*S. D. WARREN CO. V. MAINE BOARD OF ENVIRONMENTAL PROTECTION**

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The Clean Water Act ("CWA") as we know it today came into being with the 1972 Amendments to the Federal Water Pollution Control Act of 1948 ("FWPCA").[1] Congress strengthened the FWPCA with new provisions for federal regulation of particular pollutant discharges, while retaining the traditional state oversight of overall water quality, leading to a new balance between state and federal roles.[2] The Supreme Court, however, had to contend with the changing role of the states in that scheme last Term in *S. D. Warren Co. v. Maine Board of Environmental Protection*,[3] when the state of Maine asserted a right to insert environmental requirements into permits for private dams licensed under the Federal Power Act[4] because the dams produced a "discharge into navigable waters" that prevented the state from reaching designated water quality goals in violation of CWA section 401.[5] Although the scope of the case was confined to non-federal hydropower dams, this initial battle over the interpretation of section 401 represents a larger affirmation that the state and federal governments need flexibility to adjust their roles as CWA enforcement expands from its traditional sphere to address water pollution in all its forms. By interpreting the CWA expansively in this case to allow Maine to control pollution by federally licensed dams, the Supreme Court preserved that flexibility.

BACKGROUND

Three of the CWA's regulatory mechanisms are relevant to *S. D. Warren*. Sections 301 and 402 were the major provisions added in 1972; they lay the groundwork for the National Pollutant Discharge Elimination System ("NPDES"), which provides the federal government with its major role in water quality regulation by prohibiting the discharge of any pol-

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* 126 S. Ct. 1843 (2006).

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[1] *See* JOEL M. GROSS & LYNN DODGE, CLEAN WATER ACT 7–9 (2005) (providing a brief overview of the 1972 amendments).

[2] Pub. L. No. 92-500, 86 Stat. 877 (codified as amended at 33 U.S.C. §§ 1251–1367 (2005)). *See* William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L.J. 215, 260–86 (2003) (offering a detailed account of the passage of the CWA). See Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 557–73 (2005) for a description of amendments to the CWA after 1972.

[3] 126 S. Ct. 1843 (2006).

[4] 16 U.S.C. §§ 791–825r (2005).

[5] 33 U.S.C. § 1341(a)(1) (2005).

lutant except under a federal NPDES permit that imposes technology-based pollution control standards.[6] The NPDES program applies only to "point sources," which are defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."[7] The complement to point source pollution is nonpoint source pollution, which does not emanate from a discrete point; for example, agricultural and urban runoff are prototypical nonpoint sources.[8]

Section 303, adapted from the pre-1972 version of the FWPCA, has been interpreted to govern both point and nonpoint source pollution.[9] It requires states to adopt water quality standards ("WQS") outlining the desired uses of the state's various water bodies, and to implement attainment plans where water quality is too low to support those uses.[10] This section thus leaves nonpoint source regulation largely to the states alone.[11] The point/nonpoint source division is defended as keeping the federal government out of the local land and water use decisions that are intertwined with regulation of activities such as agriculture, decisions that states have the necessary knowledge of local conditions and concerns to make.[12] The federal role is generally limited to funding state efforts and providing some technical guidance.[13] It is states that are supposed to address this side of water quality, by setting Total Maximum Daily Loads ("TMDLs") of pollution—limits that will be sufficient to prevent violation of WQSs—for each water body.[14]

Finally, section 401 of the CWA, the provision at issue in this case, requires that "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State" that the discharge will comply with CWA requirements.[15] In other

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[6] *Id.* §§ 1311, 1342.

[7] *Id.* § 1362(14).

[8] Michael C. Blumm & William Warnock, *Roads Not Taken: EPA vs. Clean Water*, 33 ENVTL. L. 79, 82 (2003).

[9] Pronsolino v. Nastri, 291 F.3d 1123, 1137 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003). *See also* ROBERT W. ADLER ET AL., THE CLEAN WATER ACT 20 YEARS LATER 7, 9 (1993).

[10] 33 U.S.C. § 1313.

[11] *See generally* Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 Envtl. L. Rep. (Envtl. L. Inst.) 10,329 (July 1997) (describing the debate over the proper state and federal roles in regulating water quality leading up to the 1972 amendments).

