No. 05-628

In the Supreme Court of the United States

STATE OF NORTH DAKOTA, THROUGH THE NORTH DAKOTA DEPARTMENT OF HEALTH, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

JAMES C. KILBOURNE
ROBERT H. OAKLEY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Army Corps of Engineers is immune from enforcement of state-law water quality standards promulgated pursuant to the Clean Water Act, 33 U.S.C. 1313, for the release of water from a Corps-operated reservoir on the Missouri River Main Stem System.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes—Continued: Page

In the Supreme Court of the United States

No. 05-628

STATE OF NORTH DAKOTA, THROUGH THE NORTH DAKOTA DEPARTMENT OF HEALTH, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 418 F.3d 915. The memorandum and order of the district court granting the federal defendants' motion to dismiss (Pet. App. 10-20) is reported at 320 F. Supp. 2d 873.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2005. The petition for a writ of certiorari was filed on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a series of lawsuits filed by various States and other entities concerning the operation of dams and reservoirs along the Missouri River by the United States Army Corps of Engineers (the Corps). The Judicial Panel on Multidistrict Litigation consolidated those lawsuits for pretrial proceedings. As is relevant here, petitioners, the State of North Dakota and various state agencies and officials, alleged that the Corps violated state-law water quality standards promulgated pursuant to the Clean Water Act, 33 U.S.C. 1313, by releasing water from Lake Sakakawea, one of the reservoirs along the Missouri River. The district court granted the federal defendants' motion to dismiss. Pet. App. 10-20. The court of appeals affirmed. *Id.* at 1-9.[1]

1. Congress enacted the Flood Control Act of 1944 (Flood Control Act or FCA), ch. 665, 58 Stat. 887, to provide for the comprehensive management of the waters of the Missouri River Basin. Along with other legisla-

[1] In a separate decision, the court of appeals rejected the claims of various other parties against the Corps and other federal defendants. North Dakota and South Dakota have filed a petition for a writ of certiorari from that decision, challenging the court of appeals' disposition of the claims of downstream parties under the Flood Control Act of 1944, ch. 665, 58 Stat. 887. See *North Dakota* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-611 (filed Nov. 14, 2005). In addition, various environmental groups have filed their own petition for a writ of certiorari from that decision, challenging the court of appeals' disposition of their claims under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* See *Environmental Defense* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-631 (filed Nov. 14, 2005). The federal respondents are filing separate briefs in opposition to those petitions for writs of certiorari.

tion, the FCA authorized the Corps to build and operate a series of six dams and associated reservoirs, known as the Main Stem System, along the upstream portion of the river in Montana, North Dakota, South Dakota, and Nebraska; this case concerns the Corps' operation of one of those dams, Garrison Dam, which is located on Lake Sakakawea in North Dakota.[2] The FCA authorizes the Corps to contract for the use of surplus water available at the reservoirs, 33 U.S.C. 708, and to "prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs," provided that "the operation of any such project shall be in accordance with such regulations," 33 U.S.C. 709. The FCA and its legislative history identify various purposes that the Corps is to serve in operating the Main Stem System, including flood control, provision of hydroelectric power, irrigation, recreation, navigation, protection of the water supply and water quality, and preservation of fish and wildlife. See, *e.g.*, *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 499-502 (1988).

2. Congress enacted the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The CWA specifically prohibits "the discharge of any pollutant by any person" except

[2] The six Main Stem System dams are as follows (with the associated reservoirs identified in parentheses): Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), Gavins Point Dam (Lewis and Clark Lake), and Fort Peck Dam (Fort Peck Lake). Congress authorized construction of the Fort Peck Dam in Montana in the earlier River and Harbor Act of 1935, ch. 831, 49 Stat. 1028, for the purpose of flood control and navigation; in 1938, Congress amended that statute to add the purpose of providing hydroelectric power, see Act of May 18, 1938, ch. 250, 52 Stat. 403.

in compliance with prescribed statutory requirements, including permitting requirements. 33 U.S.C. 1311(a). Although the release of dredged or fill material can constitute the "addition of [a] pollutant * * * from [a] point source," and therefore the "discharge of [a] pollutant," for purposes of the CWA, see 33 U.S.C. 1311(a), 1344, 1362(6) and (12), the release of water from a reservoir has consistently been held not to constitute the "discharge of [a] pollutant," and the Corps has therefore not been required to obtain a CWA permit before releasing water from a Corps-operated reservoir. See, *e.g.*, *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 584-588 (6th Cir. 1988); *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165, 168-169 & nn.39-40, 174-177 (D.C. Cir. 1982).

