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IN THE SUPREME COURT OF THE UNITED STATES

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S.D. WARREN COMPANY, :

Petitioner, :

v. : No. 04-1527

MAINE BOARD OF ENVIRONMENTAL :

PROTECTION. :

- - - - - x

Washington, D.C.

Tuesday, February 21, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:34 a.m.

APPEARANCES:

WILLIAM J. KAYATTA, JR., ESQ., Portland, Maine; on behalf of the Petitioner.

G. STEVEN ROWE, ESQ., Attorney General, Augusta, Maine; on behalf of the Respondent.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondent.

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3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in S. D. Warren Company versus Maine Board of
5 Environmental Protection.

6 Mr. Kayatta.

7 ORAL ARGUMENT OF WILLIAM J. KAYATTA, JR.,

8 ON BEHALF OF PETITIONER

9 MR. KAYATTA: Mr. Chief Justice, and may it -
10 - and may it please the Court:

11 The Presumpscot River is a single body of
12 water, as that term was used in last year's Miccosukee
13 decision. Warren's position is that the flowing of
14 that single body of water through Warren's five dams is
15 not a discharge into that same single body of water.
16 In arguing that certification under section 401 of the
17 Clean Water Act is, therefore, not required, we are not
18 maintaining that the State either has, or should have,
19 no voice on matters of water quality in connection with
20 the relicensing of these dams.

21 In 1986, Congress took care to ensure States
22 a forceful, but not controlling, voice on environmental
23 issues, including water quality issues, in all
24 hydropower relicensing proceedings. Congress was very
25 specific about its intent in 1986, and it intended to

1 give States a strong voice, but not a veto. So, we
2 feel the case -- that the States clearly have that
3 voice.

4 Now --

5 CHIEF JUSTICE ROBERTS: Mr. Kayatta, if I
6 took a drum of water out of the river and put it in the
7 garage next to the river for 5 years, and, 5 years
8 later, came out and poured that drum of water back into
9 the river, is that a discharge into the river?

10 MR. KAYATTA: Yes, that would be a discharge
11 into the river.

12 CHIEF JUSTICE ROBERTS: How is it different
13 here, where you have the dam restraining the waters for
14 a certain period, and then it's being released later,
15 at a subsequent time? Why --

16 MR. KAYATTA: Yes.

17 CHIEF JUSTICE ROBERTS: -- isn't that also a
18 discharge?

19 MR. KAYATTA: There is -- we draw a
20 distinction -- and I'm referring just to discharge, I'm
21 not addressing the issue that the Court could get to in
22 another case of whether you actually need a discharge
23 of a pollutant, as to just a discharge into the river -
24 - we draw a distinction between actually removing
25 something entirely from the river, exercising control

1 over it. Your hypothetical, Mr. Chief Justice, had it
2 for 5 years. In that situation, one could say that
3 there may be a discharge into the river when an
4 activity is proposed to pour that back into the river.

5 In a -- in the dams -- the dams, the water
6 continuously flows down. The water never leaves the
7 single body of water called the Presumpscot. And
8 that's the distinction that we would draw.

9 CHIEF JUSTICE ROBERTS: Even though it's
10 retained in a -- what -- an impoundment pool, or
11 whatever, behind --

12 MR. KAYATTA: Well, the dams slow down the
13 water as it comes down the Presumpscot. And because
14 the dams slow down the water, then the river widens in
15 an area called an impoundment area. But the -- there
16 is a continuous motion leaving the dam in the same
17 amount of water that comes into the area above the dam.

18 JUSTICE KENNEDY: Well, this --

19 CHIEF JUSTICE ROBERTS: So, you think it's a
20 different case if it's not a continuous motion; in
21 other words, that the water is released -- you know,
22 it's released on the weekends, but, during the week, it
23 has to build up in the -- you would draw a distinction
24 and say there's a discharge, in that case?

25 MR. KAYATTA: Mr. Chief Justice, the

1 distinction we would draw would be when the exercise
2 over the water, and the separation of the water from
3 the river, reach the point where it could be said that
4 we're no longer dealing with one unitary body of water,
5 as that term is defined in Miccosukee. If we --

6 JUSTICE KENNEDY: But this is an important
7 point for me, and I wasn't quite clear what the briefs
8 told me about it. My understanding was that there is
9 an argument that when the water stays in the reservoir,
10 the impoundment area, that there's a stratification,
11 and the oxygen components at different levels change,
12 so that when the water goes back into the dam, it's
13 qualitatively different. It's the same water, in a
14 sense, but it's also qualitatively different in its
15 oxygen and other characteristics. And that sounded to
16 me like a discharge.

17 MR. KAYATTA: Yes. The -- there is -- there
18 is no dispute that when one changes the movement of
19 water and its flow, then characteristics of the water
20 can change. For example, in the impoundment area you
21 can have not a change, overall, of temperature, but a
22 stratification of warmer water going to the top, colder
23 water going to the bottom. Similarly, you can have
24 changes in other aspects of the water. All of those
25 have been classified by the EPA as nonpoint source

1 pollution. And it is undisputed that 401 does not
2 cover nonpoint source solution -- pollution. So --

3 JUSTICE GINSBURG: I don't --

4 JUSTICE KENNEDY: So, if --

5 JUSTICE GINSBURG: I don't --

6 JUSTICE STEVENS: But is it --

7 JUSTICE KENNEDY: So, if it were established
8 in this case that the water is qualitatively changed in
9 a significant degree because of its oxygen component,
10 that would be irrelevant to the question you're asking?

11 MR. KAYATTA: The water, as it comes into the
12 dam and in the impoundment area, there is a -- there
13 are findings, that we are not here challenging, that
14 that water changes as it comes into the impoundment
15 area. The discharge of that water -- that water then
16 flows through the dam on its way down the river. There
17 is nothing -- there is no nexus between the water
18 exiting the dam and any of the changes that Your Honor
19 has pointed to.

20 JUSTICE KENNEDY: Are you --

21 JUSTICE SCALIA: You're saying the changes
22 occur in the river, above the dam; and, therefore,
23 what's left -- what's let back into the river below the
24 dam is the same river, unchanged.

25 MR. KAYATTA: We're saying that the river

1 flows continuously down. It changes at various points
2 as it goes down a river. As it goes through rapids, a
3 river changes. The nature of a river changes as it
4 goes over rapids. As it comes --

5 JUSTICE STEVENS: Now, let me just be sure I
6 understand one point fully. But the character of the
7 water is different above the dam and below the dam.

8 MR. KAYATTA: No. The character of the water
9 --

10 JUSTICE STEVENS: I thought you agreed that
11 there was a different -- a different oxygen content in
12 the water.

13 MR. KAYATTA: The water -- take the -- Mr.
14 Chief Justice's barrel of water that has not been
15 removed from the river -- it comes down the river. It
16 changes as it goes down the river. It is potentially
17 changed in the impoundment area. It then flows through
18 the dam.

19 JUSTICE STEVENS: No.

20 MR. KAYATTA: The same water that went into
21 the dam --

22 JUSTICE STEVENS: Yes, but it's the same
23 water, with a slightly different chemical composition,
24 isn't that true?

25 MR. KAYATTA: It's the same water that went

1 into the dam as comes out of the dam.

2 JUSTICE STEVENS: But with a slightly
3 different chemical composition.

4 MR. KAYATTA: Than it was further --

5 JUSTICE STEVENS: Am I correct --

6 MR. KAYATTA: -- up the river.

7 JUSTICE STEVENS: -- when I say that?

8 MR. KAYATTA: Yes, you are.

9 JUSTICE STEVENS: Thank you.

10 JUSTICE SOUTER: But you said -- in response
11 to Justice Kennedy's question, you said that there was
12 nothing, I think, as you put it, in the exiting of the
13 water that was significantly different that -- or that
14 we could peg as significantly different. But that
15 seems to me to be at odds with your answer to the Chief
16 Justice's question about the barrel, because the
17 exiting of the water from the barrel and the exiting of
18 the water from the dam are exactly the same. And if
19 one is a discharge, I don't see why the other isn't a
20 discharge.

21 MR. KAYATTA: Well, the difference, we would
22 say, is that, in the barrel hypothetical, the water has
23 been -- the water that is put into the river from the
24 barrel that has been in someone's garage for 5 years --

25 JUSTICE SOUTER: Then it isn't the exiting

1 that you're getting at. And I --

2 MR. KAYATTA: Well, we --

3 JUSTICE SOUTER: I mean, it seems to me --
4 and I don't want to make a joke, but I think you're on
5 to something when you talk about the exiting, because
6 the word "discharge," as we commonly use it, is a word
7 that describes how you get rid of something. And how
8 you get rid of something, it seems to me, is exactly
9 the same, whether you're pouring the barrel over the
10 bank or whether pouring the barrel, as it were, through
11 the turbine after impounding it, it is the --
12 everybody's been quoting dictionary definitions -- it's
13 the "flowing out." The flowing out is the same with
14 the barrel as it is with the dam.