[12] *See* Robin Kundis Craig, *Local or National? The Increasing Federalization of Nonpoint Source Pollution Regulation*, 15 J. ENVTL. L. & LITIG. 179, 181 (2000) [hereinafter Craig, *Local or National?*].

[13] *See id.* at 188–91; 33 U.S.C. § 1329. *See generally* U.S. EPA, State-EPA NPS Partnership, http://www.epa.gov/owow/nps/partnership.html (last visited Apr. 16, 2006) (on file with the Harvard Environmental Law Review).

[14] *See* 33 U.S.C. § 1313.

[15] *Id.* § 1341(a)(1).

words, this section allows the state to regulate certain federally permitted activities that might interfere with the achievement of state WQSs. The provision was adapted from the 1970 Water Quality Improvement Act, a statute concerning state regulation of water pollution.[16] The Supreme Court has held that under section 401(d) a federal license or permit must incorporate, without amendment, any limitations placed upon the permitted activity by the state in its certification that are designed to attain planned water quality goals, even if they are not related to the specific water quality impacts of the regulated discharge.[17]

All three of these provisions bear on the central question in *S. D. Warren Co. v. Maine Board of Environmental Protection*: what is the definition of the word "discharge"? In the NPDES context, regulated discharges are described as any "discharge of a pollutant," defined in section 502 to mean "any addition of any pollutant to navigable waters from any point source."[18] The bare term "discharge," as it is used in section 401, however, is treated separately in the definitions section: "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."[19] This case asks to what extent the word "discharge" means the same thing in all of these provisions—whether section 401 covers only the point sources encompassed by section 402, or includes a broader range of activities. This is not only an important question in terms of the scope of section 401 itself, but also significant in determining the fate of what may be the first of many attempts by the states to readjust their role within the CWA as their capabilities and priorities change.

The petitioner, S. D. Warren Co. ("Warren"), has federal licenses for five hydropower dams on the Presumpscot River in Maine under section 4(e) of the Federal Power Act, a statute administered by the Federal Energy Regulatory Commission ("FERC").[20] The dams provide electricity for a nearby paper mill.[21] They operate in "run-of-the-river" mode, meaning that they restrain the river in an impoundment, from which the water is piped through turbines to generate power and then released back into the riverbed through a "tailrace channel."[22] The channel may discharge some distance below the dam, leaving a part of the riverbed known as the "by-

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[16] *See* Brief for Respondent Maine Board of Environmental Protection at 27, S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (No. 04-1527) [hereinafter Maine DEP Brief]. *See also* Andreen, *supra* note 2, at 257–58 (outlining the history of the Water Quality Improvement Act in the context of U.S. water pollution control efforts).

[17] PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 711 (1994); 33 U.S.C. § 1341(d).

[18] 33 U.S.C. § 1362(12)(A).

[19] *Id.* § 1362(16).

[20] *See* Brief for Petitioner at 3–5, S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (No. 04-1527) [hereinafter Warren Brief].

[21] *Id* at 3.

[22] *Id.*

pass reach" dry.[23] The licenses are potentially subject to section 401 because the dams, mainly in the impoundment stage, cause changes to the Presumpscot's rate of flow, temperature stratification, nutrient content, sedimentation patterns, and oxygen concentration that contribute to the river's failure to reach relevant WQSs.[24] Additionally, the dam's turbines and the lack of water in the bypass reach block the passage of fish.[25]

Maine waived its opportunity to address these water quality issues in Warren's original FERC licenses, issued between 1979 and 1981.[26] In 1999, Warren applied for renewal of the licenses, which were set to expire in 2001.[27] The renewed licenses would last for forty years, making this the last window for state regulation of the dams until at least 2039.[28] This time, the Maine Department of Environmental Protection ("DEP") found that Warren's dams would cause violations of the Presumpscot's WQSs for dissolved oxygen content, fish habitat, and recreational fishing, and ordered the implementation of certification requirements including minimum water flows, fish passages, and enhancement of recreational facilities.[29]

Warren appealed this order to the Maine Board of Environmental Protection ("BEP"), arguing, *inter alia*, that its dams are not within the scope of section 401 because the flow of water through them does not produce any "discharge into" the river. Warren alleged that the section 401 meaning of "discharge" matches the section 402 definition, requiring the addition of something to the water body.[30] The BEP, however, upheld the DEP order on October 2, 2003.[31] A Maine Superior Court judge affirmed, holding (without much discussion) that the rerouting of the Presumpscot constituted a discharge subject to state certification.[32]

Maine's Supreme Judicial Court ("SJC"), the highest court in the state, sustained the Superior Court decision.[33] The SJC agreed with Warren's argument that "[a]n addition is the fundamental characteristic of

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[23] *Id.* at 3–4.

