No. 04-1527

In The
Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE BOARD OF
ENVIRONMENTAL PROTECTION,

Respondent.

**On Writ Of Certiorari To The
Maine Supreme Judicial Court**

REPLY BRIEF FOR PETITIONER

WILLIAM J. KAYATTA, JR.
MATTHEW D. MANAHAN
(*Counsel of Record*)
MARK E. PORADA
NICHOLAS D. LIVESAY
PIERCE ATWOOD LLP
One Monument Square
Portland, Maine 04101
(207) 791-1100
(207) 791-1350 Fax

Counsel for Petitioner
S.D. Warren Company

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

AGENCY ORDERS

TABLE OF AUTHORITIES – Continued

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES – Continued

OTHER

REPLY BRIEF FOR PETITIONER

I. Respondents Fail To Give Proper Effect To Congress's Words Requiring That The Discharge Be "Into The Navigable Waters."

Warren agrees with Respondents that resolution of the question presented begins and ends with the language of the statute itself. Brief for Respondents American Rivers and Friends of the Presumpscot River ("A.R. Br.") at 19; Brief for Respondent Maine Board of Environmental Protection ("BEP Br.") at 15-19.[1] The language of section 401 plainly states that, in order for certification to be required, a licensed activity must pose a threat of a "discharge *into the navigable waters*." 33 U.S.C. § 1341 (emphasis supplied). Interpreting this language requires that we "give effect, if possible, to every clause and word." *United States v. Menasche*, 348 U.S. 528, 538 (1955); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, ___ U.S. ___, 125 S. Ct. 2611, 2620 (2005) (statutory interpretation requires examination of the text "in light of context, structure, and related statutory provisions"). However one might read the lone word "discharge" by itself, the complete

[1] The Maine Department of Environmental Protection (the "DEP") consists of the Commissioner and the Board of Environmental Protection (the "BEP"). ME. REV. STAT. ANN. tit. 38, § 341-A(2). At issue in the present case is the water quality certification issued by the State of Maine through the Commissioner and affirmed by the BEP following Warren's intra-agency appeal. The agency-party in the Superior Court was the DEP. Pet. App. A-19. In publishing its decision the Supreme Judicial Court ("SJC") changed the name in the caption from DEP to BEP without explanation, and possibly inadvertently. *See* Pet. App. A-1. The Attorney General in his corrected brief to this Court now uses "BEP," while American Rivers uses "DEP," presumably because the DEP is indeed the actual agency itself. In this reply Warren follows the lead of the Attorney General and uses "BEP" to refer generally to the respondent state agency by whatever designation.

statutory phrase "discharge into the navigable waters" entails the introduction of something into the waters. Any reading that effectively writes the prepositional phrase "into the navigable waters" out of the statute is simply not a reasonable reading. "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a line.'" *Dir., Office of Workers Comp. Programs v. Rasmussen*, 440 U.S. 29, 47 (1979).

Respondents nevertheless argue: (a) that Congress's words "into the navigable waters" can be more or less ignored as having no significance other than talismatically invoking Commerce Clause powers; (b) that the grammatical object of the preposition "into" can be something other than "the navigable waters;" and/or (c) that the river can be subdivided into upstream and downstream rivers, or diverted and undiverted rivers, the former of which then "discharges into" the latter. In each instance, Respondents' arguments grasp beyond the reach of Congress's words.

A. The Requirement That The Discharge Be Into The Navigable Waters Cannot Be Ignored As Some Type Of "Jurisdictional Necessity."

