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## Can States Regulate Hydropower Dams as Dischargers Pursuant to Their Clean Water Act Certification Authority?

by Robert H. Abrams

PREVIEW of United States Supreme Court Cases, pages 251-254. © 2006 American Bar Association

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Under §401 of the Clean Water Act, 33 U.S.C §1341, to obtain a federal license for any activity that results in a "discharge into the navigable waters," the license applicant must obtain a certification from the state in which the activity takes place that the discharge complies with several aspects of state water-quality regulation under the Clean Water Act. A common setting in which this requirement has been applied is when a hydropower dam seeks to be relicensed by the Federal Energy Regulatory Commission (FERC). In this case, S. D. Warren Company (Warren), the operator of five dams up for relicensing, and the State of Maine differ on whether the flow through Warren's dams constitutes a discharge that would subject it to the §401 certification requirement that, in turn, allows the state to set additional requirements that Warren must satisfy.

### ISSUE

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

### FACTS

The Presumpscot River flows approximately 25 miles, beginning as the outlet of Lake Sebago in southern Maine and entering the Atlantic Ocean near Portland, Maine's largest city. Although the river once had a teeming fishery that included Atlantic salmon and shad, that is no longer the case, and the eight dams on the river, including the five owned and operated by Warren that are being relicensed in this case, are a major factor in the absence of a vital fishery.

Warren's dams are sometimes termed "run-of-the-river" dams,

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S. D. WARREN COMPANY V. MAINE  
BOARD OF ENVIRONMENTAL  
PROTECTION ET AL.  
DOCKET NO. 04-1527

ARGUMENT DATE:  
FEBRUARY 21, 2006  
FROM: SUPREME JUDICIAL  
COURT OF MAINE

# Case at a Glance

S. D. Warren Company operates a series of hydropower dams on the Presumpscot River in Maine for which it is seeking relicensure from the Federal Energy Regulatory Commission. Under the Clean Water Act (CWA), Maine can regulate such dams through the certification process of CWA §401 that comes into play when a federal license is needed by an entity that "discharges" into the nation's navigable waters. At issue is whether dams that pass water through can be said to "discharge" to the navigable waters and thus trigger §401.





which means that the entire river passes through the dam. Frequently, that term describes dams that have little effect on the river's flow or the nature of the river's channel, such as dams that create a pond but let the entire river flow over the confining structure. In this case, the dams alter the river in major ways. The five dams in question and the reservoirs they create cover approximately 12 miles of the river's length and are operated so that the pool from each lower dam extends upstream to the outlet of the dam above it. Warren operates them in a way that maintains the levels behind each dam at a nearly constant level, working in conjunction with releases from another upstream hydroelectric dam that is not involved in this litigation. The turbines and power houses are located off to the side of the original riverbed. Water is diverted into a power canal that passes through the turbines and returns downstream through a tailrace. Except for leakage and occasional deliberate spills in times of very high water, portions of the original riverbed ranging from 300 to 1075 feet at each of the five locations are dewatered by this method of operation. There are no fish ladders to permit passage through the dams.

The dams were originally licensed by FERC between 1979 and 1981 and the licenses were scheduled to expire in 2001. Roughly two years prior to expiration, Warren filed renewal applications, and FERC as part of its standing practice required Warren to present CWA §401 certifications from the state. Warren applied to Maine for the certificates but claimed in both the federal proceeding and state administrative proceedings that no certificate was required because their dam operations were not "discharges." In 2003, the Maine Department of Environmental Protection (MDEP) approved certificates that imposed

conditions on the operation of Warren's dams. The conditions included minimum stream flows in the original river channel at three of the five dams, additional deliberate spillage at two facilities to increase the amount of dissolved oxygen in the river, and a contingent plan for fish ladders at all dams to provide Atlantic salmon access to nursery and spawning waters. The conditions imposed would improve the water quality and further the ability of the state to achieve its water-quality standards for the river. These changes in operations, however, would also reduce the amount of power generated and impose costs in relation to the construction of the fish ladders. The conditions in the certificates were challenged by Warren and upheld by the Maine Board of Environmental Protection, and that ruling was subsequently sustained by the Maine Supreme Judicial Court.

#### CASE ANALYSIS

The legal issues in this case are relatively easy to understand. The basic statutory command of §401 is unambiguous: persons whose activities result in discharges to the nation's navigable waters requiring federal licenses must, as a precondition of obtaining the license, obtain a state certification of compliance under §401 of the CWA. The principal question is whether Warren's activities, impoundment, the running of water through the power canal and release to the original streambed are a discharge. That question is not trivially easy, but the range of relevant materials is not nearly as great as in other interpretive issues. Previous decisions addressing the topic and possibly analogous topics are not particularly numerous, nor, with one possible exception, are they particularly hard to follow.

