



ENVIRONMENTAL AND ENERGY

**Ruling Hints Roberts Court
Isn't Hide-Bound Conservative**

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BY NORMAN A. DUPONT

A unanimous U.S. Supreme Court ruled last month in favor of fish, eels and other aquatic life over the protests of a New England-based paper mill manufacturer. Despite predictions that the new conservative Supreme Court with a new chief justice (Roberts) and a new associate justice (Alito) would remake the Court into a pro-business conservative body, the early evidence from this environmental case suggests that a much more nuanced view of the new Roberts Court may be in order.

In *S.D. Warren Co. v. Maine Board of Environmental Protection*, No. 04-1527, the preliminary signs suggested serious trouble for environmental groups. A business owner, S.D. Warren Co., sought to renew a federal license on five hydroelectric dams it had held for years on a river in Maine. The federal agency in charge of the renewal, the Federal Energy Regulatory Agency, conditioned the renewal of the permit to use the dams for power for the company's paper mills upon receiving a state environmental permit. Although Warren went ahead with the permitting process, it steadily protested this overly zealous environmental rule. The company's basic position was simple: All that it was doing was holding the same river water in a temporary holding basin and then releasing that same river water back into

the river. The company's position was that this environmental regulation was totally unnecessary—why regulate the injection of water into the same river that it came from? As counsel for the company put it, "Warren's position is that the flowing of that single body of water through Warren's five dams is not a discharge into that same single body of water."

Moreover, the company had what it thought was a favorable Supreme Court case from 2004, which addressed the very next statutory provision of the environmental statute in question, the Clean Water Act. In that 2004 case, the Supreme Court stated that a "pump" between a canal and impoundment did not produce a "discharge" within the meaning of that statutory provision, which immediately followed the provision that the Warren Co. was now challenging.

Notwithstanding both an apparent appeal to common sense and a decision from only two years ago, the Roberts Court came out in full support of the environmental groups. First, the court explained that the word "discharge" did not, with respect to the federal permitting requirement, require even the discharge of a pollutant. Rather, the mere "flowing" of water from one area of the dam into the very same river, a Maine river called the Presumpscot, constituted a literal "discharge." Second, the court distinguished its own 2004 decision, finding that that decision dealt with a separate statutory provision. Notwithstanding that both provisions were part of the Clean Water Act, the Supreme Court essentially held that discharge under Section 401 of the Clean Water Act could





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and does mean something different than discharge under Section 402 of that same law.

But, the most significant aspect of this decision is not the final legal analysis of specific words and precise distinctions of statutory provisions involved in prior cases. Rather, the Roberts Court emphasized its willingness to focus on the broad environmental picture—in this case noting that the company’s argument “miss the forest for the trees.” The “forest” in this case was the fact that even the temporary impoundment of river water could change the environmental quality of that water. The use of dams in the river could reduce oxygen circulation in the water, causing an impact on fish and other organisms in the water. The court, in reaching its conclusions specifically alluded to briefs by such environmental friendly groups as the National Wildlife Federation and Trout Unlimited. This position was espoused not just by those justices who are traditionally accorded the liberal label but also by justices from the more conservative side of the spectrum. In the oral argument of this case, it was Justice Kennedy who emphasized that the oxygen content of the water behind one of the company’s dams could be changed to a significant degree by the very nature of the impoundment of the water.

One might conclude that the Roberts Court has demonstrated a broad concern for environmental issues. A second understanding of this case is that the decision is a narrow one and does not portend a broader environmental concern on the part of the entire court. What is clear, however, is that in its first published decision since two new justices have arrived at the court, is that the

Roberts Court cannot be simply dismissed as a hide-bound conservative instrument of a Republican president or a Republican Senate. Instead, it appears to be very focused on specific legal arguments in specific cases, thereby reaching results that might confound the outside observer who simply tries to count the votes.

Norman A. Dupont is of-counsel at Richards, Watson & Gershon in Los Angeles. He is a member of the Firm’s Environmental and Energy department and Water Rights and Water Law Practice Group.

FOR ADDITIONAL INFORMATION REGARDING RW&G’S ENVIRONMENTAL AND ENERGY DEPARTMENT, PLEASE CONTACT NORMAN A. DUPONT AT NDUPONT@RWGLAW.COM

LOS ANGELES

355 South Grand Avenue, 40th Floor
Los Angeles, California 90071-3101
Telephone: 213.626.8484
E-mail: la@rwglaw.com

ORANGE COUNTY

1 Civic Center Circle, PO Box 1059
Brea, California 92822-1059
Telephone: 714.990.0901
E-mail: oc@rwglaw.com

SAN FRANCISCO

44 Montgomery Street, Suite 3800
San Francisco, California 94104-4811
Telephone: 415.421.8484
E-mail: sf@rwglaw.com

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