The BEP asserts that the "requirement that the discharge be 'into' navigable waters is a jurisdictional necessity to link the regulatory scheme to the Commerce Clause powers of Congress. The use of this simple preposition has no other significance . . . ." BEP Br. at 18. This assertion is simply wrong. Congress did not need to focus on discharges "into" the navigable waters in order to assert its powers under the Commerce Clause. Congress easily could have required certification for any activity that did anything "to the navigable waters" or "to the

quality of the navigable waters." The fact that Congress chose a particular and more specific formulation to justify the assertion of its powers under the Commerce Clause should provide more, not less, reason to abide by the particular words chosen.[2]

B. Congress Specified That The Discharge Must Be Into The Navigable Waters – Not Into The Riverbed Or Channel.

In their unsuccessful struggle with the statutory syntax, Respondents and their supporting *amici* frequently rewrite the grammatical object of the preposition "into," replacing "navigable waters" with "the river bed" or the "river channel." *See*, *e.g.*, U.S. Br. at 21 ("The facility thereby returns the water by 'discharge into' the same river channel from which it was withdrawn."); A.R. Br. at 27 & n.3 (equating "into rivers downstream" with "into the riverbed"). The BEP rewrites not only the statute, but even Warren's brief. *Compare* BEP Br. at 22 (citing Pet. Br. at 3 for the proposition that "according to Petitioner, the operation of a Facility 'channel[s]' the water 'back into' the River."), *with* Pet. Br. at 3 (water flowing through the dam is channeled "back into the river bed"). Similar linguistic alchemy appears at least nine other times in the briefs of the Respondents and the United States.[3] The fact that

[2] CWA section 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F), demonstrates that Congress knew how to describe the mechanisms other than discharges by which dams do something to the navigable waters.

[3] *See*, *e.g.*, BEP Br. at 18-19 ("back *into* the riverbed" satisfies "[s]ection 401's requirement that the discharge be 'into' navigable waters"); U.S. Br. at 10 (describing Warren's dams as returning "the water into a different portion of the river channel"); *id*. ("into the concededly navigable river channel."); *id*. at 11 ("any 'flowing or issuing out' of water from the facility into the river channel"); *id.* at 14 ("return

(Continued on following page)

Respondents are so inexorably pulled away from Congress's words evidences the extent to which Respondents essentially seek to rewrite those words.

C. The Presumpscot River Is A Single, Distinct Body Of Water.

Alternatively, both Respondents adopt a version of the SJC's approach by dividing the Presumpscot River into several water bodies so that waters from one can be said to flow "into" the other's waters. In so doing, neither Respondent goes so far as to label the divided waters as "U.S." and "non-U.S." waters, an approach abandoned by all parties to this case. BEP Br. at 23; A.R. Br. at 25 n.17; *see also* U.S. Br. at 15. Rather, they use synonyms to create several fictional bodies of water. Thus, the BEP asserts that "the Presumpscot is not simply discharging into itself; the water flows into each Facility – including the impoundment, power canal, turbines and tailrace – out of which the water is emitted, *i.e.*, is discharged, 'into' the River." BEP Br. at 22. In this manner, the BEP ends up with: (1) the "Presumpscot;" (2) the "water" that flows through and discharges; and (3) the "River" into which the "water" discharges. American Rivers similarly uses the term "water" and "Presumpscot River" in order to be able to say that each of the dams "results in 'discharges' because their releases of water into the Presumpscot River clearly amount to a flowing or issuing out . . . ." A.R. Br. at

---

the diverted water to the river channel"); *id*. (citing a case that refers to "the discharge of water from the Reservoir into a spilling basin below"); *id*. at 15 ("into the channel of the Presumpscot River"); *id*. ("the water is returned to the river's channel").

14; *see also id.* at 21 n.13 (each of Warren's hydropower projects "conveys water into the Presumpscot River").

Respondents adopt yet another variant of this approach in trying to reconcile their positions with the "pot of soup" analogy employed by this Court in *South Florida Water Management District v. Miccosukee Tribe of Indians,* 541 U.S. 95, 110 (2004). They compare the ladled soup going back into the pot with water going through the dam and then going back "'into' a waterway." A.R. Br. at 26; *see also* BEP Br. at 22-23 (advancing a similar argument). In this manner, they argue, the waters flowing out of the dams constitute an "object" that is discharging "back into" something, the nature of which is not entirely clear. A.R. Br. at 26; BEP Br. at 22.

