LAWSUITS FILED OR PENDING

U.S. SUPREME COURT HEARS ARGUMENT ON THE REGULATION OF DAMS UNDER CLEAN WATER ACT

S.D. Warren Company v. Maine Dept. of Environmental Protection, S.Ct. Case No. 04-1527.

On February 21, 2006, the U.S. Supreme Court held oral arguments for *S.D. Warren Co. v. Maine Board of Environmental Protection*, a case arising under § 401 of the Clean Water Act (CWA). The case, which is on appeal from the Supreme Judicial Court of Maine, presents the Justices with the opportunity to reach a landmark decision concerning the authority of states to regulate hydroelectric dams based on the quality of water flowing out of them. Under § 401 of the CWA, states may impose water quality certification requirements on federally-licensed facilities that cause "any discharge" into navigable waters. The question now confronting the Supreme Court is whether the operation of several hydroelectric dams along Maine's Presumpscot River causes discharges, thereby entitling the state to insist that the dams obtain water quality certification. (For a discussion of the broader issues raised by this case, *see* "Supreme Court Re-Examines the Permitting of Intra-Basin Water Transfers in *S.D. Warren Company v. Maine Department of Environmental Protection*," 1 *East. Water L. & Pol'y Rptr.* 20 (Jan. 2006).

Petitioner's Argument

Attorney for petitioner S.D. Warren Co., William Kayatta, Jr., opened the arguments, asserting that the CWA does not authorize states to interfere with dam operations because the facilities do not discharge any pollutant into the water as it flows through the dam and its electricity-generating turbines. Justice John Paul Stevens quickly intervened, "Then, you believe that the character of the water is the same above and below the dams?" Answering in the affirmative, Kayatta reminded the Court that the state has not accused the petitioner of physically adding pollutants to the water. Apparently unsatisfied with this response, Justice Stevens persisted by citing water quality monitoring studies performed on the river and added, "But with slightly higher dissolved oxygen" exhibited in the water flowing out of the dams. "Yes," Kayatta agreed with little elaboration.

Justice David Souter concurred with his colleague's approach, stating that the water exiting the facilities "is the key here" because the issue is whether a discharge is taking place. He countered Kayatta's argument with a hypothetical. "I have trouble with the claim that taking a barrel full of water from above the dams and emptying it below the dams would be the same as" allowing the water to flow through the dams; "It just doesn't follow," argued Souter. Kayatta disagreed, stating that Justice Souter's position is based on viewing the river "as two separate waters, not one" as *South Florida Water Management District v. Miccosukee Tribe of Indians*, 124 S.Ct. 1537 (2004) (*Miccosukee*) requires.

Justice Ruth Bader Ginsburg interjected that Kayatta's *Miccosukee* reference was misplaced. In *Miccosukee*, Ginsburg explained, the Court discussed the analogy in which a ladle of soup is lifted from a pot and then placed back into the same pot. In such a situation, no "addition" occurs. But here, the dam may act like a food processor, churning anything that passes through its turbines. "What you get out is quite different from what you put in," Ginsburg concluded.

The argument then shifted to the propriety of state regulation of discharges under § 401. Chief Justice John Roberts asked if dam operators would rather be regulated by the Federal Energy Regulatory Commission (FERC than by the states under § 401 of the CWA. "Absolutely," Kayatta quickly replied, "FERC imposes uniform national regulation."

Justice Steven Breyer seized on this statement, asking Kayatta, "Don't states have water quality certification" authority to prevent harmful discharges into their rivers and streams, and "doesn't Section 401 require compliance with the states' water quality certification process?" Kayatta responded, "Section 401 is a trigger that gives the state a voice and a mandatory veto over discharges." But to trigger § 401, there must be an actual discharge *into navigable waters*, "not

just a discharge *of water*," Kayatta added.

Justice Samuel Alito, Jr., in his first day hearing oral arguments on the Supreme Court, posed the final question to Kayatta. "Would you consider the Missouri River flowing into the Mississippi River to be a discharge?" Alito asked. When Kayatta explained that this would be a discharge because the two rivers represent two separate water bodies, Alito countered, "They are separate water bodies only because people gave them two different names." Kayatta's attempt to clarify his position was cut short as Justice Alito completed his point and the petitioner's time expired, "And, § 401 does not require that the discharge be from one water body into another."

Respondent's Argument

Maine Attorney General Steven Rowe, representing respondent Maine Board of Environmental Protection, presented the next argument to the Court. Rowe began by explaining that Petitioner's hydroelectric dams operate by transferring water and therefore cause a discharge into the river below the dams. Moreover, Rowe continued, because the dams are facilities that require federal licenses to operate, they must obtain state water quality certification under § 401 of the CWA.