15 MR. KAYATTA: The difference --

16 JUSTICE SOUTER: And that seems to me where I
17 have trouble with your argument.

18 MR. KAYATTA: Yes, Justice Souter. The
19 difference is the "discharge into." To have something
20 "discharge into the river," you need something
21 different than the river to go into the river.

22 JUSTICE SOUTER: Well, as I understand it, in
23 some or all of these dams, at the point of discharge,
24 there isn't any river down there. It's dry. It's --
25 the bed, in effect, has been deprived of the river by

1 the impoundment, so that you're not simply, as it were,
2 taking, you know, one spoonful out here and dropping it
3 into a river -- putting the spoonful back into a river
4 that's flowing there, because it isn't flowing there,
5 as a result of your dam.

6 MR. KAYATTA: But the -- if you accept the
7 proposition that the river is divided into two
8 different things, then you can start to talk about a
9 discharge of one thing into the other. But Miccosukee
10 makes clear that the structure of a dam does not keep
11 us from viewing this as a single body of water which
12 flows through a dam. It does not flow "into the
13 navigable waters"; the navigable waters themselves flow
14 through the dam.

15 JUSTICE GINSBURG: Miccosukee assumed that --
16 the soup ladle example from the Second Circuit; you
17 took out the ladle, you held it up, and you put the
18 same thing back. But if I understand what happens as a
19 result of the impoundment of the water and then its
20 release, what comes out is quite different from what
21 was put in. It's kind of like you had a pot boiling
22 with vegetables, and then you put it through a food
23 processor, and then what you got out would be quite
24 different from what went into the food processor.

25 MR. KAYATTA: Yes. And, again, we don't

1 dispute that there are nonpoint source changes in the
2 water as it flows down the river, before it goes
3 through the dam. The water that then goes in and emits
4 --

5 JUSTICE GINSBURG: I thought the descriptions
6 that we had was, it is a result of the impoundment and
7 the subsequent release that the water emerges in this
8 unnatural state, in this striated state that Justice
9 Kennedy was referring to.

10 MR. KAYATTA: Yes. The -- it is the
11 impoundment that changes the nature of the water.

12 JUSTICE SCALIA: And not the release. You
13 contest that the release makes any change.

14 MR. KAYATTA: The release simply continues
15 the flow of that water, albeit however it has been
16 changed by mechanisms other than discharges into the
17 river.

18 JUSTICE BREYER: Well, that's true, but --
19 so, you said it's conceded in this case? I thought, in
20 answer to Justice Kennedy, you said something that -- I
21 was surprised, if it's conceded. I thought it wasn't
22 conceded -- tell me if I'm wrong -- that the States
23 have water quality standards. Those water quality
24 standards may or may not have something to do with
25 point source discharges. They don't have to. They

1 want water to be good enough for recreation. They want
2 water without algae so there are more fish. They have
3 a lot of things. And this statute seems to say the F-
4 -- what used to be the FPC. I -- is it now FERC?

5 MR. KAYATTA: Yes, it is, Your Honor.

6 JUSTICE BREYER: Yes, okay -- used to be the
7 Federal Power Commission -- tells them, "You have to
8 get approval to build your dam. And we're not going to
9 give you approval unless you comply with State water
10 quality standards." This seems to me to go back into
11 ancient history, like 1920. And of course you have to
12 comply. And so, isn't the purpose of -- is there
13 agreement that it only concerns point discharges, or
14 does it concern water quality standards?

15 MR. KAYATTA: The consistent position of the
16 EPA all along has been that 401 requires a discharge
17 from a point source before it applies.

18 JUSTICE BREYER: Really?

19 MR. KAYATTA: Yes.

20 JUSTICE BREYER: In other words -- discharge
21 from a point source, what is -- well, then EPA concedes
22 you win?

23 MR. KAYATTA: No. EPA is claiming that the
24 discharge from a point source occurs as the water exits
25 the dam --

1 JUSTICE BREYER: Well, fine.

2 MR. KAYATTA: -- not in the --

3 JUSTICE BREYER: So, what's --

4 MR. KAYATTA: -- impoundment.

5 JUSTICE BREYER: -- the problem? So, they're
6 saying, as I thought was true since 1920, that you're
7 going to get your dam only if you comply with State
8 standards, including standards about fish, algae, junk
9 in the water, all kinds of things that might be put
10 there by the dam.

11 MR. KAYATTA: Well, the -- 401 is a
12 triggering, or a threshold determination, as set forth
13 in one of this Court's prior decisions, that gives the
14 State not just a voice, but essentially a mandatory
15 veto over a very broad area. The question in this case
16 is, have we triggered -- have we stepped over that
17 threshold? The point that there is no disagreement
18 between the parties on is that to step over that
19 threshold, to trigger 401, one has to have a discharge
20 into the navigable waters --

21 JUSTICE BREYER: Right. And they're saying,
22 "Of course there is a discharge. The discharge is a
23 discharge of water." Okay? The water runs into it.
24 Now, that's enough for you to have to comply with the
25 State standards before the F- -- FERC is going to give

1 you a license.

2 MR. KAYATTA: No, their position is precisely
3 that the water is running into the water.

4 JUSTICE BREYER: Now, have you got anything -
5 - I've heard you argue about the word "discharge"; and
6 you say "discharge" doesn't mean "discharge of water,"
7 it means something else. And I think that's a very
8 logical argument. Is there any other argument that
9 you'd have, related to the purpose of the statute for
10 the objective?

11 MR. KAYATTA: Yes. Let me refer to the
12 purpose. There's -- as is always the case, there are
13 general pronouncements about purpose. And the
14 Respondents have taken those general pronouncements to
15 basically say, "Anything that allows the States greater
16 control or improvement over water quality is the
17 direction in which the statute should be interpreted,
18 to achieve that general purpose." However, we know
19 that, notwithstanding the general purposes, that
20 Congress, when it turned to approve specific words in
21 401, did not simply say "anything that affects water
22 quality." It divided a line. And that line, for
23 example, means that Federal permits for grazing, or
24 Federal permits for logging roads, do not trigger 401;
25 and they do not trigger it, because there is no

1 discharge from a point source.

2 So, we know a line has been drawn by Congress
3 in pursuit of its purpose, as compared to other goals
4 that Congress has in mind. The question is, Where was
5 that line drawn? We think you look to the statute to
6 see where that was drawn, and it was "discharge into
7 the navigable waters." Otherwise, what we're left with
8 is, we're left with trying to, sort of, almost
9 metaphysically think of the water discharge -- the same
10 water discharging into the same water in order to reach
11 a conclusion that the real way you should read the
12 statute is just as if it says, "If one does anything at
13 all to the water, you need to get certification." And
14 we don't think it says that. It would --

15 JUSTICE STEVENS: But, Counsel, I keep
16 thinking of this example, and I want you to comment on
17 it. Out West, of course, there are a lot of dams where
18 there are salmon in the -- in the river, going down,
19 and a lot of salmon get killed if they go through the -
20 - through the dam, so that the water before the dam has
21 live salmon, and the water after that has dead salmon.
22 And say that happened in Maine. Would that be
23 a discharge if that happened?

24 MR. KAYATTA: The --

25 JUSTICE STEVENS: If there were live fish --

1 MR. KAYATTA: Yes.

2 JUSTICE STEVENS: -- above the dam, and they
3 all -- they get killed going through the dam, and they
4 were dead when they --

5 MR. KAYATTA: Yes.

6 JUSTICE STEVENS: -- came out, would that be
7 a discharge in --

8 MR. KAYATTA: Actually, the record here would
9 indicate that that -- that could happen with some eels,
10 not salmon.

11 JUSTICE STEVENS: Yes.

12 MR. KAYATTA: So, your point is well taken,
13 Justice Stevens. The fish that, as the water flows
14 through the dam, may be killed by coming in contact
15 with, and getting hit by, the turbine, are not
16 discharged into the water; they're in the water as it
17 goes into the dam, they're killed as it goes through
18 the dam, they remain in the water. The dam discharges
19 nothing. It puts nothing --

20 JUSTICE STEVENS: So, you would say --

21 MR. KAYATTA: -- into the river.

22 JUSTICE STEVENS: -- even in that case, that
23 would not be a statutory discharge.

24 MR. KAYATTA: That's correct, Your Honor. We
25 think that --

1 CHIEF JUSTICE ROBERTS: Counsel, you don't
2 dispute that FERC could impose the same conditions that
3 Maine has imposed in this case, as a matter of FERC
4 authority.

