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United States Court of Appeals,
Ninth Circuit.

**CITY OF NORMANDY PARK; City of Des Moines; City of Burien; City of Federal Way;
City of Tukwila; Highline School District, No. 401, individually and collectively as the Airport Communities Coalition; Petitioners,
v.
PORT OF SEATTLE, a Washington municipal corporation, Intervenor-Respondent,
v.
FEDERAL AVIATION ADMINISTRATION; U.S. Department of Transportation,
Respondents.**

No. 97-70953.

Argued and Submitted Nov. 6, 1998.
Decided Nov. 24, 1998.

Petition to Review a Decision of the United States Department of Transportation Federal Aviation Administration.

Before CANBY and HAWKINS, Circuit Judges, and SILVER, [FN**] District Judge.

FN** Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36.3.

**1 Petitioners ("the Cities") appeal the Federal Aviation Administration's decision granting final approval of the Master Plan development project adopted by the Port of Seattle for the expansion of the Seattle-Tacoma International Airport ("Sea-Tac"). We affirm.

The Cities argue that the Administrator's decision improperly relied on a "no growth" demand model and a limited prediction forecast thereby failing to accurately assess the project's environmental impacts and necessary mitigation measures. Under the Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. § 47106(c)(1)(C), an Administrator may approve an airport development project that is found to have significant environmental effects "only after finding that ... every reasonable step has been taken to minimize the adverse effects." Here, the Administrator's lengthy decision indicates a careful review of the project's potential environmental impacts, a host of mitigation measures and the entire administrative record. Moreover, it was within the agency's discretion to select a testing method for determining airport demand. See Seattle Comm. Council Federation v. Federal Aviation Admin., 961 F.2d 829, 833-34 (9th Cir.1991). Because intervening circumstances called into question the 2020 model's accuracy, the Administrator was also entitled to rely on a prediction forecast to the year 2010. See City of Los Angeles v. Federal Aviation Admin., 138 F.3d 806, 808 (9th Cir.1998).

Next, the Cities argue that the Administrator's decision violates the AAIA § 47106(a)(1), which requires that "the project is consistent with plans ... of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport." The Cities' argument is unavailing because the Administrator was allowed to rely on the

approval of the Puget Sound Regional Council, the designated Metropolitan Planning Organization responsible for transportation planning in the region, to satisfy the consistency requirement. See Suburban O'Hare Comm'n v. Dole, 787 F.2d 186, 199 (7th Cir.1986). Moreover, the administrative record indicates that every effort was made to ensure consistency with planning efforts of local communities.

Finally, the Cities contend that the Sea-Tac project violates the Clean Air Act, 42 U.S.C. § 7506(c), that prohibits federal agencies from supporting "any activity which does not conform to [the State's] implementation plan." This contention also fails because the FAA conducted extensive environmental analyses, including a conformity analysis, and ultimately found that the air emissions levels would be "de minimis." 40 C.F.R. § 93.153(c)(1). Moreover, the United States Environmental Protection Agency, the State of Washington Department of Ecology, and the Puget Sound Air Pollution Control Agency all agree with the FSEIS conclusion.

The FAA Administrator's decision was supported by substantial evidence.

**2 AFFIRMED.

END OF DOCUMENT

United States Court of Appeals,
District of Columbia Circuit.

NATURAL RESOURCES DEFENSE COUNCIL, INC.[FN*]

FN* For convenience the court will refer to this case hereafter as NRDC v. Costle (Runoff Point Sources).

v.

Douglas M. COSTLE, Administrator, Environmental Protection Agency, et al., National Forest Products Association, Appellant.

NATURAL RESOURCES DEFENSE COUNCIL, INC., etc.

v.

Douglas M. COSTLE, Administrator, Environmental Protection Agency, et al., National Milk Producers Federation, Appellant.

NATURAL RESOURCES DEFENSE COUNCIL, INC., etc.

v.

Douglas M. COSTLE, Administrator, and Environmental Protection Agency, et al., Appellants.