Chief Justice Roberts was the first to respond to the Attorney General's claim regarding discharges from the dams. "So under your interpretation, water going through a mill's water wheel is a discharge," the Chief Justice challenged. Rowe responded, "if the water is taken up and used by the facility or the flow is altered, then yes." On the other hand, if the water merely flows through with little disruption, such as when "a net is put into a river, then no." Rowe emphasized that the with the dams, the flow of the river is altered and "there could be a discharge resulting from that."

This discussion drew the attention of Justice Antonin Scalia, who remarked that Rowe's interpretation of "discharge" does not seem to square with "normal usage." Scalia explained that, like the dams in Maine, rapids in the Colorado River alter the flow of water without adding pollutants. The waters above and below the rapids are part of the same river, and even with the altered flow, it can hardly be said that a discharge has occurred. A single river is involved, Scalia reasoned, and "a river can't discharge into itself." Conversely, a tributary to the Colorado River would be a separate and distinct water body capable of discharging into the river.

Justice Scalia then questioned the State of Maine's assertion that a discharge had occurred despite the failure to allege that the dams added pollutants to the water. "How do you differentiate this from *Miccosukee*?" Justice Scalia asked. Underscoring his point, Scalia added, "The reason we held that the activity in *Miccosukee* was not covered [by the CWA] was because there was no discharge of a pollutant." Rowe disagreed with this characterization of the issue, however, asserting that *Miccosukee* dealt only with the "addition of a pollutant" under § 402 of the CWA not a "discharge" under § 401 and concluded, "If the flow is interrupted by a federally licensed activity, then Section 401 applies." Leaning forward in his chair, Justice Scalia forcefully replied: "*No*. That case involved a *discharge*." The reason this Court found that there was no discharge of a pollutant in *Miccosukee* "wasn't because there was no discharge; it was because no pollutants were added into the water." Scalia concluded, "It's the word 'into' that is the crucial part. There must be a discharge of something *into* navigable waters, and in *Miccosukee* there was no such discharge."

Ending the brief period of silence that followed this heated exchange, Justice Alito shifted the focus of the argument to the policy implications of Rowe's position. Alito asked the Maine's Attorney General whether a state may use its CWA authority to control where hydroelectric dams may be located and operated within the state and, if so, whether the state could "adopt water standards that make any hydroelectric power illegal." Rowe indicated that states have the authority to declare specific "designated uses" for each river flowing through it and that in Maine there is only one river for which the designated use of hydroelectric power generation would be permitted. However, Justice Alito expressed skepticism, responding that such an interpretation would allow states to have widespread authority over federal agencies such as FERC. He added, "You think this is something Congress intended?"

Justice Scalia evidently shared in the new Justice's skepticism. Responding as much to Justice Alito as to counsel for the respondent, Scalia wondered "Doesn't that amount to a massive conflict between federal and state authority." Trying to instill a sense of parity, Rowe offered that states value the importance of

their Clean Water Act authority, but that they also value the importance of hydroelectric power. "They probably don't value hydro power as much as FERC," Scalia replied.

Jeffrey Minear, assistant to the U.S. Solicitor General, presented the final argument of the day to the Court. Arguing on behalf of the United States as *amicus curiae*, he explained that the federal government supports the position of Maine because the CWA confers upon states the authority to regulate discharges into the waterways of the state. Minear stated that for purposes of § 401, it is irrelevant whether or not pollutants are added to the water as it flows through the dams. According to Minear, to trigger the state's water quality certification authority, it is sufficient that the water is transferred from above the dams to below the dams as part of the operation of the federally-licensed facilities. He explained, "Under 401, we're talking about a discharge, not an addition."

Justice Scalia again posed a question that referred back to *Miccosukee*. "Wasn't the point of *Miccosukee* that there was no regulated discharge because the same body of water was involved?" Scalia asked. Minear responded that under the provision of the CWA at issue "it is not odd for a water to discharge into itself because the concern of Section 401 is the discharge, not the water body." Reflecting for a moment, Minear added, "A discharge must come out of something and go into something, but they can be the same thing."

Chief Justice Roberts then turned the argument back toward the perceived incongruity between concurrent state and federal regulation of the dams. The Chief Justice opined that the extensive authority cited by the respondent and the United States is difficult to accept given that it conflicts with the federal interest in using the dams to generate electricity. Roberts asked whether FERC, which did not expressly weigh in on the matter, was consulted about the Administration's support of the state's regulation under § 401. Minear stated that the commission was consulted and that it also supports the state's regulation of the dams.

Conclusion and Implications

As the arguments drew to a close, commentators in the Court surmised that the ultimate decision of the Justices may be much closer than originally had been predicted in the weeks leading up to the arguments. This uncertainty stems from the view that several Justices gave credence to the theory that there may be substantive differences between § 401's state certification requirement for "any discharge" that may harm water quality and § 402's permitting provision for the "discharge of any pollutant" into navigable waters. Water managers throughout the country will await the opinion in this case with keen interest. (PWM/RSD)