This entire approach is twice flawed.

First, no party can directly dispute that the present case involves a single, distinct body of navigable waters – the waters of the Presumpscot River. U.S. Br. at 16 n.4 (subscribing to the U.S. Environmental Protection Agency's position that a "dam merely conveys water from one location to another within the same waterbody" (citation and internal quotations omitted)); A.R. Br. at 1 (referring to "[t]he water body at issue in this case, the Presumpscot River"); *see* BEP Br. at 23 (describing a water's status as "unnecessary" to its analysis). Certainly the Presumpscot – whether the water is above, below, or within one of Warren's hydro projects – is a single body of water as that concept is applied in *Miccosukee*. 541 U.S. at 109-11. Assigning that single body of navigable waters different labels at different points as it flows downstream for no purpose other than being able to say that one thing discharges into another is to argue by tautology. Respondents are not looking at language and asking what it means. Rather, they are beginning with a conclusion and

then struggling with words to make the conclusion fit the statutory language.

Second, the suggestion that water flows through the dam "into" other waters "downstream" makes no sense. *See*, *e.g.*, A.R. Br. at 27 (characterizing the flow of water through dams as "hydropower facilities emitting waters 'into' rivers downstream"). Water upstream does not flow or discharge into water downstream. Rather, upstream water becomes downstream water as it flows downstream. To the extent that the condition of the water changes as it flows downstream, such a change is not the result of a discharge. Indeed, if one walled off entirely that which Respondents call a "discharge into the navigable waters," there would be no waters at all downstream.

II. Respondents Fail To Support Their Claim That The Word "Discharge" Has Different Meanings In Sections 401 And 402.

Respondents do not dispute that the word "discharge" as used in section 402, 33 U.S.C. § 1342, contemplates an "addition" to the navigable waters from a point source. They do not dispute that the mere "emitting" or "flowing" of water-borne pollutants out of the tailrace is not a discharge of pollutants into the Presumpscot River under section 402. Respondents argue, instead, that the word "discharge" in section 402 means something narrower than it does in section 401. Thus, say Respondents, there can be a "discharge" without any addition at all under section 401 even though there must be an addition for there to be a "discharge" of a pollutant under section 402.

No court or agency decision so holds. To the contrary, to the extent any issue pertinent to this appeal has been settled, it is that a discharge into the water requires an

addition to the water. Thus, in *Miccosukee*, the issue before the Court was not whether there was a pollutant present. The issue was whether there was a "discharge," and the answer was that there could be no discharge without an addition. *Miccosukee*, 541 U.S. at 110. Precisely the same reasoning has been repeatedly applied in defining the identical word in section 401. In the words of the SJC, "[a]n 'addition' is the fundamental characteristic of any discharge." Pet. App. A-6; *see also North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (reasoning that "the word 'discharge' contemplates the addition . . . of a substance or substances"); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 299 (D.C. Cir. 2003) (reaffirming that "[a]s discussed in [*North Carolina*], 'the word "discharge" contemplates the addition . . . of a substance or substances' into the navigable waters").[4]

Respondents proffer only two arguments to support their position that the word "discharge" has different meanings in sections 401 and 402. First, they contend that the definition of "discharge" in section 502(16), 33 U.S.C. § 1362(16), provides no basis for limiting the "general term" discharge, which they say need not entail any "addition." Second, they argue that because "discharge" initially appeared in section 21(b) of the Water Quality Improvement Act of 1970 ("1970 Act"), Pub. L. No. 91-224, § 21(b), 84 Stat. 91, 108 (1970), its meaning is uninformed by the 1972 legislation. Neither argument can withstand even minimal scrutiny.

[4] While Warren agrees that the *Alabama Rivers* court applied the proper legal standard, Warren disagrees with that court's application of the standard.

