

# U.S. Supreme Court Grants Certiorari in Clean Water Act Section 401 Case

October 19, 2005

On October 11, the United States Supreme Court granted certiorari in *S.D. Warren Co. v. Maine Department of Environmental Protection*. This case presents the issue of whether the mere flow of water passing through an existing hydroelectric project constitutes a “discharge” requiring state water quality certification under Section 401 of the Clean Water Act (CWA). The Supreme Court’s decision in this case could have significant implications regarding the applicability of Section 401 certification in hydroelectric project licensing, relicensing, amendment, and reopening proceedings before the Federal Energy Regulatory Commission (FERC).

## Case Overview: What Constitutes a “Discharge” Under Section 401 of the CWA?

S.D. Warren owns five hydroelectric projects on the Presumpscot River in Maine, all of which are operated in run-of-river mode. Several of these projects are impoundment projects with powerhouses integral with the dam, while others divert water out of the river, through powerhouses, and then return the water to the river downstream. According to the record in the case, there is no evidence that operation of these projects entails permanent removal of water from the stream or the introduction of any substance into the water as it passes through the facilities.

When S.D. Warren applied for new licenses for the projects before FERC in 2001, it also applied, pursuant to FERC regulation, for water quality certification before the Maine Department of Environmental Protection (DEP). It did so under protest, however, asserting that certification was not required because the projects do not result in a “discharge,” as required under Section 401 of the CWA. In 2003, DEP held that water quality certification was required for FERC relicensing of S.D. Warren’s projects and issued the certification containing numerous conditions. S.D. Warren unsuccessfully appealed the certification to the Maine Board of Environmental Protection and the Maine Superior Court. S.D. Warren then appealed to the Maine Supreme Judicial Court (SJC).

On appeal, the SJC held that removing water from the river’s natural course, subjecting it to private control, and then redepositing the water into the river constitutes a “discharge” requiring Section 401 certification. The SJC reasoned that as the water flows through a hydroelectric project, it becomes subject to the project operator’s private control, temporarily losing its status as “waters of the United States.” When the water rejoins waters of the United States, it constitutes an “addition.” The SJC also held that the word “discharge” is not limited to the “discharge of a pollutant” or “discharge of pollutants.” Rather, the SJC held that the term “discharge” is broadly defined under the CWA to encompass the release of water into the waters of the United States, thus requiring a hydroelectric project to obtain Section 401 certification, regardless of whether water passing through the project contains a pollutant, pollutants, or otherwise impacts state water quality standards.

In response to the SJC’s decision, S.D. Warren filed a Petition for Certiorari before the U.S. Supreme Court on May 12, 2005. In its petition, S.D. Warren argues, *inter alia*, that the SJC’s interpretation of what constitutes an “addition” in ascertaining whether a release constitutes a discharge under Section 401 of the CWA is inconsistent with the Supreme Court’s 2004 decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), in which the Court confirmed that, for the purposes of Section

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402 of the CWA, a “discharge of a pollutant” occurs only when the water body receiving the release is “meaningfully distinct” from the water body that conveyed the release. Furthermore, *in dicta*, the Court in *Miccosukee* suggested that removing water and then returning it to the same water body does not constitute an “addition” of a pollutant under Section 402 of the CWA. S.D. Warren’s petition contends that the “meaningfully distinct water body” test also should be applied to determine the existence of a “discharge” for purposes of Section 401.

In addition, S.D. Warren’s petition argues that, following *Miccosukee*, at least four approaches for determining whether releases from dams constitute an “addition” continue to be employed by the courts of appeals and FERC. First, the petition notes that several courts of appeals apply the “meaningfully distinct water body” test referenced in *Miccosukee*. *E.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001); *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). Second, the petition states that the D.C. Circuit, in *Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003), abandoned the “meaningfully distinct water body” test in favor of a test that analyzes whether the license or permit would involve an increased rate of flow. Third, the petition states that FERC applies a different test, inquiring whether there has been “some alteration of the chemical, physical, or biological integrity of the water, even if it does not involve the discharge of a pollutant or pollutants.” *FPL Energy Maine Hydro LLC*, 111 FERC ¶ 61,104, at P 21 (2005). Finally, the SJC’s holding analyzes the issue by examining whether the releases in question were an exercise of private control of the water. The petition asserts that Supreme Court action could clarify the standard and eliminate confusion.

As noted above, the Supreme Court granted the petition on October 11, 2005. S.D. Warren’s brief on the merits is due on November 25, 2005. Any *amicus curiae* brief in support of S.D. Warren must be filed on the same date. The Maine DEP’s brief on the merits is due December 30, 2005. Oral argument has not yet been scheduled.

### **Potential Implications and Opportunities**

This case presents a unique and important opportunity for the hydroelectric industry to advocate its position with regard to the applicability of CWA requirements in FERC hydroelectric licensing proceedings, including relicensing, amendment, and reopener proceedings. S.D. Warren’s petition calls into question the manner in which FERC, the SJC, and various courts of appeals have defined terms that govern the applicability of Sections 401 and potentially 402 of the CWA to hydroelectric facilities. Accordingly, this case could have far-reaching impacts in proceedings before FERC.

Van Ness Feldman, P.C. prepared an *amicus curiae* brief on behalf of the National Hydropower Association in *Miccosukee*, in which it argued that water flowing from a hydroelectric project does not constitute the addition of a pollutant. Consistent with this approach, the firm currently is assembling a coalition of hydroelectric industry interests likely to be affected by the issues involved in *S.D. Warren Co.* for the purpose of preparing and filing an *amicus curiae* brief.

### **For Additional Information**

If you have any questions or are interested in participating in these efforts before the Supreme Court, please call Mike Swiger at (202) 298-1891 or Sam Kalen at (202) 298-1826 at Van Ness Feldman.

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