5 MR. KAYATTA: Exactly. And we would --

6 CHIEF JUSTICE ROBERTS: Could they even
7 impose something in the condition to your hydroelectric
8 power license saying, "You must comply with State water
9 quality standards"?

10 MR. KAYATTA: I think they could -- I'm not
11 sure they could word it that way, but they could
12 effectively -- FERC could effectively do it. In
13 effect, Congress has told FERC that in a -- in a
14 Federal -- in a FERC proceeding, it not only has to
15 listen to the State, but it has to give considerable
16 consideration to the State's arguments. And it has to
17 --

18 CHIEF JUSTICE ROBERTS: So, you're concerned
19 about conditions -- I mean, as a practical matter, in
20 terms of how the result in this case would change
21 things, it's a question of whether FERC has to more or
22 less accept what the State does, or whether FERC simply
23 considers and decides whether it wants to impose those
24 conditions.

25 MR. KAYATTA: That's correct. And it's a

1 very substantial issue, because essentially what FERC
2 proceedings are -- under the hydropower sections of
3 FERC, essentially what they are is environmental
4 proceedings, where there's a determination made about
5 water quality issues that are then balanced off against
6 energy issues. If the -- under prior interpretations,
7 the 401 powers have become quite robust. If we now
8 take the threshold of "discharge into the navigable
9 waters," and interpret that in a way so it essentially
10 applies in all situations, FERC proceedings essentially
11 will be a mail office, where they receive the
12 conditions from the State and have no choice but to
13 file them -- follow them. Our position is that
14 Congress intended to leave some room --

15 CHIEF JUSTICE ROBERTS: You would rather be
16 regulated more aggressively by FERC than by the Maine
17 Board of Environmental Protection.

18 MR. KAYATTA: That's correct. It would have
19 a uniform national energy and environmental policy, in
20 that respect. And we believe that -- Congress, in '86,
21 clearly thought that's what we had. That's the -- it
22 would make no sense, in Congress in '86, to order FERC
23 to give weight to what the States say in these
24 situations if what we're now told is, "Congress was
25 wasting your time, because the States already had a

1 mandatory veto on all of these issue -- issues in every
2 single situation with respect to every single
3 hydropower licensing" --

4 CHIEF JUSTICE ROBERTS: Does FERC --

5 MR. KAYATTA: -- "proceeding."

6 CHIEF JUSTICE ROBERTS: -- as a regulator,
7 tend to give greater priority to power considerations,
8 as opposed to local environmental concerns?

9 MR. KAYATTA: There was some concern prior to
10 '86 by Congress that FERC was doing just that. And
11 that's why Congress told, in 1986, long after the
12 statute was passed, that FERC has to make specific
13 findings if it disagrees with the State. Additionally,
14 Congress gave to the Department of Interior, under
15 section 18, certain powers to dictate to FERC, for
16 example, fish passages. FERC has no choice on those.
17 So, Congress -- this reference to cooperative
18 federalism clearly was in Congress's mind, but it
19 wasn't a cooperative federalism in which, on all issues
20 in all proceedings, all the State needed to do is tell
21 FERC what to do. But they --

22 JUSTICE BREYER: No, no, but it doesn't -- it
23 doesn't say -- it says they have to comply with State
24 water quality standards, doesn't it?

25 MR. KAYATTA: It doesn't -- Congress did not

1 order, in 1986, FERC to always comply in all situations
2 --

3 JUSTICE BREYER: No, I thought -- it says
4 that you have to get your permit. You have to be
5 compliant with State water quality standards. Now,
6 suppose a State has a nutty water quality standard.
7 Doesn't EPA have some authority there to make sure that
8 a water quality standard of a State, under the Clean
9 Water Act, is -- makes sense?

10 MR. KAYATTA: Well, EPA has some authority
11 with respect to any State water quality standards that
12 are less stringent than EPO's -- EPA's own
13 requirements. It's not clear that EPA, under the Act,
14 has the ability to go beyond that. Moreover, it's --
15 if --

16 JUSTICE BREYER: In other words, if a State
17 were to say, "Our water quality standard is the
18 following. We never build a dam in our State, no
19 matter what." Okay? Now, there's no authority in the
20 EPA to set that aside as it not being a proper Clean
21 Water Act standard.

22 MR. KAYATTA: If this decision is --

23 JUSTICE BREYER: It has to be just a Clean
24 Water Act standard.

25 MR. KAYATTA: Yes.

1 JUSTICE BREYER: I'm not an expert on the
2 Clean Water Act. Is that a proper Clean Water Act
3 standard?

4 MR. KAYATTA: If this decision is affirmed,
5 then you will have precisely held --

6 JUSTICE BREYER: No, this decision -- I'm not
7 asking you about this decision. I'm asking you if a
8 State, under the Clean Water Act, were to say, "We have
9 the following Clean" -- now you understand what I'm --

10 MR. KAYATTA: Yes.

11 JUSTICE BREYER: Does EPA, or anyone else,
12 have authority to say, "That isn't a proper Clean Water
13 Act standard, however good you may think it is"?

14 MR. KAYATTA: I don't know, Justice Breyer,
15 about the wording posed in your hypothetical, so I
16 can't answer the wording. I can say this, that
17 effectively the States can do precisely that by simply
18 saying, "We want the river water quality to be like X,
19 and X is inconsistent with there being any dam at all
20 on the river." So, indeed, if this decision is
21 affirmed, it truly does mean that States can entirely
22 dictate everything having to do with any environmental
23 aspects of dams, including to the point of requiring
24 that the dams not operate; and FERC can do nothing
25 about it. We do -- we do not see how that would leave

1 any sense of cooperative federalism, and it would tell
2 Congress, "In 1986, you were just entirely wasting your
3 time, because you had already, in '72, given them the
4 power to control everything."

5 JUSTICE ALITO: Well, has FERC said that this
6 is a problem, that the States are interfering?

7 MR. KAYATTA: Well, FERC has sort of been all
8 over the place. They're sort of the odd man out,
9 because it's their jurisdiction that's being taken
10 away; and yet we're talking about a Clean Water Act
11 case where EPA is the agency defined with that Act.
12 FERC has argued to the courts, on several occasions,
13 that 401 needs to be limited to discharge of
14 pollutants. FERC, at one point, the first several dam
15 proceedings that came up, it didn't even require
16 certifications at all. It then promulgated
17 certification requirements that said, "Either get a
18 certification or otherwise comply with the law." And
19 then, in the interim period, it is simply -- as we've
20 been affected, simply said, "Go get your
21 certifications." It then tried to say, "But we can do
22 something about it if we don't like them." And the
23 Circuit Courts, at least one, has said, "No, you
24 can't."

25 And when 401 applies, as this Court found in

1 Public Utility Districts versus Jefferson, it is a
2 robust power. It is an awesome power that is given to
3 the States under 401. And to -- giving that power
4 greatly cabined-in FERC's authority to now extend that
5 power automatically to any conduct that in any way
6 "touches on the water" by turning "touches on the
7 water" or "moving the water" into "discharge into the
8 water" -- effectively wipes out that balance entirely.

9 I would note, too, that we don't even -- we
10 can answer all of this without even getting into those
11 by going back to the statute. We have a statute here
12 that uses the word "discharge," in one form or another,
13 on 421 occasions in 37 different sections of the
14 statute. With the exception of the section that deals
15 with the discharge of employees -- not into the river --
16 -- and the discharge --

17 [Laughter.]

18 MR. KAYATTA: -- and the discharge of board
19 duties, in every single one of those instances, as you
20 thumb through the statute, Congress is always clearly
21 talking about "putting something into the water."
22 There is no doubt. On the one occasion in the statute
23 --

24 CHIEF JUSTICE ROBERTS: But I don't
25 understand, linguistically, why this isn't "putting

1 something into the water," to the extent the dam holds
2 back and restrains the water, then it "puts back into
3 the water" the water that it had held back.

4 MR. KAYATTA: Well, the water slows down,
5 meanders around, as it would in an eddy, and continues
6 on through the dam, down the river. If you take a
7 water molecule, it comes down, goes through and out.
8 If -- unless you get --

9 CHIEF JUSTICE ROBERTS: Here's -- I'm
10 thinking of the Hoover Dam, and it's got these huge,
11 you know, discharge points.