The Clean Water Act also requires States to promulgate water quality standards, which must be approved by EPA. 33 U.S.C. 1313. Water quality standards are specific to particular bodies of water and consist primarily of (1) the "designated uses" of the bodies involved (*e.g.*, navigation, recreation, or supplying water to the public), and (2) "water quality criteria" based on those designated uses. 33 U.S.C. 1313(c)(2). The CWA provides for the imposition of more stringent restrictions, where necessary, in order to ensure that water quality standards are met. 33 U.S.C. 1311(b)(1)(C); see *Arkansas* v. *Oklahoma*, 503 U.S. 100, 101 (1992).

The Clean Water Act contains a general waiver of federal sovereign immunity, providing that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements[] * * * respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. 1323(a). In language added in

the 1977 amendments to the CWA, the waiver provision states that an enforcement action may be brought in state court and that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." *Ibid.* A separate section of the CWA, however, specifically provides that the CWA "shall not be construed as * * * affecting or impairing the authority of the Secretary of the Army * * * to maintain navigation." 33 U.S.C. 1371(a).

3. For several years beginning in the late 1990s, the Missouri River Basin experienced prolonged drought conditions, which forced the Corps to make decisions about the allocation of water among competing interests. 05-611 Pet. App. 36. In 2002, North Dakota sought and obtained a preliminary injunction in federal district court under the Flood Control Act requiring the Corps to limit discharges from, and maintain water levels in, Lake Sakakawea. *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1019-1022 (8th Cir. 2003), cert. denied, 541 U.S. 987 (2004). In 2003, that injunction was vacated. *Id*. at 1030-1032.

North Dakota also sought to use its CWA water quality standards to prevent the Corps from discharging water from Lake Sakakawea. Under those state standards, Lake Sakakawea's designated use (as a "Class 1 lake") is fishing, and one water quality criterion is that the dissolved oxygen level in the lake must remain above 5 milligrams per liter. N.D. Admin. Code § 33-16-02.1-09(1)(f), (3)(e)(1), and Table 1 (2001). On March 27, 2003, the North Dakota Legislature passed an "emergency" bill amending its water quality statute to authorize the State to seek injunctive relief for the "threat-

ened or continuing violation of a water quality standard" by any person. N.D. Cent. Code § 61-28-06(3) (2003).

4. On April 29, 2003, petitioners filed suit against the Corps and two federal officials in state court, alleging that the Corps' management of Lake Sakakawea would violate North Dakota's water quality standards by reducing the amount of cold-water habitat necessary to support fish populations in the lake. The state court entered a temporary restraining order in which it ordered the Corps to reduce its releases and to "show cause" why further reductions should not be ordered. Pet. App. 77-88. Without addressing 33 U.S.C. 1371(a), the CWA provision specifically applicable to the Corps, the court reasoned that the Corps was subject to suit under 33 U.S.C. 1323(a), the CWA provision generally waiving the federal government's sovereign immunity. Pet. App. 78. The following day, the federal defendants removed the case to the United States District Court for the District of North Dakota. *Id.* at 57. The federal district court dissolved the temporary restraining order, *id.* at 55-76, and then denied petitioners' motion for a preliminary injunction, *id.* at 21-54. As to the latter, the court held that petitioners were unlikely to succeed on the merits because it was "likel[y] that the Corps of Engineers will be able to successfully argue it is immune from suit under [Section 1371(a)]." *Id.* at 54.

