.* (emphasis added). Those remarks do not stand alone.[14]

When Congress recast the former Section 21(b) as Section 401 of the Federal Water Pollution Control Act in 1972, the Senate Report on the new legislation again confirmed Congress's intent that the state certification requirement would apply to Federal Power Act licenses. See S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971). The Senate Report states that Section 401 "continues the authority of the State * * * 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" and that "[s]hould such an affirmative denial occur no license or permit could be issued by such Federal agencies as the * * * *Federal Power Commission* * * * unless the State action was overturned in the appropriate courts of jurisdiction." *Ibid.* (emphasis added).

When Congress enacted the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, it also reaffirmed its desire for a broad reading of Section 401. As part of those amendments, Congress modified Section 401 to add a reference to Section 303 and state water quality standards, which had been inadvertently left out of the original version. See § 64, 91 Stat. 1599. The Senate Report explains that the "amendment follows the original congressional intent and clarifies that * * * Section 303 was intended to be part of the control mechanism available to the States for protection of State water quality." S. Rep. No. 370, 95th Cong., 1st Sess. 72-73 (1977); see H.R. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977). That history confirms that Congress enacted Section 401 not

[14] For example, the House Report responded to a concern that the provision would apply selectively to nuclear power plants and thereby place nuclear power at an "undesirable" competitive disadvantage. The report stated that "this concern is met by the fact that a Federal license or permit of some kind is required for almost all electric generating plants." See H.R. Rep. No. 127, 91st Cong., 1st Sess. 7 (1969).

as an adjunct to the new federal controls on the "discharge of pollutants," but to continue the existing program to empower States to regulate any "discharges" from federally licensed facilities that cause pollution.[15]

In sum, the Clean Water Act's specific text, this Court's decisions, and the purposes that Congress sought to achieve are all in alignment. Petitioner's operation of its hydroelectric facilities results in a "discharge" for purposes of Section 401(a) of the Clean Water Act.

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[15] Petitioner ignores those straightforward statements of congressional intent, and instead proposes a convoluted and unsatisfying explanation for Congress's use of the term "includes." See Pet. Br. 29-33. Petitioner observes that the original, but not enacted, Senate bill defined "discharge" to "mean," among other things, the "addition" of pollutants to navigable waters, see *id.* at 29-30 (citing S. 2770, 92d Cong., 1st Sess. § 2 (1971) (proposed § 502(n)). Petitioner posits that Congress substituted the word "includes" in the final definition, enacted in Section 502(16), in conjunction with an abandoned legislative effort to include a "thermal discharge" as a type of discharge for purposes of Section 401, but not for Section 402's NPDES permitting requirements. Petitioner speculates that Congress used the term "includes" inadvertently, *i.e.*, as a vestige of the failed legislative proposal, and not deliberately to give Section 401 broader scope than Section 402. See Pet. Br. 32. But such speculation about Congress's "true" intent notwithstanding, inadvertent, but duly enacted, text is not a proper basis for interpreting a statute and is inconclusive in any event. Congress did not need to use the verb "includes" in defining "discharge" to achieve the proposed, but ultimately abandoned, result for "thermal" discharges. The House bill could have achieved that result by defining "discharge" to "mean" the "discharge of pollutants" and "thermal discharges." Accordingly, the legislative history cited by petitioner provides no explanation for Congress's choice of the word "includes" rather than "means" in defining "discharge." The only reasonable conclusion is that Congress meant what it said and employed "includes" to ensure that the term "discharge" would be given a broad construction in keeping with its ordinary meaning.

CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 101(a) and (b) of the Clean Water Act, 33 U.S.C. 1251(a) and (b), provides:

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;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpointsources of pollution.

(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.

2. Section 401(a)(1) and (d) of the Clean Water Act, 33 U.S.C. 1341(a)(1) and (d), provides:

Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) 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 agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certifi-

cation required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

* * * * *

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

3. Section 502(6), (12), (16), and (19) of the Clean Water Act, 33 U.S.C. 1362(6), (12), (16), and (19), provides:

Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(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.

* * * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

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

* * * * *

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

4. Section 510 of the Clean Water Act, 33 U.S.C. 1370, provides:

State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect

under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.