12 MR. KAYATTA: Yes.

13 CHIEF JUSTICE ROBERTS: And every now and
14 then they let the water come out. Isn't that a
15 discharge?

16 MR. KAYATTA: The -- I would say, in an
17 ordinary dictionary definition, if you stand below the
18 Hoover Dam and look up at it, you would say, "Water is
19 emitting from the dam. Water is discharging from the
20 dam," in an ordinary dictionary definition. I would
21 agree with that.

22 What I'm saying, though, is that if you keep
23 in mind that it's not a reservoir emitting into a
24 river, but it's a single river flowing through the dam,
25 that water is not "discharging into" that water.

1 That's what we're saying.

2 JUSTICE ALITO: Would it be fair to say that,
3 let's say, the Missouri River discharges into the
4 Mississippi? Is that consistent with ordinary usage?

5 MR. KAYATTA: If you have two water bodies,
6 then you could have one discharging into the other.
7 Yes, Your Honor.

8 JUSTICE ALITO: But they're two water bodies,
9 only because people gave them two different names.

10 MR. KAYATTA: Well, in *Miccosukee*, the Court
11 actually go into that and set forth -- in fact,
12 remanded the case to decide whether the aquifer was one
13 water body or two. If you look at that remand, it's
14 absolutely clear that this water body, under any
15 standard discussed in that opinion, would be a single
16 water body. And the United States agrees with us on
17 that. The United States agrees we're talking about a
18 single water body here.

19 JUSTICE ALITO: But the --

20 MR. KAYATTA: And I could --

21 JUSTICE ALITO: -- the statute doesn't say
22 "discharge from one water body into another water
23 body." It says "discharge into the navigable waters."

24 MR. KAYATTA: Yes.

25 JUSTICE ALITO: And if the portion of the

1 river below the dam is a navigable water, why is there
2 not a pouring forth of the water into the navigable
3 waters below the dam?

4 MR. KAYATTA: Well, if one thinks of upstream
5 waters and downstream waters, it -- our view is that
6 upstream waters simply become downstream waters as they
7 flow through the dam. One doesn't discharge into
8 another.

9 I would -- I would concede that very bright
10 people working very hard with virtually any words in
11 the English language can find some way to reach a point
12 to say that perhaps something fits something. But, at
13 some point -- at some point, I think we need to ask, is
14 -- if Congress uses the same word throughout the
15 statute to always mean putting something into water,
16 then how do we get to the conclusion that what that
17 really means is doing anything to the water is always -
18 - because --

19 JUSTICE SOUTER: Well, isn't --

20 MR. KAYATTA: -- the --

21 JUSTICE SOUTER: -- isn't the answer to your
22 question that a great number of those usages that you
23 refer to are uses that refer to the discharge of
24 pollutants? And there is a good -- there are good
25 reasons in the statute -- and we have recognized them -

1 - to say that when you discharge a pollutant, you are
2 adding something that wasn't there before? But when
3 the statute, in this case, is using "discharge" without
4 a reference to "pollutant," it makes perfectly good
5 linguistic sense to construe it just as the Court has
6 done.

7 MR. KAYATTA: Well it makes -- it is
8 linguistically logical to say that we're, therefore,
9 going to assume that a pollutant is not needed here.
10 But when Congress has replaced the "discharge of a
11 pollutant" with a "discharge into," it seems to me
12 Congress has actually moved in the other direction of
13 reinforcing that we're talking about --

14 JUSTICE SOUTER: Well, maybe it's --

15 MR. KAYATTA: -- putting something into the
16 water.

17 JUSTICE SOUTER: -- "reinforcing," and maybe
18 it's "changing." I mean, you're characterizing it one
19 way. We start with a different canon of meaning, and
20 that is that we look to the words around which, in
21 connection with which, the word is used. In here, it's
22 being used without certain modifiers or descriptive
23 conditions. In other cases, it is being used with
24 them. And that's a good reason to think that probably
25 the word is intended to mean something different in

1 those situations.

2 MR. KAYATTA: Well, I would -- I would
3 hesitate, Justice Souter, to go from taking a specific
4 word, like "discharge," and, therefore, saying that it
5 meant something that is both more general and much more
6 easily set.

7 JUSTICE SOUTER: No, but your argument, I
8 thought, was simply this, that it uses "discharge" in,
9 you know, X number -- I forget how many you had -- and
10 it's perfectly clear that in most of those instances it
11 requires an addition; and, therefore, it should be
12 construed as requiring it here. My point was that in a
13 great many of those instances, the statute is not
14 merely using the word in isolation; it's using it in
15 connection with a couple of other words, like
16 "discharge a pollutant." And it, therefore, number
17 one, makes sense to construe "discharge of a pollutant"
18 differently from "discharge." That's the -- that's the
19 only point.

20 MR. KAYATTA: Yes.

21 JUSTICE SOUTER: The only point is, you can't
22 simply argue from the fact that the word occurs somehow
23 X number of times to the conclusion that it has to mean
24 the same thing every time it's used.

25 MR. KAYATTA: I agree with you. And my point

1 is, I am including instances not just in which
2 "pollutant" is used. A whole variety. And, in every
3 single one of those, its common -- and I would submit
4 that the word itself, when you use the word "into,"
5 naturally suggests -- in fact, why would someone use
6 the phrase "discharge into the navigable waters" if
7 what they really meant was, "If you do anything to the
8 navigable waters at all, you've got to get a permit"?

9 JUSTICE SOUTER: Because that isn't what they
10 mean. I mean, for example, if somebody puts a stick in
11 the middle of the river, no one -- no one is claiming
12 that the water that flows around the stick is being
13 discharged. I mean, there are a lot -- I don't know
14 whether anyone wants to put a stick in the river, but -
15 -

16 MR. KAYATTA: Yes.

17 JUSTICE SOUTER: -- there are things you can
18 do that clearly would not activate the Corps'
19 interpretation here.

20 MR. KAYATTA: I -- this logic, I think, would
21 probably include virtually anything you do to the
22 water, because it would separate the water, the water
23 going around the stick. One would then say the
24 dictionary definition means it's then discharging back
25 into itself on the other side of the stick. There

1 would be, perhaps, no water quality concerns, but 401
2 doesn't say "water quality concerns"; it says
3 "discharge into."

4 JUSTICE SOUTER: Would you agree that if the
5 -- if somebody with property on each side wanted to
6 build a dam -- I'm sorry, wanted to build a bridge to
7 connect his property, and he needed to put a post in
8 the middle of the river to support the bridge, that
9 there would be no discharge of water occasioned by
10 putting the post in there?

11 MR. KAYATTA: Under the Government's
12 interpretation, there would be. There would be a
13 discharge into the navigable waters in that situation.

14 JUSTICE SOUTER: Why, if -- you may answer.

15 MR. KAYATTA: Because the post -- to put --
16 well, in the first place, putting the post in might,
17 itself, be a -- what we could concede to be a
18 discharge. In the second case, though, is that we
19 understand that you would be exercising control over
20 the flow and direction of that water, it would separate
21 the river into two portions -- of course, small. But
22 if we're pursuing this line of logic that the
23 Government has to its final extent, it would then
24 discharge back into itself on the other side of that
25 post.

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
2 General Rowe?

3 ORAL ARGUMENT OF G. STEVEN ROWE
4 ON BEHALF OF RESPONDENT

5 MR. ROWE: Mr. Chief Justice, and may it
6 please the Court:

7 The flow of water through Petitioner's dams
8 into the Presumpscot River is a discharge, under
9 section 401(a) of the Clean Water Act. This finding is
10 supported by the plain text of section 401(a), the
11 purpose, the history, and the structure of the Clean
12 Water Act, in more than 30 years of administrative
13 practice and agency interpretation. Under the Clean
14 Water Act, Congress --

15 CHIEF JUSTICE ROBERTS: Is there a --

16 MR. ROWE: -- requires --

17 CHIEF JUSTICE ROBERTS: Is there a discharge
18 if you have a simple waterwheel in the river? Is that
19 a discharge?

20 MR. ROWE: Well, first of all, Your Honor,
21 for 401 to apply there must be a federally licensed
22 activity. In that case --

23 CHIEF JUSTICE ROBERTS: Yes, so it's a old
24 hydroelectric plant, it uses a simple waterwheel. I
25 mean, is that -- does that fit your definition of a

1 "discharge"? In other words, it restrains the water
2 temporarily.