5. In the meantime, North Dakota and other parties had filed lawsuits in various district courts, seeking to compel the Corps to alter its operation of the Main Stem System. After the district court denied the motion for a preliminary injunction in this case, the Judicial Panel on Multidistrict Litigation consolidated all of the lawsuits, including this one, for pretrial proceedings before a single court in the District of Minnesota. *In re Operation*

of the Missouri River Sys. Litig., 277 F. Supp. 2d 1378, 1379 (2003). The federal defendants subsequently moved for dismissal of petitioners' complaint in the instant case.

The Minnesota district court granted the motion to dismiss. Pet. App. 10-20. At the outset, the court noted that waivers of sovereign immunity must be strictly construed. *Id.* at 14. The court suggested that it was "possible," if not certain, that Section 1323(a) was applicable to discharges from reservoirs, insofar as the Corps had "jurisdiction" over Lake Sakakawea. *Id.* at 15-16. The court reasoned, however, that, "even if § 1323(a) constituted a waiver of sovereign immunity in this particular case, it would not be a complete waiver of sovereign immunity." *Id.* at 16. The court recognized that Section 1371(a) "provides sovereign immunity for the Corps when compliance with [state] water quality standards might affect or impair the authority of the Corps to maintain navigation." *Ibid.* The court then noted that, under the Flood Control Act, the Corps was required to manage the waters of the Missouri River Basin in such a way as to both control flooding and maintain navigation. *Id.* at 16-17. The court reasoned that "the Corps is faced with an either-or situation: it can either comply with North Dakota's water quality standards and potentially violate its statutory obligation under the FCA to maintain navigation, or it can operate as required under the FCA and potentially violate North Dakota's water quality standards." *Id.* at 17. "Although it is possible that the Corps may be able to simultaneously meet both its obligations," the court concluded, "the Court simply cannot require the Corps to always do both." *Ibid.* The court added that principles of preemption supported its conclusion, because "[r]equiring that the Corps always

comply with North Dakota's state water quality laws in its operation of the Missouri River impairs the Corps' ability to maintain navigation, and its ability to comply with the FCA." *Id.* at 19.

6. The court of appeals affirmed. Pet. App. 1-9. Like the district court, the court of appeals first noted that waivers of sovereign immunity must be strictly construed. *Id.* at 4. The court reasoned that, "[o]n its face, § 1371(a) exempts the Corps[] * * * from complying with the CWA when its authority to maintain navigation would be affected." *Id.* at 5. "It is also clear from the face of North Dakota's complaint," the court continued, "that North Dakota is attempting to use its state water-quality standards to affect the Corps' authority to release water from Lake Sakakawea to support navigation." *Ibid.* The court concluded that "[t]here are no exceptional circumstances here to indicate that Congress would not have intended the § 1371(a) 'navigation exception' to the waiver of sovereign immunity to apply in this case." *Ibid.*

The court of appeals then rejected petitioners' contention that the language or legislative history of the 1977 amendments to the CWA altered its analysis. Pet. App. 6. The court reasoned that the 1977 amendments, "while emphasizing that the limited waiver of sovereign immunity in § 1323(a) applied to the Corps, left the clearly worded navigation exception in § 1371(a) intact." *Ibid.* The court noted that, "[i]n any event," "[t]he legislative history indicates that Congress' intent in enacting the 1977 amendments was to subject the Corps' *channel-dredging* activities to state water-quality standards promulgated pursuant to the CWA, while preserving its authority to maintain navigation." *Id.* at 6 n.4. In light of its interpretation of Section 1323(a), the court did not

reach the issue whether Section 1323(a) was even applicable to releases of water from reservoirs. *Id.* at 5 n.3.

The court of appeals also rejected petitioners' contention that whether compliance with North Dakota's water quality standards would affect the Corps' authority to maintain navigation was a factual question. Pet. App. 7. The court reasoned that, "[i]f each state is allowed to use its reservoir water-quality standards as a tool to control how the Corps must release water from the main stem reservoirs, the 'authority of the Secretary of the Army . . . to maintain navigation' will obviously be affected." *Id.* at 8 (quoting 33 U.S.C. 1371(a)). Finally, the court of appeals, like the district court, noted that "the above result is also supported by the principles of preemption," *ibid.*, because "[a]llowing individual states to use their water-quality standards to control how the Corps balances water-use interests would frustrate the design of the FCA," *id.* at 9.