A. Use Of The Word "Includes" In Section 502(16) Offers No Basis For Inferring That The Word "Discharge" Itself Has Different Meanings In Sections 401 And 402.

A reader could infer from the language of section 502(16) that the term "discharge" when used by itself could involve the discharge of something other than a pollutant. Such an inference would give full voice to the argument that "includes" is not necessarily a word of limitation. Respondents, however, go much further. They contend that the very word "discharge" itself has a broader meaning in section 401 than it does in section 402. Respondents argue that the term "discharge" is a "general term," not a uniform "term of art," and that the dictionary definitions of the word "discharge" are numerous and broad enough to allow it to be used without connoting the addition of anything to anything. *See*, *e.g.*, A.R. Br. at 19-20, 22, 24; BEP Br. at 16-18; *see also* U.S. Br. at 10, 12-15, 18-20.

This argument asks too much and establishes too little.

It asks too much to presume that the word "includes," the use of which is otherwise fully understandable, should carry the extraordinary inference that Congress, without so stating, meant the same word to say different things. Such an inference violates a basic principle of statutory construction. *See Exxon Mobil Corp.*, 125 S. Ct. at 2622 (noting that it "is implausible, however, to say that the identical phrase means one thing" in one section of a statute "and something else" in a neighboring provision); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) ("[W]e adopt the premise that the term should be construed, if possible, to give it a consistent meaning through

the Act. That principle follows from our duty to construe statutes, not isolated provisions."); *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) ("'[I]dentical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (some internal quotation marks omitted)).

Respondents' argument that the word "discharge" by itself requires no addition establishes too little because the notion of putting something into the water is independently signified by the context in which "discharge" is used in section 401 (followed by the preposition "into"). In short, the context in which "discharge" is used in section 401 directly suggests the addition of something to the water; Congress in fact directly equated "discharge" with "addition" when defining the term "discharge of a pollutant," *see* 33 U.S.C. § 1362(12); and the general presumption (of which we can assume Congress was aware) is that the same word means the same thing. In this context, section 401 may not require the addition of a pollutant, but it does require the addition of something to the water.

B. The Fact That Section 401 As Enacted In 1972 Was Derived From Section 21(b) Of The 1970 Act Provides No Basis For Presuming That The Word "Discharge" Has A Special And Unstated Meaning In Section 401.

Central to Respondents' position is the observation that section 401 had its source in the 1970 Act, that the 1970 Act contained no definition of the word "discharge," and that it was therefore a "general term" rather than a "term of art." *See*, *e.g.*, U.S. Br. at 18-20; A.R. Br. at 40-41;

BEP Br. at 22. By this argument, section 402 was one of the "new provisions" (U.S. Br. at 19) and thus the fact that its "discharge" meant "addition . . . from a point source" is of no moment in assigning meaning to the "general term" "discharge" as written initially in 1970. *See id.*

On one level, this whole notion of differing "discharges" is irrelevant given that the Court is not called upon to construe the bare word out of context. Putting that point to one side, Respondents' argument still fails. The legislative record shows that Congress considered sections 401 and 402 and their associated definitions as part of a single whole. S. 2770, 92 Cong. § 2, at 146-52, 166 (1971) (proposing sections 401, 402, and 502(n)). In addition, in adopting section 401 Congress actually rewrote part of the language from section 21(b) of the 1970 Act, substituting the word "discharge" for the second use of the word "activity" as it had appeared in section 21(b). *Compare* 1970 Act, § 21(b), 84 Stat. at 108, *with* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 401, 86 Stat. 816, 877 (1972). If accepted, Respondents' argument would mean that the first word "discharge" in section 401, carried forward from the 1970 legislation, has the "general meaning," while the second word "discharge" in section 401 is a "new provision," presumably with a new meaning. Congress certainly said nothing to indicate that it was using the same word in its 1972 enactment to convey two different meanings. To the contrary, the Senate Report acknowledged that the term "discharge" was a "word of art" as used in the statute: "The term 'discharge' is a word of art in the legislation." *Senate Consideration of the Report of the Conference Committee, October 4, 1972*, *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 178 (1973). Nothing in this language or in the statute suggests

that this "word of art" has a different meaning in section 401 than it has in section 402 of that same legislation.