3 MR. ROWE: Yes, Your Honor.

4 CHIEF JUSTICE ROBERTS: And then it releases
5 it again as it passes by the wheel.

6 MR. ROWE: Yes, Your Honor. It --

7 CHIEF JUSTICE ROBERTS: So, if you put a
8 waterwheel in a flowing river, under your definition,
9 that's a discharge into the navigable water.

10 MR. ROWE: It could, Your Honor. It could
11 discharge. It depends on the actual circumstances.
12 Obviously, under the doctrine of de minimis non curat
13 lex, it may not pose any problems, and it wouldn't be
14 an issue. But certainly to the extent that it used the
15 water and then it discharged the water, there was
16 emitting out or flowing out.

17 If you put a fishnet in the river, there would be
18 no discharge. Justice Souter's example of a simple --
19 a post, probably no discharge. But if you put a
20 hundred-foot -- a post 100 foot in diameter into a 200-
21 foot-wide river, then you may have a discharge. So,
22 Your Honor, I would suggest it depends on the
23 circumstances. But, remember, 401 does require it to
24 be a federally licensed project.

25 The point I was going to make, Your Honor, is

1 that, under the Clean Water Act, Congress requires
2 States to adopt clean water standards --

3 JUSTICE SCALIA: I must say, this --

4 MR. ROWE: -- water quality standards.

5 JUSTICE SCALIA: -- this doesn't seem to me
6 normal usage. I don't think if -- you know, if you see
7 a rapids in a river, it would be strange to say the
8 rapids of the Colorado "discharge" into the Colorado.
9 You're usually talking about a different body of water.
10 You could say the Green River discharges into the
11 Colorado. Likewise, a waterfall, you wouldn't say, you
12 know, "The waterfall on this river discharges into the
13 river." It's part of the river. But if it were a
14 waterfall that brought a tributary into the river, you
15 would then say that, you know, "the waterfall
16 discharges into the Colorado," or whatever river it
17 enters at that point. It seems to me very strange to
18 talk about a river discharging into itself.

19 MR. ROWE: Justice Scalia, it's not strange
20 at all. It's not -- it's discharging from the activity
21 into the river. The water goes into the activity. The
22 activity, in this case, is a -- an impoundment. There
23 are five impoundments. These dams create impoundments.

24 One's 197 acres --

25 CHIEF JUSTICE ROBERTS: But that doesn't --

1 but that --

2 MR. ROWE: -- in size.

3 CHIEF JUSTICE ROBERTS: But that doesn't
4 matter to your analysis. It's the one post, right? I
5 mean, if you have just sort of a foot indentation on
6 either side, would -- the flows, in -- under your view,
7 suddenly becomes a discharge.

8 MR. ROWE: Your Honor, my point is, that's
9 not the case we have. We're talking about a
10 hydroelectric dam here.

11 CHIEF JUSTICE ROBERTS: Well, but --

12 MR. ROWE: But --

13 CHIEF JUSTICE ROBERTS: -- we're trying to --

14 MR. ROWE: But --

15 CHIEF JUSTICE ROBERTS: -- define --

16 MR. ROWE: I understand, Your Honor.

17 CHIEF JUSTICE ROBERTS: -- a statutory term
18 that's going to apply in a wide variety of cases.

19 MR. ROWE: Yes. In that case, Your Honor,
20 I've said it could cause a discharge -- if the flow was
21 interrupted, the flow regimen of the river, to such an
22 extent that it -- that it increased, substantially, the
23 flow on one side, and that was a federally licensed
24 activity, then 401 would apply. It would be a
25 discharge from the activity.

1 Now, I'm -- again, I'm using the de minimis
2 rule here. But what we have here, Your Honors, is a
3 dam, we have the water being diverted into a power
4 canal, then dropping down onto the top of the turbines.
5 The turbines are using the water, they're taking the
6 energy from the water to turn the turbine, and then the
7 water is being released.

8 JUSTICE KENNEDY: So, what's --

9 MR. ROWE: It's being discharged.

10 JUSTICE KENNEDY: So, what's the definition -
11 - what's the general definition that you're giving us
12 that describes this result you've given?

13 MR. ROWE: Justice --

14 JUSTICE KENNEDY: It --

15 MR. ROWE: -- Kennedy --

16 JUSTICE KENNEDY: It is a discharge, because
17 a "discharge" means what?

18 MR. ROWE: It means a flowing or issuing out.
19 It's the -- it is the dictionary definition. Mr.
20 Kayatta mentioned the Hoover Dam. It is that. That's
21 what it is. It's the --

22 JUSTICE SCALIA: But the --

23 MR. ROWE: -- ordinary definition.

24 JUSTICE SCALIA: -- the issue is not whether
25 there is a discharge, as I see it. The issue is

1 whether there's a "discharge into the river." And one
2 does not usually speak of the "river discharging into
3 itself." That -- it's the "into" that's the crucial
4 part. How do you distinguish this case from
5 Miccosukee, if I'm saying it right? -- yes, Miccosukee
6 --

7 MR. ROWE: Well, Your Honor, Miccosukee --

8 JUSTICE SCALIA: -- where we had, you know, a
9 pumping of water from one polluted body into another,
10 and it was held -- we held that that was not a
11 discharge?

12 MR. ROWE: Your Honor, the -- in Miccosukee,
13 that was a section 402 case.

14 JUSTICE SCALIA: It --

15 MR. ROWE: It dealt with discharge of a
16 pollutant.

17 JUSTICE SCALIA: That's right.

18 MR. ROWE: And this --

19 JUSTICE SCALIA: But the crucial --

20 MR. ROWE: -- Court held --

21 JUSTICE SCALIA: -- word was "discharge."
22 The reason we held it was not covered is not because
23 there was no pollutant. It was clear that there was a
24 pollutant. But we held there was no discharge.

25 MR. ROWE: No, Your Honor, you held that

1 there was no discharge of the pollutant. You held that
2 it was --

3 JUSTICE SCALIA: Because there was no
4 discharge of a pollutant. There were pollutants in -
5 - on both sides. That -- I think that was conceded in
6 the case. The reason that the case came out the way it
7 did was that we held there was no discharge of a
8 pollutant.

9 MR. ROWE: But there -- Your Honor -- Your
10 Honor, in that case, it required a discharge of a
11 pollutant from a point source. The definition of
12 "discharge" in section 401 is much broader.

13 JUSTICE SCALIA: Wasn't it conceded that
14 there was a pollutant -- that a pollutant was involved
15 in that case?

16 MR. ROWE: Your -- yes, Your Honor, but the -
17 -

18 JUSTICE SCALIA: So, what must have been the
19 difference was that there was no discharge.

20 MR. ROWE: There was no discharge of a
21 pollutant, Your Honor.

22 JUSTICE SCALIA: There was no discharge of
23 anything. It was clear that if there was a -- if there
24 was a discharge, it was a discharge of a pollutant.

25 MR. ROWE: Your Honor, in -- with all due

1 respect, in that case -- and, in that case, you joined
2 Justice Thomas in saying, "The term 'discharge' is not
3 defined in the Clean Water Act, but its plain and
4 ordinary meaning suggests a flowing or issuing out, or
5 something that is emitted." In the case we have here,
6 something is emitted. It is water. It is emitted
7 from a facility. We have a federally licensed
8 facility. And out of the turbines comes water, and it
9 flows into the river. Miccosukee was a 402 case, Your
10 Honor, with all due respect.

11 And, in another point, I --

12 JUSTICE SOUTER: Didn't -- didn't that case
13 involved the -- a violation there -- involve the
14 addition of a pollutant? And there was no addition of
15 a pollutant, because the water was equally polluted on
16 each side. Wasn't that the --

17 MR. ROWE: That's --

18 JUSTICE SOUTER: -- the case?

19 MR. ROWE: That's correct, Your Honor.

20 JUSTICE SOUTER: Yes.

21 MR. ROWE: The pollutant was already in the
22 water when it -- when it entered -- the water from the
23 pipe. And the point that Justice Ginsburg's mentioned,
24 the quote, is, if one takes a ladle of soup from a pot,
25 lifts it up above the pot and pours it back into the

1 pot, one has not added soup or anything else to the
2 pot. Section 401, the word "discharge" in that section
3 does not require an addition of anything. It can be --

4 CHIEF JUSTICE ROBERTS: Well, then -- but
5 your focus -- in response to my question about what
6 would constitute release, you focused on the fact of
7 impoundment, a restriction of the flow. It seems to me
8 that the ladle analogy that the Court has made part of
9 the law of the land is -- refutes that, because if it's
10 hold -- you're holding it up in the ladle, that's like
11 an impoundment. You've separated it, to that extent,
12 from the other body, and the Court said, when you pour
13 it back in, that's not --

14 MR. ROWE: It wasn't --

15 CHIEF JUSTICE ROBERTS: -- that's not a
16 discharge of a pollutant --

17 MR. ROWE: No, Mr. Chief --

18 CHIEF JUSTICE ROBERTS: -- and there was no
19 dispute that there were pollutants, so it must mean it
20 wasn't a discharge.