[24] *See* Brief *Amicus Curiae* of Water Quality and Riverine Scientists in Support of Respondent Maine Department of Environmental Protection at 13–21, S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (No. 04-1527) [hereinafter Water Quality and Riverine Scientists Brief] (offering detailed explanation of how hydropower dams affect water quality).

[25] *Id.* at 12.

[26] Maine DEP Brief, *supra* note 16, at 10.

[27] *Id.*

[28] *Id.* at 11.

[29] Brief for Respondents American Rivers and Friends of the Presumpscot River at 11–12, S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (No. 04-1527) [hereinafter American Rivers Brief]; S. D. Warren Co. v. Me. Dep't of Envtl. Prot., No. AP-03-70, 2004 Me. Super. LEXIS 115, at *3 n.1 (Me. Super. Ct. May 4, 2004).

[30] Warren Brief, *supra* note 20, at 9–10.

[31] *Id.* at 10.

[32] *S. D. Warren*, 2004 Me. Super. LEXIS 115, at *6–*8 (relying on PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 711 (1994)). The judge also approved the specific conditions imposed by the DEP. *Id.*

[33] S. D. Warren Co. v. Bd. of Envtl. Prot., 868 A.2d 210, 215 (Me. 2005).

any discharge," but held that the dams *did* add something to the Presumpscot.[34] Construing an addition to include the redeposit of a substance removed from a water body and then returned to it, the SJC cited one First Circuit case for the proposition that when waters are subject to "private control," they lose their status as "waters of the United States" and thus their redeposit into a water body constitutes an addition and a discharge.[35]

The SJC's application of a "private control" analysis was unprecedented in section 401 jurisprudence; the cited First Circuit case used it to demarcate a discharge under section 402, not section 401.[36] On appeal to the Supreme Court,[37] Warren challenged the use of that test, and instead argued for application of the Supreme Court case *South Florida Water Management District v. Miccosukee Tribe of Indians*.[38] *Miccosukee* was decided in 2004 and dealt with the question of whether a pump transferring water from a canal to a nearby reservoir, without adding any pollutants, produced a "discharge of pollutants" requiring a NPDES permit under section 402.[39] The Supreme Court decided that the water transfer could not be a discharge if the canal and reservoir were not "meaningfully distinct water bodies," quoting the Second Circuit's aphorism that "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.'"[40]

The Supreme Court, in a unanimous decision, rejected this argument in *S. D. Warren* and affirmed the SJC's holding that the Warren dams produced a "discharge" regulable under section 401, though on grounds different from a "private control" test.[41] Justice Souter, writing for the Court, held that the meaning of the term "discharge" in section 401 cannot be confined to the bounds of "discharge of a pollutant" as used in section 402, since "discharge" is defined separately as merely "includ[ing]" the "discharge of a pollutant."[42] In lieu of any specific definition of "discharge" itself, Souter interpreted the term in accordance with its dictionary meaning of "flowing or issuing out."[43] Under that con-

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[34] *Id.*

[35] *Id.* at 215–16 (citing Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1297 (1st Cir. 1996)).

[36] *Dubois*, 102 F.3d at 1297–98.

[37] Warren's petition for certiorari was granted on October 11, 2005. *See* S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 415 (Oct. 11, 2005) (No. 04-1527).

[38] Petition for Writ of Certiorari at 7, S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (No. 04-1527) (citing South Florida Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004)).

[39] *Miccosukee*, 541 U.S. at at 99–103.

[40] *Id.* at 110–12 (quoting Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York, 273 F.3d 481, 492 (2d Cir. 2001)).

[41] S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006). Justice Scalia did not join in Part III-C of the opinion, which rebutted Warren's statutory interpretation arguments.

[42] *Id.* at 1847.