In sum, the bare word "discharge" has a single uniform meaning in the CWA except to the extent the statute's language or context says otherwise. No one disputes that the word means the addition of something from a point source as used in section 402. It should therefore mean the same thing in section 401, the difference being that section 401 requires only the threat of an addition, and does not state that the thing added actually need be a pollutant.

III. The Question Presented Is Not "Settled."

Respondents in various ways suggest that the question presented in this case largely has been settled in practice and in the courts for thirty-plus years. This is not correct. The question has been quiescent, not settled, because until recently it was of little practical significance.

A. State Certification Was Initially Of Little Practical Importance.

Until the early 1990s, the state certification associated with the relicensing of hydropower facilities such as Warren's was a mere formality. American Rivers cites 39 licenses issued by FERC from 1970 through 1975 (A.R. Br. at 44 n.27, 45 n.28); only one of those licenses contained state-imposed conditions, and those conditions, only two in number, did not influence operation of the project. *See Sho-me Power Corp.*, 53 F.P.C. 1999, 1975 FPC LEXIS 792, at *6-7 (1975). Further, states often waived the opportunity to certify dams, as Maine did with regard to the very dams involved in this case. Pet. Br. at 5.

By 1993, states were choosing to attach conditions to their 401 certifications for a greater percentage of hydro projects, but even then dam operators generally had little incentive to challenge whether states had the legal authority to certify the continued operation of all dams. Of the twenty-two FERC orders issuing hydropower licenses in 1993, for example, none contained burdensome state-imposed conditions, if they contained section 401 conditions at all.[5]

[5] In seven of the twenty-two FERC Orders issuing hydropower licenses in 1993, the state waived section 401 certification. *Pac. Gas & Elec. Co.*, 62 F.E.R.C. ¶ 62,093, 63,136 (1993); *Mayo Hydro*, 62 F.E.R.C. ¶ 62,150, 63,266 (1993); *Adirondack Hydro Dev. Corp.*, 63 F.E.R.C. ¶ 62,256, 64,436 (1993); *Potomac Edison Co.*, 63 F.E.R.C. ¶ 62,262, 64, 512 (1993); *Heck, III*, 65 F.E.R.C. ¶ 62,149, 64,315 (1993); *Commonwealth Edison Co.*, 65 F.E.R.C. ¶ 62, 262, 64, 609 (1993); *Pac. Gas & Elec. Co.*, 65 F.E.R.C. ¶ 62,265, 64,634 (1993). In six of the orders FERC noted that certification was granted, but there is no indication that those certifications contained any conditions. *Blandin Paper Co.*, 62 F.E.R.C. ¶ 62,142, 63,221 (1993); *Georgia Power Co.*, 62 F.E.R.C. ¶ 62,201, 63,349 (1993); *Beaver City Corp.*, 62 F.E.R.C. ¶ 62,207, 63,378 (1993); *Minn. Power & Light Co.*, 65 F.E.R.C. ¶ 62,084, 64,152 (1993); *Minn. Power & Light Co.*, 65 F.E.R.C. ¶ 62,094, 64,192 (1993); *Alaska Power & Telephone Co.*, 65 F.E.R.C. ¶ 62,122, 64,250 (1993). In three of the orders FERC noted that those conditions that were called for by the states were consistent with FERC's own determination, indicating that the conditions would have been imposed under FERC's own authority regardless of whether the conditions had been part of the state certification. *City of Norwich, Dep't of Public Utils.*, 62 F.E.R.C. ¶ 62,225, 63,440 (1993); *Cent. Me. Power Co.*, 65 F.E.R.C. ¶ 62,154, 64,337 (1993); *Niagra Mohawk Power Corp.*, 63 F.E.R.C. ¶ 62,257, 64,456 (1993). Another order contained water quality-related conditions that were the product of negotiations between the state and FERC, and agreed upon at "the 10(j) meeting." *Ind. Mich. Power Co.*, 65 F.E.R.C. ¶ 62,063, 64,085 (1993). These conditions were attached to the final license under FERC's authority under section 10(j), 16 U.S.C. § 803(j), and not as a result of the state's authority under the CWA. In two orders, both concerning the construction of new dams, state certification was discussed only in the attached Environmental Assessment ("EA") and it