ARGUMENT

Petitioners contend (Pet. 16-30) that the court of appeals erred by holding that the Corps of Engineers is immune from enforcement of state-law water quality standards promulgated in accordance with the Clean Water Act for the release of water from a Corps-operated reservoir on the Missouri River Main Stem System. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. Petitioners do not contend that the decision below conflicts with any decision of another court of appeals. Instead, petitioners contend (Pet. 29) only that the holding of the court of appeals is "inconsistent with the man-

date of this Court" in *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology*, 511 U.S. 700 (1994). As petitioners correctly note (Pet. 29), in *PUD No. 1*, the Court rejected the proposition that the CWA "is only concerned with water 'quality,' and does not allow the regulation of water 'quantity.'" 511 U.S. at 719. The Court ultimately held that a State possessed the authority under Section 401 of the CWA, 33 U.S.C. 1341, to impose minimum stream flow requirements as a means of enforcing its water quality standards. 511 U.S. at 723. In *PUD No. 1*, however, the Court considered only the substantive scope of Section 401 of the CWA. It did not address any issue relating to the immunity of federal agencies under the CWA generally, much less the immunity of the Corps concerning discharges from Corps-operated reservoirs more specifically, and it likewise did not resolve any questions in that case concerning possible conflicts between state standards and federal licensing decisions. See *id.* at 722. Because *PUD No. 1* is inapposite, petitioners identify no conflict that warrants this Court's review.[3]

2. In any event, the court of appeals correctly held that the Corps is immune from enforcement of state-law water quality standards for the release of water from Lake Sakakawea. The CWA contains a general waiver

[3] For much the same reason, it is unnecessary for the Court to hold this petition pending its disposition of *S.D. Warren Co.* v. *Maine Department of Environmental Protection*, cert. granted, No. 04-1527 (Oct. 11, 2005). That case presents the question whether the release of water from a dam constitutes a "discharge" for purposes of the state certification requirement of Section 401(a)(1) of the CWA, 33 U.S.C. 1341(a)(1). Like *PUD No. 1*, *S.D. Warren Co.* concerns only the substantive scope of Section 401 of the CWA, not the application of state standards in other contexts or the immunity of a federal agency from enforcement of such standards.

of sovereign immunity, providing that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements[] * * * respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity," and it provides for enforcement of those requirements in court. 33 U.S.C. 1323(a). The CWA, however, also specifically provides that the statute "shall not be construed as * * * affecting or impairing the authority of the Secretary of the Army * * * to maintain navigation." 33 U.S.C. 1371(a). The most natural reading of those provisions is that Section 1371(a) provides an exception to the general waiver of sovereign immunity in Section 1323(a) where compliance with state-law water quality standards would interfere with the Corps' statutory obligation to maintain navigation. As both of the lower courts noted (Pet. App. 4, 14), that reading is consistent with the oft-cited principle that "a waiver of sovereign immunity must be strictly construed in favor of the sovereign." *Orff* v. *United States*, 125 S. Ct. 2606, 2610 (2005); see, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992).

In this case, although petitioners contended (see Pet. App. 7-8) that the Corps could have fulfilled its statutory obligation to maintain navigation through other means (*e.g.*, by constructing new outflow structures to ensure that only warmer water was released from Lake Sakakawea), and although petitioners note (Pet. 22) that their complaint "contains no reference to, and no request for, any relief relating to navigation," it is indisputable that the Corps acted primarily, if not exclusively, for the purpose of maintaining downstream navigation in ordering discharges from Lake Sakakawea.