[43] *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 742 (2d ed. 1949)).

struction, the term "discharge" includes the output of water from a dam.[44] Justice Souter rejected Warren's argument that the addition test for section 402 discharges from *Miccosukee* should be applied to section 401 discharges as well, since the two provisions were enacted to serve different purposes.[45]

S. D. Warren also rejected all of the other rationales offered by Warren in urging the Court to construe section 401 more narrowly. Warren had cited some legislative history in support of a claim that the "includes" language of the definition of "discharge" was merely a holdover from a previous iteration that included thermal discharges in the definition, rather than an attempt to broaden the scope of the term.[46] The Court's opinion, however, pointed out that Congress had rejected that version of the definition, and that the Court must assume it had done so "with a purpose in mind."[47]

Justice Souter found support for his broader reading of section 401 in several sources: the use of "discharge" according to its ordinary meaning in past Supreme Court cases;[48] the established practices of EPA and FERC in reading "discharge" as having its "plain meaning";[49] and the broad goals of the CWA.[50] The decision especially relied on *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, in which the Court held that a state could impose certification conditions on a dam to achieve water quality goals that were unrelated to the particular impacts of its discharges.[51] In the course of that analysis, the *PUD No. 1* opinion had treated the tailrace output as a discharge under section 401 without protest by any of the Justices.[52]

The *S. D. Warren* opinion also cited the past practices of the EPA and FERC; both agencies have consistently interpreted section 401 as including federally licensed hydropower dams.[53] Although EPA (the agency charged with executing the CWA) has never formalized this stance in a regulation promulgated through notice-and-comment procedures, it is a view contained in several EPA and FERC guidance documents, as well as briefs before the Supreme Court in prior cases.[54] The Court was undoubtedly also influenced by the fact that the Solicitor Gen-

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[44] *S. D. Warren*, 126 S. Ct. at 1847–48.

[45] *Id.* at 1850.

[46] Warren Brief, *supra* note 20, at 25–33.

[47] *S. D. Warren*, 126 S. Ct. at 1852.

[48] *Id.* at 1847–48.

[49] *Id.* at 1848–49.

[50] *Id.* at 1852–53.

[51] 511 U.S. 700, 711 (1994).

[52] *See id.* at 710–23; Brief for the United States as Amicus Curiae Supporting Respondent at 23–24, S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (No. 04-1527) [hereinafter Solicitor General Brief]. *See also* American Rivers Brief, *supra* note 29, at 18.

[53] *S. D. Warren*, 126 S. Ct. at 1848–49.

[54] Maine DEP Brief, *supra* note 16, at 39–40.

eral, representing the views of both EPA and FERC, supported Maine in this case.[55]

Finally, *S. D. Warren* invoked the larger purposes of the CWA in support of its interpretation of the term "discharge." Justice Souter cited the CWA's commitment to "'restore and maintain the chemical, physical, and biological integrity of the nation's waters,'" in order to "achieve 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.'"[56] He also emphasized the clear evidence that dams do affect water quality for the worse. Stating that Warren's arguments "miss[ed] the forest for the trees," Justice Souter's opinion affirmed state authority under section 401 as essential to a CWA structure that gives states the ultimate responsibility for addressing water pollution.[57]

ANALYSIS

The *S. D. Warren* decision will have important ramifications. On the most basic level, *S .D. Warren* will affect the future of more than a thousand non-federal hydropower dams across forty-five states, many of which will have their licenses come up for renewal in a new era of more aggressive state environmental regulation.[58] A narrower interpretation of the term "discharge" by the Supreme Court could have left the states with no way to regulate the impact of some dams on water quality.[59] This would have created a hole in a statutory scheme that, while assigning to the federal government the narrow task of eliminating water *pollutants*, makes states responsible for managing the larger problem of water *pollution*.[60] The Supreme Court avoided such a gap by leaving in place a flexible, functional version of section 401.

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[55] *See generally* Solicitor General Brief, *supra* note 52.

[56] *S. D. Warren*, 126 S. Ct. at 1852 (quoting 33 U.S.C. § 1251(a)).

[57] *Id.* at 1852, 1853 ("Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns.").

[58] *See* John Richardson, *Maine Dam Case Reaches Top Court*, PORTLAND PRESS HERALD (Maine), Feb. 19, 2006, at A1; American Rivers, Hydropower Dams Licensed by the Federal Energy Regulatory Commission (FERC), http://www.americanrivers.org/site/DocServer/FERC_Map.pdf?docID=3501 (last visited Apr. 16, 2006) (providing a map of all non-federal hydropower dams) (on file with the Harvard Environmental Law Review).

[59] *See* Maine DEP Brief, *supra* note 16, at 23–25 (citing 33 U.S.C. § 1251).