(Continued on following page)

B. The Question Whether Certification Is Required Began To Percolate In The Mid 1990s.

This Court's 1994 decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), emboldened states to emerge as a major factor in the FERC licensing process. *PUD No. 1* established that states may impose any limitations they see fit, as a condition of certification, provided the limitations are consistent with state water quality standards or "any other appropriate requirement of State law." 511 U.S. at 714 (internal quotations and citation omitted). As a result, rather than discussing with FERC the need for greater public access, improved fish passage, or the maintenance of minimum water levels in the bypass reach and allowing FERC to address these issues in light of the overall public benefit of the project, the door was opened for state environmental agencies to dictate license terms as a condition of state certification.

FERC initially pushed back: "After careful consideration, we have decided that our prior conclusion regarding the mandatory nature of conditions contained in state water quality certifications was incorrect." *Tunbridge Mill Corp.*, 68 F.E.R.C. ¶ 61,078, 61,387 (1994). FERC

---

is unclear whether FERC included the conditions of certification in the final licenses. *Evans, Jr.*, 63 F.E.R.C. ¶ 62,243, 64,401 (1993); *CPS Prods., Inc.*, 65 F.E.R.C. ¶ 62,211, 64,478 (1993). Another order referenced state certification only in the attached EA and noted that the lone condition – that the applicant submit an "Operational Plan" – had been satisfied by the time FERC issued its license. *Potlatch Corp.*, 62 F.E.R.C. ¶ 62,143, 63,240 (1993). Finally, in two orders FERC noted that one condition – a water temperature monitoring requirement – was inconsistent with its determination, but that nevertheless it had to include the state condition. *Weyerhaeuser Co.*, 63 F.E.R.C. ¶ 61,191, 62,437 (1993); *Weyerhaeuser Co.*, 63 F.E.R.C. ¶ 62,194, 63,056 (1993).

thereafter demonstrated a willingness to reject or amend conditions similar to those contained in Warren's current licenses. *See*, *e.g.*, *Cent. Vt. Pub. Serv. Corp.*, 69 F.E.R.C. ¶ 62,197, 64,435-36 (1994) (rejecting part of a condition related to upstream fish passage and a condition allowing the certification to be reopened and amended); *Green Mountain Power Corp.*, 70 F.E.R.C. ¶ 62,205, 64,436-37 (1995) (rejecting conditions allowing the state to later amend peak flow and draw down levels); *see also Great Northern Paper, Inc.*, 77 F.E.R.C. ¶ 61,068, 12 (1996) (rejecting Maine DEP conditions of section 401 certification).

In addition, license applicants recognized that many conditions attached by states to their section 401 certifications would effectively duplicate conditions that FERC would impose pursuant to its authority under the Federal Power Act. *See*, *e.g.*, *Rumford Falls Power Co.*, 69 F.E.R.C. ¶ 61,063, 61,248 (1994) (noting that Maine DEP lacked authority to require recreational canoe access, but nevertheless requiring such access on its own). Thus, in many instances a successful challenge to a state certification would have been very expensive and time consuming with little practical effect.