NATURAL RESOURCES DEFENSE COUNCIL, INC.

v.

Douglas M. COSTLE, Administrator, Environmental Protection Agency, Colorado River Water Conservation District, Appellant.

Nos. 75-2056, 75-2066, 75-2067 and 75-2235.

Argued Dec. 3, 1976.
Decided Nov. 16, 1977.

The National Resources Defense Council, Inc. challenged authority of the Environmental Protection Agency Administrator to exempt categories of point sources from permit requirements of the Federal Water Pollution Control Act Amendments of 1972. The United States District Court for the District of Columbia, Thomas A. Flannery, J., 396 F.Supp. 1393, granted summary judgment to the NRDC and the Administrator and others appealed. The Court of Appeals, Leventhal, Circuit Judge, held that: (1) legislative history shows that National Pollution Discharge Elimination System permit is the only means by which discharger may escape total prohibition of discharges from point sources found in FWPCA; (2) national effluent limitations need not be uniform as precondition for NPDES program to include pollution from agricultural, silvicultural, and storm runoff point sources, and while technological or administrative infeasibility of such limitations may warrant adjustments in permit program it does not authorize Administrator to exclude relevant point sources; (3) where numeric effluent limitations are infeasible, permit conditions may proscribe industry practices that aggravate problems of point source pollution as well as require monitoring and reporting of effluent level; and (4) a number of administrative devices, including general or area permits are available to aid EPA in practical administration of NPDES program, and FWPCA, however tight in some respects, leaves some leeway to EPA in interpretation of that statute and affords agency some means to consider matters of feasibility.

Affirmed in accordance with opinion.

MacKinnon, Circuit Judge, filed a concurring opinion.

West Headnotes

[1] Health and Environment ⇐ 25.7(16)
199k25.7(16) Most Cited Cases

[1] Navigable Waters ⇐ 35
270k35 Most Cited Cases

Legislative history clearly shows that Congress intended that the national pollution discharge elimination system permit be the only means by which a discharger of pollutant may escape total prohibition of discharges from point sources found in Federal Water Pollution Control Act Amendments. Federal

Water Pollution Control Act, §§ 301, 301(a), 402 as amended 33 U.S.C.A. §§ 1311, 1311(a), 1342.

[2] Health and Environment ⇐ 25.7(13.1)
199k25.7(13.1) Most Cited Cases
(Formerly 199k25.7(13))

[2] Navigable Waters ⇐ 35
270k35 Most Cited Cases

Use of word "may" in that section of Federal Water Pollution Control Act Amendment providing that the administrator may issue permit for discharge of any pollutant means only that the administrator has the discretion either to issue permit or to leave pollutant discharger subject to total proscription of statute making discharge of any pollutant by any person unlawful except as provided in Act. Federal Water Pollution Control Act, §§ 301(a), 302, 304 as amended 33 U.S.C.A. §§ 1311(a), 1342, 1344.

[3] Health and Environment ⇐ 25.7(6.1)
199k25.7(6.1) Most Cited Cases
(Formerly 199k25.7(6))

[3] Navigable Waters ⇐ 35
270k35 Most Cited Cases

Existence of uniform national effluent limitations is not a necessary precondition for incorporating into the national pollutant discharge elimination system program pollution from agricultural, silvicultural, and storm water runoff point sources; technological or administrative infeasibility of such limitations may result in adjustments in permit programs but does not authorize administrator to exclude relevant point sources from program. Federal Water Pollution Control Act, §§ 301, 402, 404, 1362(12, 14), as amended 33 U.S.C.A. §§ 1311, 1342, 1344, 502(12, 14).

[4] Health and Environment ⇐ 25.7(10.1)
199k25.7(10.1) Most Cited Cases
(Formerly 199k25.7(10))

[4] Navigable Waters ⇐ 35
270k35 Most Cited Cases

Where numeric effluent limitations are infeasible, point of discharge permits may proscribe industry practices which aggravate problems of point source pollution as well as require monitoring and reporting of effluent levels contrary to claim that any limitations must be issued in terms of a numerical effluent standard. Federal Water Pollution Control Act, §§ 302(a), 402, 402(a) as amended 33 U.S.C.A. §§ 1312(a), 1342, 1342(a).