[60] *See id.*; American Rivers Brief, *supra* note 29, at 33–35. *Compare* 33 U.S.C. § 1362(19) (2005) ("The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water") *with id.* § 1362(6) ("The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."). Excluding dams from CWA jurisdiction would also shift more of a regulatory burden onto other sources of pollution. Maine DEP Brief, *supra* note 16, at 25–26.

Now states may impose certification limitations on such dams that will address water quality for the next thirty to fifty years, the usual timespan for FERC licenses.[61] This is especially important because dams are often cited as one of the largest remaining contributors to water pollution problems in the United States.[62] A range of measures, from fish passages to adjustments of water flow patterns, can be employed by dam owners to improve water quality.[63] On the other side of the scale, the effects of this decision may not be entirely positive if regulation adversely affects electricity prices.[64]

Beyond these practical effects, one must also understand the significance of the *S. D. Warren* decision in the context of the CWA as a whole. Section 401 jurisdiction over dams was contested because it was not clear how the term "discharge" in that provision fit in with the use of "discharge" in section 402. Until recently, the NPDES permit regime has been the most widely utilized tool for addressing water pollution in the United States, while the attainment of state WQSs through TMDLs has been only minimally implemented, due to obstacles such as limited state resources to monitor water pollution and a lack of state political will to crack down on sources like agricultural runoff.[65] Thus, while the interpretation of section 401 remained murky, it is the NPDES "point source" conception of discharge as the addition of a pollutant to a water body at

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[61] For a list of current licenses, when they were issued, and when they will expire, see FERC, Hydropower—Licensing, http://www.ferc.gov/industries/hydropower/gen-info/licensing/app-new.asp (last visited Apr. 7, 2006) (on file with the Harvard Environmental Law Review).

[62] *See* Nat'l Wildlife Federation v. Gorsuch, 530 F. Supp. 1291, 1297–1303 (D.D.C. 1982) (thoroughly discussing a range of dam-induced water quality problems); U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL WATER QUALITY INVENTORY 14, 22 (2000), *available at* http://www.epa.gov/305b/2000report (identifying hydrological modification, including dam construction, as the second most prevalent cause of water body impairment for rivers, streams, reservoirs, and lakes). *See also* Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL. L. 29, 51 (2003).

[63] *See Amicus Curiae* Brief of National Wildlife Federation, et al., in Support of the Respondent at 25, S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (No. 04-1527). The need for such measures is particularly acute in the Pacific Northwest, where fish populations have been significantly reduced due to the interference of hydropower dams with their natural breeding cycles. *See* Blumm & Warnock, *supra* note 8, at 84 n.21; Jory Ruggiero, *Toward a Law of the Land: The Clean Water Act as a Federal Mandate for the Implementation of an Ecosystem Approach to Land Management*, 20 PUB. LAND & RESOURCES L. REV. 31, 60 (1999).

[64] Hydropower dams are the major source of renewable energy in the U.S., and provide about 10% of the nation's electricity supply. Brief for *Amici Curiae* Edison Electric et al. in Support of Petitioner at 3, 7, S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (No. 04-1527). Less than half of that electricity, however, is generated by non-federal, licensed hydropower dams. National Hydropower Association, Hydro Facts, http://www.hydro.org/hydrofacts/facts.asp (last visited Apr. 7, 2006) (approximately 40 gigawatts out of a national capacity of 100 gigawatts are produced by non-federal hydroelectric dams) (on file with the Harvard Environmental Law Review).

[65] Oliver A. Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, 27 Envtl. L. Rep. (Envtl. L. Inst.) 10,391, 10,391-92 (Aug. 1997).

one discrete point that has been entrenched in agency regulations, federal litigation, and other analyses of the definition of discharge.