21 MR. ROWE: Mr. Chief Justice, the Court
22 didn't say that there was no discharge; the Court said
23 that there was no addition of soup or anything else
24 into the pot. The point is, there was not the addition
25 of a pollutant. And you do not need the addition of a

1 pollutant to find a discharge, under section 401.

2 I just want to remind the Court that section
3 401 came from section 21(b) of the Water Quality
4 Improvement Act of 1970. That was the old section 401.

5 It said, "Anytime that there's a licensed activity
6 that's going to create a discharge from a facility into
7 navigable waters, then the States are to enforce their
8 water quality standards." Congress requires States to
9 adopt water quality standards, according to section
10 303. And we have. All States have. And those water
11 quality standards are consistent. We have designated
12 uses, water quality criteria, and an antidegradation
13 policy.

14 The Court should know that, as part of our
15 designated uses, hydropower is one of those. The State
16 values hydropower. We understand the importance of it.

17 CHIEF JUSTICE ROBERTS: But you --

18 MR. ROWE: Most --

19 CHIEF JUSTICE ROBERTS: -- you don't -- you
20 don't value it as much as FERC does, though, do you?

21 MR. ROWE: Your Honor, I don't know.

22 [Laughter.]

23 MR. ROWE: You heard -- Your Honor, you heard
24 earlier --

25 CHIEF JUSTICE ROBERTS: I mean, isn't one way

1 to look at this -- I mean, the concern is that your
2 constituents probably have a higher priority and a
3 greater concern with the environmental consequences of
4 generating power, while FERC's priority is to make sure
5 that we have sufficient power. And you're likely to
6 weigh these competing uses in very different ways.

7 MR. ROWE: Well, Your Honor, you heard
8 earlier about the -- 1986, the Electric Consumers
9 Protection Act. That did require FERC to give equal
10 consideration to the protection of the environment with
11 respect to the production of -- hydropower production.

12 But the States have a responsibility given to them by
13 Congress. The States have the primary responsibility
14 for the prevention, for the reduction, and for the
15 elimination of pollution. The way we enforce that is
16 through our water quality standards. And so, the only
17 way we can enforce those standards with respect to
18 federally licensed facilities is section 401. And if
19 you should take that from us, it will create a gaping
20 hole in the Clean Water Act.

21 JUSTICE SCALIA: Well, only if you assume
22 that letting out the same water into the same river is
23 pollution. It seems to me you're begging the question.

24 MR. ROWE: Your Honor --

25 JUSTICE SCALIA: You --

1 MR. ROWE: -- the --

2 JUSTICE SCALIA: If there were a discharge of
3 something into the river, you'd be able to move against
4 it. But the question here is whether there's any
5 discharge into the river when you stop the river and
6 then let the same river out.

7 MR. ROWE: Your Honor, the "pollution," as
8 defined in the Clean Water Act, is the alteration of
9 the physical, chemical, and biological integrity of the
10 water. That's the pollution.

11 The reason 401 exists, and the reason
12 "discharge" is used broadly, and it's the trigger for
13 the section to work, is because you look at the impacts
14 of that activity on the environment. You look at the
15 physical integrity -- Has it been altered? -- the
16 chemical integrity, the biological integrity. We look
17 at things like the impact on aquatic ecosystems, the
18 thermal stratification in the impoundment areas,
19 whether there is lower dissolved oxygen. And certainly
20 we look at the fish migration issues. Has there been
21 blockage?

22 JUSTICE ALITO: Could you, as Justice
23 Breyer's question to your adversary suggested, adopt
24 water quality standards that would make any
25 hydroelectric power impossible, in Maine?

1 MR. ROWE: Your Honor, we could. We have a
2 number of classes of rivers. With respect to one
3 class, that is not a designated use. With respect to
4 all the others, hydropower is the designated use.

5 JUSTICE ALITO: Do you think that's something
6 that Congress intended when they adopted this, to allow
7 a State to rule out hydroelectric power?

8 MR. ROWE: Justice Alito, Congress did not
9 give the States unbounded authority. Indeed, in
10 section 401(d), there is a restriction. It restricts
11 the conditions to those necessary to assure that the
12 applicant will comply with conditions in our water
13 quality standards. And if -- I mean, FERC does
14 incorporate those standards into the license, but the
15 applicant can redress that in court, as this one has.
16 So, we -- I want to mention, again, that States care
17 about hydropower. We care about fish migration. We
18 care about recreation activities. We care about all of
19 these things, and they're all incorporated into our
20 water quality standards.

21 JUSTICE SOUTER: So, I take it your ultimate
22 answer is, no, a State could not, in effect, eliminate
23 hydropower from --

24 MR. ROWE: Well, Your --

25 JUSTICE SOUTER: -- development.

1 MR. ROWE: -- Your Honor, in our State it's a
2 designated use --

3 CHIEF JUSTICE ROBERTS: I'm sorry --

4 MR. ROWE: -- on most of our rivers.

5 JUSTICE SOUTER: I'm not interested -- I'm
6 asking for an answer to my question. I take it, based
7 on your further answer to Justice Alito, that your
8 answer to the first question is, no, a State could not,
9 in effect, eliminate all hydropower from -- development
10 from its rivers.

11 MR. ROWE: Your -- Justice Souter, a State --
12 a State could do that if it changed the designated uses
13 for its rivers. But in the State of Maine, as in 45
14 States --

15 JUSTICE SOUTER: And you don't think there
16 would be any conflict with the FERC scheme if you did
17 that? You don't think there would be any conflict
18 between the Federal policy embodied in the Power Act
19 and in the State law?

20 MR. ROWE: Well, Your Honor, again, I want to
21 -- under the Clean Water Act, the States have primary
22 responsibility for the reduction and for the
23 elimination and --

24 JUSTICE BREYER: Yes, I --

25 MR. ROWE: -- prevention of pollution.

1 JUSTICE BREYER: -- I think the question --
2 maybe it just -- I don't understand, totally, how the
3 Clean Water Act works, but I thought that what we're
4 talking in this statute is a State rule that's called
5 the State Clean Water Act rule. It's a creature of the
6 Clean Water Act, isn't it? A water quality standard?

7 MR. ROWE: Yes, Your Honor.

8 JUSTICE BREYER: All right. And, therefore,
9 a State, I would think, that had some totally bizarre
10 Clean Water Act standard might find that it had a
11 standard that didn't fit within the scope of the Clean
12 Water Act. And, therefore, it wasn't going to be
13 enforced here. Is that right, or not right? Maybe the
14 Federal Government will explain this --

15 MR. ROWE: Well, Your Honor, I'm sure the
16 Federal Government will also address this question, but
17 the parameters of the water quality standards are
18 addressed in section 303 of the Clean Water Act. And
19 there are parameters in there. And the States' Clean
20 Water -- or water quality standards must conform to
21 those standards. We submit our Clean -- our water
22 quality standards --

23 JUSTICE SCALIA: Are they maximums or
24 minimums?

25 MR. ROWE: Your Honor, it's simply categories

1 in there. We submit --

2 JUSTICE SCALIA: I expect that they're
3 minimums.

4 MR. ROWE: We -- well, they are minimums,
5 Your Honor. We submit these to the EPA. The EPA
6 approves the State water quality standards, and then
7 those standards are how we evaluate these federally
8 licensed activities as to whether they're in compliance
9 or not. And they determine the certification, whether
10 it's issued, and if it's issued, with what conditions.

11 If a State -- if a State's rivers were not conducive
12 to hydropower -- the question you asked, Your Honor was
13 -- Justice Souter -- could a State prevent hydropower
14 from occurring? Again, we have, with respect to a few
15 rivers in the State of Maine; but most of the rivers,
16 it is a designated use, because States, like the
17 Federal Government, value hydropower. There is no air
18 pollution. It's a clean source of energy. We value
19 it. And, indeed, the antidegradation policies that are
20 part of our water quality standards require us to look
21 at the impact on Petitioner's dams, the power output
22 that's going to be -- going to -- is going to result
23 from these various conditions that we impose as a part
24 of our certification.