C. By The Late 1990s State Certification Began To Impact Dam Owners.

In 1997, the Second Circuit held that FERC must incorporate all conditions of state certification in its final license – even those conditions FERC sees as being beyond a state's authority under section 401. *American Rivers v. FERC*, 129 F.3d 99, 110-11 (2d Cir. 1997). FERC immediately began incorporating all state certification conditions into its licenses. *See*, *e.g.*, *Town of Madison, Dep't of Elec. Works*, 81 F.E.R.C. ¶ 61, 252, 62,157 (1997) ("[W]e are

required by the recent decision . . . in *American Rivers* . . . to accept all conditions in water certification as conditions on a license even if we believe that the conditions may be outside the scope of Section 401."). Less than two years later, when Warren first commenced the license renewal process for these dams in January of 1999, Warren raised the question presented in this case.

D. *PUD No. 1* Did Not Resolve Or Even Address The Question Presented.

PUD No. 1 involved the construction of a new dam, as opposed to the relicensing of an existing facility. 511 U.S. at 708. Construction necessarily involved the discharge of fill material into the river. Based on this fact alone the need for state certification was apparent. Thus, the license applicant lacked incentive to contest whether the mere flow of water through a dam was an independent reason for requiring certification, and this Court never decided the issue.

E. The Question Presented Has Not Been Settled Formally At The Agency Level.

Respondents cite various agency materials containing statements about the scope of section 401 in support of their argument that all federally licensed dams must undergo state certification. A.R. Br. at 47; BEP Br. at 39. All but one of these documents is entirely consistent with Warren's position that only the licensing of new dams and some operating dams require certification. The only cited agency document that can be read as implying that all federally licensed dams require certification is an October 26, 1996 letter. Letter from Jonathan Z. Cannon, EPA, et al., to Hon. Lois D. Cashell, FERC, regarding "Virginia

Electric and Power Co." at 4 (Oct. 24, 1996) (cited in U.S. Br. at 22 n.9). Such a letter hardly settles the matter.

Even if this question had been formally "settled" by an agency regulation following notice and comment without dissent, such a regulation could not dictate a statutory interpretation that could not reasonably be borne by the text of the statute itself. *See*, *e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("Of course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms."); *Nat'l R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 418 (1992) (stating that "a reviewing court need not accept an interpretation which is unreasonable").

IV. Respondents' Use Of Legislative History Is Both Unduly Selective And Ultimately Inadequate As A Basis For Rewriting Plain And Specific Statutory Language.

Respondents, *et al*., argue at length that in enacting the CWA, Congress was motivated by, among other things, the goals of improving water quality, preserving state control over water quality, and the reduction of water pollution. Warren does not dispute that each of these goals provided much of the motivation for portions of the CWA. Nor does Warren dispute that section 401 is aimed at reducing the scope of federal preemption that might otherwise apply to state regulation of federally licensed projects.

The question, instead, concerns the precise extent to which Congress ultimately chose to pursue those goals. The answer to that question is found, in the first instance, by examining the statutory language. Only when that language is ambiguous does one begin a search through

legislative history. *See*, *e.g.*, *Exxon Mobil Corp.*, 125 S. Ct. at 2625 ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *Carter v. United States*, 530 U.S. 255, 270 (2000) ("reliance on . . . legislative history is unavailing in light of this Court's approach to statutory interpretation, which begins by examining the text, not by psychoanalyzing those who enacted it") (internal quotation and citations omitted). Were the law otherwise, Congress need simply pass one sentence laws announcing its goals, leaving it to agencies and courts to rule in whatever way furthered such goals.

Respondents rely heavily on snippets of legislative history summarizing statutory aims in characteristically broad terms. They repeatedly quote legislative history leading up to the 1970 Act referring to "activities or operations potentially affecting water quality." BEP Br. at 33; *see also id.* at 34. The BEP thus baldly asserts that "Congress expressed its intent to have the states issue certifications for a 'wide variety of licenses and permits (construction, operating and otherwise) . . . issued by various federal agencies' that involve 'activities or operations potentially affecting water quality.'" BEP Br. at 33 (selectively quoting excerpts from H.R. Rep. No. 127 (1970)). Similarly, the BEP quotes Senator Cooper to the effect that "all Federal activities that have any effect on water quality be conducted so that water quality standards will be maintained . . . ." *Id.* at 34. Of course the statute itself, and even section 21(b) of the 1970 Act, does not say that certification must be obtained for any licensed activity that has any effect on water quality.