Now that point source pollution has been regulated to the hilt, the clear leading cause of water quality impairment is nonpoint source pollution.[66] But efforts to jumpstart effective implementation of the WQS and TMDL provisions of the CWA to address nonpoint pollution have been less than a resounding success. A series of lawsuits successfully forced states to create and apply TMDLs in the 1990s with regard to some individual states and water bodies.[67] But the Water Quality Planning and Management Regulation, a rule proposed by the Clinton-era EPA that would have mandated the completion of TMDLs and their incorporation into water quality plans in all states was blockaded by Congressional action and widespread criticism in 2000 and finally shelved in 2003.[68]

Against that background, some scholars have looked to section 401 as a possible "sleeping giant" that could at least be used to regulate federally licensed nonpoint source pollution, such as runoff from federal lands used for grazing.[69] Their argument is that section 401 should govern any federally licensed activity that contributes pollution to a water body, even if it does not do so through a discrete discharge.[70] To support that interpretation, proponents point to the broad language of the provision ("*any* activity . . . which may result in *any* discharge"),[71] and also invoke the broader purpose of the CWA: the promotion of the chemical, physical, and biological health of U.S. waters, not just regulation of one category of water pollution.[72] Justice Souter's reference to that overarching aim in his opinion[73] suggests that the above argument may at least be viable, if not guaranteed to support extension of section 401's scope to nonpoint source pollution.[74]

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[66] *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 62, at ES-3. *See also* Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 ECOLOGY L.Q. 201, 202–03 (1996).

[67] Oliver A. Houck, *The Clean Water Act TMDL Program V: Aftershock and Prelude*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10,385, 10,387 (Apr. 2002) [hereinafter Houck, *TMDLs: Aftershock and Prelude*].

[68] *See* EPA, Final Rule, Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the NPDES Program in Support of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. 13,608 (Mar. 19, 2003).

[69] *See, e.g.*, Donahue, *supra* note 66, at 204–06.

[70] *See id.* at 218–26.

[71] 33 U.S.C. § 1341(a)(1) (2005) (emphases added).

[72] *Id.* § 1251(a) ("The objective of this Act . . . is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."). *See* Adler, *supra* note 62, at 38–39.

[73] S. D. Warren v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843, 1853 (2006). *See also supra* notes 56–57 and accompanying text.

[74] The Ninth Circuit rejected the application of section 401 to nonpoint sources in 1996. Or. Natural Desert Ass'n v. Dombeck, 151 F.3d 945, 950 (9th Cir. 1996). That opinion, however, cited the creation of the NPDES program as fundamentally reorienting the CWA toward the regulation of only point source pollution, rather than looking at the larger

The question of whether section 401 covers nonpoint sources highlights a larger issue in the CWA: the usefulness of the line drawn between nonpoint and point source regulation. Congress inserted that distinction into the FWPCA in 1972 as a basis for point source regulation through the NPDES provisions, but failed to make clear how it would interact with the state and federal roles set out by the CWA. Essentially, Congress bit off a piece of the water pollution problem—point sources that added discrete pollutants to the water—and designated it as an element amenable to federal enforcement; but that logic does not necessarily indicate how other kinds of pollution should be regulated, or by whom.[75] Thus, as the spotlight has shifted from point to nonpoint source pollution, more litigation has arisen that attempts to settle new questions not resolved by precedents dealing with section 402, such as whether water bodies polluted only by nonpoint sources must have enforceable TMDLs,[76] whether section 401 does in fact cover nonpoint sources,[77] and, as in *S. D. Warren*, what exactly the term "discharge" entails throughout the CWA.[78]

S. D. Warren shows that such novel problems should not be governed by the formalistic approach of section 402, as embodied in *Miccosukee*. Instead, Justice Souter looked to more functional factors, such as past agency practices, the overall structure of the CWA, and the actual effect of dams on water quality. In so doing, he avoided the tangled web that the Court ran into during oral argument in trying to apply the meaning of "discharge" to the actual action of water going through a dam. Warren had tried to raise the formalistic question of whether a river can discharge into itself.[79] Justice Alito highlighted the essentially unhelpful nature of this query when he pointed out the arbitrariness of asking if a river discharges into itself when the very designation of a river as "the same" water body above and below a dam is dependent on a human determination rather than any inherent property of the river itself.[80] Justice Souter was able to sidestep this muddle by holding merely that dam outputs do fall within the ambit of section 401, without addressing which activities would *not* be

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purposes of the Act to interpret it broadly as Justice Souter did here. *See id.* at 949 (Section 401 "was thus amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.").

[75] *See* Craig, *Local or National?*, *supra* note 12, at 184–86.

[76] Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002) (holding that even water bodies polluted only by nonpoint sources must have enforceable TMDLs).

[77] Or. Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998) (holding that section 401 governs only point source discharges).

[78] See generally Blumm & Warnock, *supra* note 8, for recent cases in which judges have tried to determine how the CWA applies to sources that are not conventional point sources.