25 JUSTICE STEVENS: General Rowe, may I ask

1 this question? In the Miccosukee case, we sent the
2 case back, as you remember, to decide whether or not
3 there were one body of water or two bodies of water.
4 In your view, are there one or two bodies of water --
5 would it be five bodies of water -- in this case?

6 MR. ROWE: There's one body of water, Your
7 Honor -- Justice Stevens.

8 JUSTICE STEVENS: So, you --

9 MR. ROWE: And that's the --

10 JUSTICE STEVENS: -- concede that.

11 MR. ROWE: -- that's the --

12 JUSTICE STEVENS: Okay.

13 MR. ROWE: -- Presumpscot River.

14 JUSTICE STEVENS: Yes.

15 MR. ROWE: All the water is waters of the
16 United States, navigable waters, but the water is being
17 discharged from the facility into the navigable waters.

18 You -- Your Honor has mentioned a storage dam. A
19 storage dam creates an impoundment. In fact, one of
20 these dams has a 50-foot-high wall that holds the water
21 back, almost 200 acres of water. At times, there is
22 water that goes over the top of the dam. That is,
23 indeed, a discharge. It is caused by the activity. It
24 results from the activity. It's not the free-flowing
25 water. And I want to make that clear. I think,

1 Justice Scalia, your question was -- that's not a
2 discharge. That's a natural flow of water. What's
3 happening here is, the flow is being altered. Because
4 of the impoundment, because of the diversion, the flow
5 is being altered. And in the case at hand here, you're
6 actually taking a turbine, the water drops down into
7 the turbine, turns the turbine blades or fans, it
8 absorbs the water of its power, and then the water is
9 released, discharged, into the tailrace channel, into
10 the natural river.

11 JUSTICE SCALIA: Well, any significant
12 obstruction in the river amounts to a -- creates a
13 discharge.

14 MR. ROWE: No, I'd -- no, Your --

15 JUSTICE SCALIA: Indeed, if it's a small
16 enough stream, I suppose just swimming in it or lying
17 sideways so you impede the flow, you are causing a
18 discharge into the waters of the United States. I find
19 that peculiar.

20 MR. ROWE: That -- Justice Scalia, that's not
21 what I said. The question was asked about a post, like
22 a bridge, the pilings for a bridge. In certain cases,
23 depending on the size, it might result in a discharge.

24 I'm not saying every -- a stick in the river is,
25 certainly not a swimmer. We have a de minimis rule.

1 We're not saying that. It needs to be --

2 JUSTICE SCALIA: Well, it depends on how big
3 the river is, doesn't it?

4 MR. ROWE: Well, I'm -- if it's navigable
5 waters, and you have a huge post that's holding up a
6 bridge, there could be a -- there -- and it's federally
7 licensed -- there could be a discharge resulting from
8 that. I mean, I -- that is what a person would say,
9 "There is a discharge," because suddenly you see --
10 where water was naturally flowing, you see a diversion,
11 in an impoundment, of sorts, moving the water over.
12 But what we have here is not that case. What we have
13 here is an impoundment. We have the water being
14 diverted into a narrow channel, dropping down onto
15 these turbines, being used, and then being discharged
16 into the river.

17 The word "discharge," again, in 1970, under the
18 21(b), was given a broad definition. 402 and 404 came
19 later, in 1972, as part of the Clean Water Act. In
20 those, we're dealing with discrete conveyances of
21 pollutants, 402. And 404 was dredge or fill discharge.

22 And those were deemed necessary. But they're consumed
23 in 401. In other words, if you get a 402, if you need
24 a 40- -- a 402 application, certification, you also
25 will need a 401. 401 deals with the effects of

1 pollution, the effects of the activity on the
2 environment.

3 I thank Your Honors very much. And I just
4 want to remind the Court that the State very much
5 values the power -- the importance of hydropower. We
6 value the -- our responsibility, as given to us by
7 Congress under the Clean Water Act, to be the primary
8 enforcer of our water quality standards. And the only
9 way we can do that, with respect to federally licensed
10 facilities, is section 401.

11 Thank you very much.

12 CHIEF JUSTICE ROBERTS: Thank you, General
13 Rowe.

14 Mr. Minear.

15 ORAL ARGUMENT OF JEFFREY P. MINEAR

16 FOR THE UNITED STATES, AS AMICUS CURIAE,

17 IN SUPPORT OF RESPONDENT

18 MR. MINEAR: Mr. Chief Justice, and may it
19 please the Court:

20 The United States submits that the operation
21 of Petitioner's hydropower facilities results in a
22 discharge into the navigable waters within the meaning
23 of section 401 of the Clean Water Act. section 401
24 uses the term "discharge" in its ordinary sense to mean
25 a "flowing out" or "issuing out." The facilities at

1 issue in this case, which divert water, impound it, and
2 then release it, produce a flowing or issuing out of
3 that water into the navigable Presumpscot River.

4 JUSTICE SCALIA: Section 402 uses "discharge"
5 in the same sense, I assume.

6 MR. MINEAR: No, it does not, Your Honor.

7 JUSTICE SCALIA: Why doesn't it?

8 MR. MINEAR: Because it uses the term
9 "discharge of a pollutant," which is --

10 JUSTICE SCALIA: Yes --

11 MR. MINEAR: -- which is defined, under the
12 Clean Water Act, as a statutory term of art, to mean
13 the addition of a pollution -- of a pollutant from a
14 point source. On the other hand, the Clean Water Act
15 interprets or defines "discharge" to include the
16 "discharge of a pollutant." So, it's clear that the
17 term "discharge" is broader than the term "discharge of
18 a pollutant," and does not include the requirement of
19 an addition.

20 JUSTICE SCALIA: It is -- it is broader. But
21 if -- the discharge of a pollutant into the same body
22 of water does not constitute the addition of a
23 pollution -- of a pollutant. It obviously is the
24 addition of a pollutant. The only reason you could say
25 that taking it from one -- pumping it from one polluted

1 body to another is not a discharge of a pollutant,
2 which is what we said in Miccosukee, the only basis for
3 saying that is that there has been no discharge.
4 There's obviously been an addition of a pollutant to
5 the -- to the other body of water. The only thing you
6 can say is, there hasn't been a discharge. It's --
7 because it's the same body of water.

8 MR. MINEAR: I respectfully disagree, Your
9 Honor, because, in Miccosukee, it addressed the
10 specific question of whether or not there is an
11 addition. And, in the much-quoted soup-ladle example,
12 what it was talking about, in that instance, was taking
13 a ladle of soup, removing it from the pot, and adding
14 it back. The pouring back of the soup into the pot is
15 a discharge, it's a flowing or issuing out. It's not
16 an addition, because nothing is being added to the
17 soup.

18 Now, in this case, we're using the term
19 "discharge," not "addition." And there is, obviously,
20 a flowing or issuing out from the dam. Anyone who goes
21 and observes a dam, and sees the water leaving the dam,
22 will say that's a "discharge." That's common parlance.

23 It's been repeated numerous times in this Court's own
24 decisions in describing dam operations.

25 Furthermore --

1 JUSTICE SOUTER: In other words, Miccosukee
2 was concerned not with molecules, but with chemical
3 composition. The chemical composition was the same in
4 this body and in that body, and, in that sense, there
5 was no addition --

6 MR. MINEAR: That's correct --

7 JUSTICE SOUTER: Well, that --

8 MR. MINEAR: -- that there was no
9 transmission.

10 JUSTICE SOUTER: Yes.

11 MR. MINEAR: But I think, Justice Souter, you
12 are right in focusing on the exiting from the dam and
13 why discharges are important here.

14 JUSTICE SCALIA: If, in Miccosukee, liquid of
15 the same composition had been taken from another body
16 of water, and from -- not the body of water that was
17 adjacent and which we held was the same body of water -
18 - with the same composition, and that had been added,
19 do you think Miccosukee would have come out the same
20 way?

21 MR. MINEAR: Yes, I think it would have come
22 out the same way.

23 JUSTICE SCALIA: Really? That you could take
24 pollutants from a different body of water and add it to
25 an already polluted stream? I thought that was clear

1 that that's not the case.

2 MR. MINEAR: Your Honor, if we look to the
3 Miccosukee opinion, at 541 U.S. 109 to 110, it
4 discusses this issue. One of the issues there is, Are
5 there two bodies of water or one body of water?

6 JUSTICE SCALIA: Exactly.

7 MR. MINEAR: And the Court -- that question
8 was left unresolved in Miccosukee. That's what's being
9 tried in Florida right now.

10 JUSTICE SCALIA: Because if it was one body
11 of water, it was okay, and if it was two bodies of
12 water, it was bad, right?