Section 401(a)(1), in relevant part, states, "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 navigable waters*, shall provide the licensing or permitting agency a certification from the State ... that such discharge will comply with the applicable provisions" of certain specified sections of the Clean Water Act pertaining to water quality, including all such standards set by the state. (Emphasis added.) There is no statutory dispute about §401 in this case on any point other than whether the return of the water by Warren is a "discharge."

Other parts of the CWA regulate activities involving releases into the navigable water using similar terms. Section 301, in particular, which is the linchpin for the National Pollution Discharge Elimination System permit system that regulates most polluting entities, uses the phrase "all point sources of discharge of pollutants." Dams have been free of this regulatory program because their activities have been ruled to not involve the "discharge of a pollutant" as that term is defined by §502(12). The statute in §502(16) also defines as a separate matter the term *discharge*, making a distinction between the two terms as follows: "The term *discharge* when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."

Maine argues that the proper reading of §401, therefore, can include a discharge of pollutants but may include things that are discharges that do not meet the statutory definition of "discharge of pollutant(s)" that is set out in §502(12). Maine further argues that the definition of *discharges* set forth by §502(16) being broader than the definition of "discharges of a pollutant" in §502(12) is aligned with the broader purposes of §401 which is intended



to give the state authority to regulate activities that affect water quality but may not be subject to regulation under the NPDES program. Warren disputes the rectitude of this view of the CWA and, in addition, offers arguments that focus on the idea that putting the river's own water back into its impounded channel is not an "addition" of pollutants and is not regulated under the CWA. "Addition" is a key concept in §502(12).

The case also presents two additional lines of argument based on recent events in the Supreme Court and at the United States Environmental Protection Agency in relation to the separate CWA NPDES program that is anchored in §§301 and 402. In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), the question before the Court involved a pump station that moved more polluted water to a less polluted area of what was argued to be the same water body. The Court did not decide that issue and instead remanded the case due to questions about the nature of the water body and the precise rulings in the courts below. Nevertheless, the Court's opinion clearly showed some sympathy for the view that pumping unaltered water from one part of a unitary water body to another did not result in the addition of pollutants that would trigger the need for a §402 NPDES permit. In the wake of that decision, a recent EPA Memorandum that applies only in the §402 context took the position that the in-water-body pumping is not a discharge of pollutants. Warren claims that if mere pumping within a single water body is not a discharge or addition of pollutants, then putting the river back in the river is likewise not a discharge or addition.

Despite the judicial and administrative developments on the NPDES

front, there has been no such movement in the §401 arena. There has been no authority questioning the leading case, *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), upholding state certification requirements that arguably entrenched on matters FERC had considered. Similarly, there has been no alteration in administrative practice. FERC has continued to require certifications in all hydropower dam relicensings.

### SIGNIFICANCE

The grant of certiorari in this case is a bit surprising. Despite the prevailing flux in the §402 area, there has been no parallel foment in the §401 certification area. The longstanding consistent interpretation of §401 by FERC, the relatively recent and clear decision in *PUD No. 1*, and the lack of splits among courts considering the applicability of that section to hydropower relicensing all made this an unlikely case for Supreme Court review. Even the U.S. solicitor general, in the United States's amicus brief in support of the state of Maine, concluded that "the Clean Water Act's specific text, this Court's decisions, and the purposes that Congress sought to achieve are all in alignment."

Hydropower licensees can save both time and money if they need not obtain a §401 certification. In some instances the conditions that states have attached to those certifications have required significant expenditures on the part of licensees. In this case the conditions relating to dissolved oxygen and flows will reduce the generating potential of the dams and may require expenditures for fish ladders.

Because the interpretation of the §402 program excludes dams from NPDES regulation as point source dischargers, §401 gives the states an

opportunity to address the very considerable water-quality impacts caused by dams. River flows affect the basic goals of the CWA, particularly in making waters fishable. Absent §401 requirements, dams that do so much to reduce dissolved oxygen and affect other parameters of water quality and fish habitat could not be called upon to pitch in with other point sources to participate in the solution of problems for which the dams are in part responsible. Virtually all states now employ §401 as part of their water-quality strategies. Should petitioner Warren prevail, the states will lose an important regulatory tool.

In assessing the significance of this case, it seems fair to say an affirmation would leave the legal landscape unchanged and have little precedential value beyond the narrow interpretive issue Warren has tried to press. A reversal, although it too would operate in a narrow area of the CWA, would make a major change in the law and severely undercut state regulatory authority over the local riverine environment. A reversal also would be a surprise given the views attributed to the current Court by so many of the commentators. A reversal would be hard to square with the "plain meaning" of words in the statute and would upset established precedent.

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