In fact, it is beyond dispute that section 401 does not apply, as Respondents claim, to all federal licenses that

involve activities or operations potentially affecting water quality. Licensed or permitted activities – *e.g.*, the operation of an airport (14 C.F.R. § 139.101), or the harvesting of timber (36 C.F.R. pt. 223, 43 C.F.R. §§ 5400.0-5, 5424.0-6) or the grazing of cattle (36 C.F.R. § 222.3) on federal lands – that potentially result in serious impacts on water quality from non-point source run-off, even Respondents would appear to agree, are not within the ambit of sections 401 or 402. That the statute does not reach all activities affecting water quality is further highlighted by the fact that, as expressly recognized by the United States, "diverting water away from" a river, even by means of what the United States calls a "discharge," does not require a certification under section 401. U.S. Brief at 21 n.8. If one of Warren's dams diverted the entire Presumpscot River away from the riverbed to a bottling plant, the impact on water quality in the impoundment and below the dam, as defined by Respondents, would be no less than that said to result from the current dams.

In sum, it is clear even to Respondents that Congress did not choose to require state certifications for all federally licensed activities that might adversely affect water quality. Instead, Congress required such certifications for only certain activities, which section 401 defines. The issue, accordingly, is not whether the CWA grants states complete insulation from the preemptive effect of any federally regulated activity that might affect water quality. It did not. The issue, instead, is where Congress drew the line.

To resolve this issue, "[a]s with other problems of interpreting the intent of Congress in fashioning various details of this legislative compromise, the wisest course is to adhere closely to what Congress has written." *Rodriguez*

v. Compass Shipping Co., 451 U.S. 596, 617 (1981); *see also Addison v. Holly Hill Co.*, 322 U.S. 607, 618 (1944) ("But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.").

Nor is the legislative record itself quite what Respondents portray it to be. In picking out their friends in the crowd, *see Exxon Mobil Corp.*, 125 S. Ct. at 2625, to suggest that Congress intended to require certification for all dam licenses, Respondents overlook the precise language used by Senator Muskie in describing exactly what dams were anticipated to be included: "[A]ny new industry . . . that requires . . . a license from the Federal Power Commission to build a dam . . . will be required to obtain this certification of compliance with water quality standards." 116 Cong. Rec. 8984 (1970); *see also* 116 Cong. Rec. 9332 (1970) (proper certification required "for any new dam which requires a license from the Federal Power Commission") (Statement of Congressman Fallon, Floor Manager of the 1970 Act).

Construction of a new dam very likely involves discharges of material into the water. The operation of an existing dam generally does not. Legislators' suggestions that it is the former that is within section 401 are completely consistent with the language of the statute. Respondents' contention that the latter are necessarily covered as well is not.

CONCLUSION

A Congress focused on activities that put something into the navigable waters could have written section 401 easily and naturally as it stands. Conversely, if Congress had intended to capture activities that did not involve putting anything at all into the water, then there is no

reason to think that it would have contemplated using a phrase like "discharge into the navigable waters." To now "interpret" the language of section 401 to say what could have been more easily and naturally said in other words is to rewrite what Congress has written.

Respectfully submitted,

WILLIAM J. KAYATTA, JR.
MATTHEW D. MANAHAN
(*Counsel of Record*)
MARK E. PORADA
NICHOLAS D. LIVESAY
PIERCE ATWOOD LLP
One Monument Square
Portland, ME 04101
phone (207) 791-1100
(207) 791-1350 Fax

Counsel for Petitioner
S.D. Warren Company