13 MR. MINEAR: Yes, but in -- at page 109, what
14 this Court said -- it talked about the S-9 pump, which
15 was central there, because it was moving the body --
16 that the -- the water. It was transmitting it. And it
17 was -- talked about pumping the water from one part of
18 the water body to the other. That's a discharge, even
19 though it's the same water body.

20 JUSTICE SCALIA: But it would add pollutants
21 to the other body whether it comes from the adjacent
22 body or whether it comes from some distant body. The
23 only reason that the pumping from the adjacent body did
24 not qualify is -- not because there no addition of
25 pollutants. There would be an addition of pollutions

1 from a distant lake, and you -- we'd be able to hold a
2 person liable. The only reason there was no addition
3 here was that there was -- there was an addition here,
4 but there was no discharge, because it was the same
5 body of water.

6 MR. MINEAR: With --

7 JUSTICE SCALIA: And I --

8 MR. MINEAR: With respect --

9 JUSTICE SCALIA: -- it seems to me that's --

10 MR. MINEAR: -- I think you have --

11 JUSTICE SCALIA: -- what you have here.

12 MR. MINEAR: -- it exactly backwards with
13 what the position of the United States was in
14 Miccosukee, and it explains why our -- we took that
15 position. And the Court upheld our position in
16 Miccosukee. And we're taking the different position
17 here. Because here we're talking about a discharge,
18 not an addition. The dictionary definition of
19 "discharge" nowhere speaks of "addition." Petitioners
20 have not pointed to any dictionary definition that
21 speaks in terms of an addition. It talks about a
22 flowing or issuing out. What it connotes is that the
23 water has, in some sense, been contained or confined,
24 to some degree.

25 CHIEF JUSTICE ROBERTS: Counsel, I was --

1 MR. MINEAR: And it's issuing out --

2 CHIEF JUSTICE ROBERTS: -- surprised, in a
3 case involving a FERC license condition, that no one
4 from FERC signed on to your brief.

5 MR. MINEAR: Well, Your Honor, as people in
6 the office are familiar with, in the SG's office, the
7 names in the brief tell very little about who has
8 participated in the discussions and the writing of the
9 brief. The Rapanos case --

10 CHIEF JUSTICE ROBERTS: But if it's a case
11 involving a FERC license, and FERC isn't there, I think
12 it says a great deal.

13 MR. MINEAR: Well, Your Honor, this is
14 primarily a case about the Clean Water Act. I would
15 point to the Rapanos case, immediately before. The
16 Corps' name is not on the brief, and EPA's name is not
17 on the brief.

18 CHIEF JUSTICE ROBERTS: Do you know what
19 FERC's --

20 MR. MINEAR: So, we can't draw --

21 CHIEF JUSTICE ROBERTS: Do you know what
22 FERC's position is --

23 MR. MINEAR: I certainly --

24 CHIEF JUSTICE ROBERTS: -- in this case?

25 MR. MINEAR: -- do. They join in the

1 consensus position of the United States. This brief
2 has been coordinated not only with EPA and FERC, but
3 also the Department of the Interior and the Army Corps
4 of Engineers. This is the position of the United
5 States.

6 CHIEF JUSTICE ROBERTS: Well, I'm sure of
7 that, and it involves a reconciliation of --

8 MR. MINEAR: Right.

9 CHIEF JUSTICE ROBERTS: -- competing
10 positions. Is there anything that FERC has issued that
11 is illuminating with respect to their view?

12 MR. MINEAR: I think what's illuminating is
13 their consistent position, since 1970, when this
14 provision was first enacted into law, in the Water
15 Quality Improvement Act of 1970, 2 years before the
16 Clean Water Act amendments.

17 CHIEF JUSTICE ROBERTS: Do you agree that a
18 State could adopt water quality standards that would,
19 in effect, preclude hydroelectric power in the State?

20 MR. MINEAR: I think it's certainly possible,
21 on an individual river. Imagine if a State had a river
22 that is designated as a wilderness area or a wild and
23 scenic river, and determined it did not --

24 CHIEF JUSTICE ROBERTS: Would they do --

25 MR. MINEAR: -- want to have hydropower.

1 CHIEF JUSTICE ROBERTS: -- it statewide?

2 MR. MINEAR: If they did it statewide, I
3 think --

4 CHIEF JUSTICE ROBERTS: Saying, "It is of
5 utmost importance to us to provide habitat for spawning
6 salmon, whatever, dams interfere with that in a way we
7 find objectionable, so we're going to go a different
8 direction, as a matter of power policy for the State of
9 whatever, and not allow hydroelectric power."

10 MR. MINEAR: If they did it statewide, it
11 would raise a question of whether or not that action is
12 preempted under the Federal Power Act, not under the
13 Clean Water Act. And that would -- that's obviously
14 not the issue here. Maine, as you have heard, supports
15 hydropower production. The question here is
16 reconciling the competing roles of the hydropower
17 company, on the one hand, and the State and Federal
18 Governments, which, in the spirit of cooperative
19 federalism, work together on these matters. We are
20 very supportive of the States' approach of reviewing
21 discharges to determine whether or not there has been
22 the creation of pollution, and determining whether or
23 not there is a violation of their water quality
24 standards. This is a part of -- an important role that
25 the State has under the Clean Water Act, that Congress

1 gave to the State, and to which we defend.

2 I'd like to point out that one of the things
3 that's been talked about here is the oddity, supposed
4 oddity, of a water discharging into itself. And that's
5 not odd at all. One often talks about, for instance,
6 the fresh water above the dam being discharged into the
7 fresh waters below. That's -- there's nothing unusual
8 about this, because we're talking about the
9 characteristic of a water that might be shared by the
10 water that's upstream and contained in the dam and is
11 also a characteristic of the water below. Now, under
12 section 401, the upstream characteristic doesn't
13 matter, because it's -- it refers to "any discharge,"
14 and it says "into the navigable waters." "Into" is
15 significant, because "any discharge" is "out of
16 something." And so, it can also be "into something."
17 And by stating "into navigable waters", Congress
18 indicated what it was concerned about, which was that
19 discharges that go into the navigable waters can cause
20 pollution, and, therefore, ought to be reviewed by the
21 State to make sure the water quality standards are
22 being met.

23 There's nothing unusual in this at all. It
24 simply indicates that Congress was not concerned about
25 discharges that go elsewhere; for instance, into a

1 municipal water system or onto irrigated land.

2 What we have here --

3 JUSTICE BREYER: Just for the few of us who
4 think the dictionary doesn't answer the case, is it
5 possible you could say a word about why Congress would,
6 or would not, have wanted, in effect, to incorporate
7 all State water quality standards into a permission to
8 build a dam?

9 MR. MINEAR: The reason why, it was because
10 Congress gave the States primary authority under the
11 Clean Water Act to deal with pollution. Discharges
12 from confinements, from confined water, creates
13 pollution, even in the absence of pollutants, by the
14 stratification, the deprivation of oxygen, and the
15 like. And Congress recognized that where there's a
16 discharge, there's likely to be a pollution problem,
17 and that pollution problem will be manifested
18 downstream. And it, therefore, makes sense for the
19 State to be able to review and determine whether or not
20 its water quality standards will be met.

21 JUSTICE BREYER: Also to protect fish?

22 MR. MINEAR: Yes. It includes the protection
23 of fish. And, in fact, one of the things that this
24 permit does, in this particular case, this condition,
25 is, it ensures that there is, in fact, water in the

1 bypass reaches. In the absence of the conditions that
2 the State imposed here, there would be no water at all
3 in the bypass reaches. Now, it's true that FERC itself
4 can impose conditions to meet these requirements --

5 JUSTICE ALITO: Well, suppose --

6 MR. MINEAR: -- but --

7 JUSTICE ALITO: -- you have a facility that
8 produces adverse environmental effects in one State,
9 but produces power for a number of adjoining States.
10 Why does it make sense for the State in which the
11 facility is located to do the balancing of the
12 environmental and the power considerations in that
13 situation?

14 MR. MINEAR: May I answer that question --

15 CHIEF JUSTICE ROBERTS: Certainly.

16 MR. MINEAR: -- Your Honor?

17 The Clean Water Act provides for exactly this
18 problem. It does address the problem of interstate
19 pollution. I believe that this Court's case in
20 Arkansas versus Oklahoma deals with that type of issue.

21 It provides for a reconciliation, with EPA playing an
22 important role in those interstate concerns.

23 Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

25 The case is submitted.

1 [Whereupon, at 12:34 p.m., the case in the
2 above-entitled matter was submitted.]
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