

## ENVIRONMENT ALERT

### THE SUPREME COURT'S DECISION IN *S.D. WARREN CO. v. MAINE*: SEEING THE FOREST FOR THE TREES OR FLOODING THE VALLEY?



On May 15 the Supreme Court unanimously held in *S.D. Warren Co. v. Maine Board of Environmental Protection* that the mere flow of water through an existing dam constitutes a “discharge” regulated by the Clean Water Act. In so holding, the Court affirmed a state’s authority to require federally licensed hydroelectric projects to comply with state water-quality standards. This decision, arising in the context of federal and state power in the area of licensing infrastructure projects, is the first environmental decision of the Roberts Court.

Section 401 of the Clean Water Act requires “[a]ny Applicant for a federal license or permit to conduct any activity . . . which may result in a discharge into navigable water[s]” to obtain a certification from the state in which the discharge originates. The statute further requires that any effluent limitations and other requirements set forth in the certification become conditions on the federal license or permit. The Federal Power Act, in turn, grants the Federal Energy Regulatory Commission (FERC) exclusive authority to license hydroelectric projects on navigable waters of the United States.

FERC had required the petitioner, S.D. Warren Co., to obtain water-quality certifications from the state of Maine as part of its application to relicense several hydroelectric dams. Maine issued the certifications, but in so doing imposed certain operating restrictions. S.D. Warren challenged the authority of the state to issue the certifications, arguing that dams do not result in “discharges” under the Clean Water Act because the dams did not add any pollutants or contaminants to the water. After losing in the state courts, S.D. Warren sought certiorari, which the Supreme Court granted on the limited issue of whether the flow of water through an existing dam constitutes a “discharge” under Section 401 of the Clean Water Act.

#### THE MEANING OF DISCHARGE (THE “TREES”)

Noting that the statute did not define “discharge,” the Court gave the term its ordinary or natural meaning as applied to water (i.e., “a flowing or issuing out,” “to emit or give outlet to,” or “to pour forth”). It further noted that its other decisions, as well as EPA and FERC interpretations of the term, reinforced the Court’s common and inclusive definition of the term. The Court then addressed the petitioner’s various arguments for limiting the term to discharges of actual added pollutants, rejecting each in turn.

## THE INTENT OF THE CLEAN WATER ACT (THE “FOREST”)

While much of the opinion discusses the interpretation of the term “discharge,” perhaps the most significant aspect of the decision came near the end of the opinion with Justice Souter’s mixed metaphor that the petitioner had missed “the forest for the trees.” In a section joined by all of the Justices, he stated:

[The CWA] does not stop at controlling the “addition of pollutants,” but deals with “pollution” generally, . . . which Congress defined to mean “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water. . . .” The alteration of water quality as thus defined is a risk inherent in limiting river flow and releasing water through turbines.

Citing the various impacts that dams could have on a river just from changing the movement, flow and circulation of the water, Justice Souter found that such changes “fall within the State’s legitimate legislative business.” As such, the Court concluded that reading Section 401 to give “discharge” its common and ordinary meaning “preserves the state authority apparently intended.”

## IS THE FOREST ABOUT TO GROW?

Federal and state officials, as well as environmental advocates, have widely praised the decision. Even representatives from the hydroelectric industry have acknowledged that, on its face, the decision merely affirms what has been standing practice in the industry: state review of hydroelectric license applications.

Still, industry officials have expressed disappointment that the Court declined to consider what happens when a state uses its authority to impose conditions that conflict with federal policy or federally imposed conditions. Such conflicts are a particular concern at a time when Congress has been acting to consolidate federal control over regulation of domestic energy production and when expanding domestic energy sources is a federal priority.

In this respect, like so many other Supreme Court decisions, the most notable aspect of this decision may be the question the Court declined to answer.

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## CONTACT INFORMATION

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