[79] Reply Brief for Petitioner at 1–2, S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (No. 04-1527) [hereinafter Warren Reply Brief]. *See also* Transcript of Oral Argument at 34, 37, S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (No. 04-1527) [hereinafter Transcript of Oral Argument].

[80] Transcript of Oral Argument, *supra* note 79, at 26.

regulable under that provision, thus avoiding the need to draw unyielding lines determining what falls inside and outside that provision's reach.

Section 401 is particularly unsuited to broad rules as to its application. As a provision created for situations in which federal actions intrude on an area of *state* jurisdiction—the overall regulation of water quality—section 401 was meant to cover a gray area, one that Congress did not think was amenable to federal regulation alone.[81] The rules of section 402 governing the scope of federal regulation, therefore, should not apply. Rather, as Justice Souter recognized, the CWA's approach to water quality regulation as a whole should come to the fore; it requires "cooperative federalism" such that the state and federal governments each take on some responsibilities according their areas of expertise.[82] That is why states' voices in federally licensed activities should be demarcated by a functional analysis of whether they or the federal government can best realize the overall goals of the CWA in a given situation.[83] This would best serve the intention of section 401 and the CWA of cooperative regulation by the states and the federal government.

In the oral argument for this case, the Court expressed concern that including dams within the ambit of section 401 would upset the state-federal balance, excluding federal control in favor of states that might use it unwisely.[84] Warren had pointed out that FERC may independently impose environmental conditions on a hydropower licensee, and could in fact balance environmental considerations with national concerns such as energy supply better than the states, making the federal agency best suited to the task.[85] But that may not be enough. To some extent, it might leave state waters at the mercy of FERC's whims, when the CWA in fact favors state authority[86] and holds the states ultimately responsible for attaining WQSs.[87]

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[81] Donahue, *supra* note 66, at 233. *See also* S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843, 1853 (2006) ("State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution.").

[82] *See* Robin Kundis Craig, *Beyond* SWANCC*: The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL. L. 113, 122 (2003) ("[T]he statutory federalism embodied in the CWA . . . reflects a complex balancing between federal and state interests in water quality.").

[83] One might argue that the *specific* goals of the CWA with respect to dam regulation cannot be discerned except through statutory interpretation. Given that Congress, however, does not seem to have definitively addressed dams when passing the 1972 Amendments, the *overall* structure of the statute seems to be the most helpful guide.

[84] Chief Justice Roberts asked at oral argument whether states might set WQSs so as to completely disallow use of any of its waterways for hydropower. Transcript of Oral Argument, *supra* note 79, at 58–59. The respondents were quick to assure the Court that such an extreme action was unlikely, and in any case presented a federal preemption issue that should not be dealt with in the instant case. *Id.* at 59.

[85] Warren Brief, *supra* note 20, at 6–7.

[86] The language of the CWA would seem to favor state authority. *See* 33 U.S.C. § 1251(b) (2005) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate [water] pollution.").

[87] *See* 33 U.S.C. § 1313(d)-(e).

It seems far more likely that FERC would inadequately provide for factors such as fish passage than that a state would ban an industry from every single one of its rivers. Furthermore, if states did go too far in restricting hydropower, the courts could intervene on preemption grounds. Alternatively, Congress could step in, as it did in 1986 when it amended the Federal Power Act to force FERC to consider environmental factors more fully in its decisions.[88] Whatever the calculus, federally licensed activities that impinge on state water quality implicate both state and federal concerns and expertise, and cannot just be assigned to one or the other for resolution as section 402 does for point source pollution.

Moreover, section 401 questions are best decided on a case-by-case basis, rather than through formal distinctions, because just what the relationship between state and federal regulation should be is far from settled.[89] Now, when states' utilization of the CWA is in upheaval, is not the time to decide that question. In the last two decades or so, states have become far more active in water quality regulation than they were when the CWA was passed.[90] This may be because of citizen suits and increased federal requirements rather than an enthusiasm for improved water quality, but at the very least increased involvement has improved the capacity of state agencies to deal with water quality issues, or in the alternative given them greater incentives (in the form of legal requirements and more

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[88] *See* H.R. REP. NO. 99-507, 99th Cong., at 21–22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2508–09 ("It is intended that the Commission give significant attention to, and demonstrate a high level of concern for all environmental aspects of hydropower development . . . ."); H.R. CONF. REP. NO. 99-934, at 21 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2537, 2538 ("The amendments expressly identify fish and wildlife protection, mitigation, and enhancement, recreational opportunities, and energy conservation as nondevelopmental values that must be adequately considered by FERC when it decides whether and under what condition to issue a hydroelectric license for a project.") (both cited in Dep't of the Interior v. FERC, 952 F.2d 538, 545 (D.C. Cir. 1992)).