See, *e.g.*, *Ubbelohde*, 330 F.3d at 1020-1022. Moreover, the court of appeals expressly rejected North Dakota's argument that the Corps could have fulfilled its statutory obligation to maintain navigation through other means on the ground that, "[i]f each state is allowed to use its reservoir water-quality standards as a tool to control how the Corps must release water from the main stem reservoirs, the 'authority of the Secretary of the Army . . . to maintain navigation' will obviously be affected." Pet. App. 8. Because the court of appeals correctly concluded that application of state water quality standards to prevent the Corps' discharges from Lake Sakakawea would necessarily "affect[]" or "impair[]" the Corps' authority to maintain navigation, the court of appeals also correctly concluded that state enforcement of those standards was barred.

Petitioners contend (Pet. 27-29) that the 1977 amendments to the CWA alter the analysis. Those amendments added language to Section 1323(a) specifying that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." Petitioners argue that the additional language constituted a plenary waiver of the Corps' immunity under the CWA—and, therefore, that the additional language effectively repealed Section 1371(a) in its entirety. Petitioners' argument, however, violates "the cardinal rule . . . that repeals by implication are not favored." *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (citation omitted). Petitioners fail to supply "the overwhelming evidence needed to establish repeal by implication." *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001).

To the contrary, the legislative history indicates that Congress did *not* intend to repeal Section 1371(a) when it amended Section 1323(a) in 1977. As the court of appeals noted (Pet. App. 6 n.4), the legislative history of the 1977 amendments makes clear that Congress's intent was merely to subject the Corps to state water quality standards when it engages in the discharge of dredged or fill material—not to subject the Corps to state authority more generally (or specifically when it is releasing water from a reservoir to maintain navigation). Moreover, in adding a separate statutory provision expressly subjecting the discharge of dredged or fill material to state water quality standards, Congress included language specifying that "[t]his section shall not be construed as affecting or impairing the authority of the Secretary [of the Army] to maintain navigation." 33 U.S.C. 1344(t). Because that language tracks the language of Section 1371(a), the incongruous result of petitioners' construction would be that Congress provided the Corps with some immunity from enforcement when it engages in the discharge of dredged or fill material, at the same time that Congress entirely abrogated the Corps' immunity from enforcement when it engages in other types of activity. Because there is no indication that Congress intended that peculiar result, the text and background of the relevant provisions of the CWA confirm that Congress left Section 1371(a) intact when it enacted the 1977 amendments.

3. Finally, the question presented is not an important or recurring one that warrants this Court's review. Petitioners not only fail to establish even an arguable conflict between the court of appeals' decision and any decision of this Court or another court of appeals; they also fail to cite a single case in which a State has at-

tempted to enforce its water quality standards against the Corps in similar circumstances, much less any case in which the Corps has invoked Section 1371(a) in response. Moreover, the court of appeals made clear that, where an action against the Corps does not affect the Corps' authority to maintain navigation, the Corps would be subject to the general waiver of sovereign immunity in Section 1323(a). Pet. App. 6. Petitioners thus provide no reason to believe that the court of appeals' decision interpreting Section 1371(a) will have significant implications beyond the instant case.[4]

---

[4] In circumstances where the Corps or another federal agency is subject to the general provisions of Section 1323(a), a further question may arise in a given case as to whether a particular state water quality standard, including the designation of use for the particular water body, would be preempted by another federal statute or the responsibilities of an agency under such a statute. See, *e.g.*, *PUD No. 1*, 511 U.S. at 722. The court of appeals did not reach or decide any such question under Section 1323(a), however. To the extent that the court of appeals discussed preemption principles, it did so to reinforce its interpretation of Section 1371(a) as independently barring this suit. Although we agree with the court of appeals that enforcement of various States' standards could significantly interfere with the Corps' ability to manage water releases in the Main Stem System (and therefore to accomplish the purposes of the Flood Control Act), that discussion was not essential to the holding of this case. See, *e.g.*, Pet. App. 8 (noting that "the above result is also supported by the principles of preemption"). It is a long-established principle that this Court "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
JAMES C. KILBOURNE
ROBERT H. OAKLEY
Attorneys

FEBRUARY 2006