[89] *Compare* Craig, *Local or National?*, *supra* note 12, *and* Andrew P. Morriss et al., *The Failure of EPA's Water Quality Reforms: From Environment-Enhancing Competition to Uniformity and Polluter Profits*, 20 UCLA J. ENVTL. L. & POL'Y 25 (2003) (advocating for local regulation of water pollution) *with* Houck, *TMDLs: Aftershock and Prelude*, *supra* note 67 (arguing for a mix of federal and state measures) *and* Blumm & Warnock, *supra* note 8 (chastising EPA for failing to take on more of a prominent role in water quality regulation).

[90] *See* Craig, *Local or National?*, *supra* note 12, at 218–28 (citizen suits spurring more stringent regulation of point sources and formulation of TMDLs by states); EPA, National Section 303(d) List Fact Sheet, http://oaspub.epa.gov/waters/national_rept.control#APRTMDLS (last visited Apr. 16, 2006) (table of approved TMDLs by year shows a drastic increase in the number approved each year since 1995) (on file with the Harvard Environmental Law Review); Brian Weeks, *Trends in Regulation of Stormwater and Nonpoint Source Pollution*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,300, 10,301–05 (June 1995) (describing progress of state compliance with CWA provisions requiring municipal regulation of stormwater runoff since 1987, and development in cooperation with the EPA of technical capacities for watershed-level regulation); Clifford Rechtschaffen, *Competing Visions: EPA and the States Battle for the Future of Environmental Enforcement*, 30 Envtl. L. Rep. (Envtl. L. Inst.) 10,803, 10,805-06 (Oct. 2000) ("[T]here is little question that state agency staffs are far more professional and competent now than in the 1970s.").

public scrutiny) to demand federal money and technical assistance.[91] As Warren noted, the use of the CWA certification process is itself a relatively new phenomenon.[92]

Point source discharges were a discrete segment of water pollution that could be dealt with by the federal government alone. But the problems of nonpoint source pollution and federally licensed activities require the federal and state governments to engage in a dialogue about the best regulatory approach and who should apply it. The history of the CWA indicates that states should have a strong voice in water quality issues. But, even if it would ultimately be more efficient for FERC alone to regulate the effects of dams on water quality, that decision on how to regulate should be reached through the accumulated experience of the players involved. The Supreme Court to some extent acknowledged the lack of any definitive answers in this arena by looking in its decision on agency experience in administering the CWA and the Court's own recent encounter with section 401 in *PUD No. 1*,[93] instead of imposing a stringent judicial test insensitive to the possibility for significant changes in water pollution regulation in the United States.

When Congress created the CWA in 1977, it reserved a unique place for the states to take the lead in remedying water pollution. That might have been the right approach, or it might not have; the debate continues over whether federal or state government is better suited to regulate matters such as nonpoint source pollution.[94] But at the very least, *S. D. Warren* preserves the flexibility in state and federal roles necessary for us to resolve that debate through experimentation and experience, while section 401 offers regulatory opportunities that will ensure that the push and pull between state and federal regulation continues.

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[91] As one EPA-funded study put it:

> [G]reater investment in the assessment of impaired waters in state biennial reports under 33 U.S.C. 1315(b) is also playing a role in the evolution of state nonpoint source authorities. These state assessments and improved technical tools and capacity, including the use of biological indices, are beginning to reveal the locations and scale of pollution problems only guessed at in prior decades. The identification of particular impaired waters can lead to political pressures at the state level to adopt control and abatement measures. In sum, this area is one in which state laws are changing.

ENVTL. L. INST., ENFORCEABLE STATE MECHANISMS FOR THE CONTROL OF NONPOINT SOURCE WATER POLLUTION 3 (1997), *available at* http://www.epa.gov/owow/nps/elistudy/nonpoint.pdf.

[92] Warren Reply Brief, *supra* note 79, at 11–16.

[93] S. D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843, 1848 (2006).

[94] *See supra* note 89 and accompanying text.