[5] Health and Environment ⇐ 25.7(13.1)
199k25.7(13.1) Most Cited Cases
(Formerly 199k25.7(13))

[5] Navigable Waters ⇐ 35
270k35 Most Cited Cases

Federal Water Pollution Control Act Amendments merely require that point of discharge permits be in compliance with limitations section of Act and as a result the use of area or general permits is allowed. Federal Water Pollution Control Act, § 402 as amended 33 U.S.C.A. § 1342.

[6] Health and Environment ⇐ 25.15(3.2)
199k25.15(3.2) Most Cited Cases
(Formerly 199k25.15(1), 270k35)

Power to define point and nonpoint sources of pollution is vested in Environmental Protection Agency under the Federal Water Pollution Control Act Amendments, and exercise of that power should be reviewed by court only after opportunity for full agency review and examination. Federal Water Pollution Control Act, § 402 as amended 33 U.S.C.A. § 1342.

[7] Health and Environment ⇐ 25.7(11)
199k25.7(11) Most Cited Cases

[7] Navigable Waters ⇐ 35
270k35 Most Cited Cases

Federal Water Pollution Control Act Amendments, however tight in some respects, leave some leeway to Environmental Protection Agency in interpretation and affords agency some means to consider matter of feasibility. Federal Water Pollution

Control Act, §§ 1-26, 101-517 as amended 33 U.S.C.A. §§ 1151- 1175, 1251-1376.

[8] Administrative Law and Procedure ⚷ 305
15Ak305 Most Cited Cases

It is not what court thinks that is generally appropriate to regulatory process, but what Congress intended.

***1370 **148** Syllabus by the Court

The National Resources Defense Council, Inc. (NRDC) challenged the authority of the EPA Administrator to exempt categories of point sources from the permit requirements of s 402 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. s 1342 (Supp. V 1975). On appeal from a grant of summary judgment to NRDC, held:

1. The legislative history makes clear that Congress intended the National Pollution Discharge Elimination System (NPDES) permit to be the only means by which a discharger may escape the total prohibition of discharges from point sources found in FWPCA s 301(a), 33 U.S.C. s 1311(a) (Supp. V 1975).

2. It is not necessary that national effluent limitations be uniform as a precondition for the NPDES program to include pollution from agricultural, silvicultural, and storm water runoff point sources. The technological or administrative infeasibility ***1371 **149** of such limitations may warrant adjustments in the permit program, but it does not authorize the Administrator to exclude the relevant point source from the NPDES program.

3. Where numeric effluent limitations are infeasible, permit conditions may proscribe industry practices that aggravate the problems of point source pollution as well as require monitoring and reporting of effluent levels.

4. A number of administrative devices, including general or area permits, are available to aid EPA in the practical administration of the NPDES program. The FWPCA, however tight in some respects, leaves some leeway to EPA in the interpretation of that statute and, in that regard, affords the agency some means to consider matters of feasibility.

Appeals from the United States District Court for the District of Columbia (D.C. Civil 1629-73).

Irvin B. Nathan, Washington, D. C., with whom Burton J. Mallinger, Washington, D. C., was on the brief, for appellant in No. 75-2056.

Charles W. Bills, Washington, D. C., with whom James R. Murphy, Washington, D. C., was on the brief for appellant in No. 75-2066.

G. William Frick, Atty., Dept. of Justice, Kansas City, Mo., of the bar of the Supreme Court of Missouri, pro hac vice by special leave of court for appellants in No. 75-2067. Peter R. Taft, Asst. Atty. Gen., Robert V. Zener, Gen. Counsel, Environmental Protection Agency, Edmund B. Clark, Lloyd S. Guerci, Larry A. Boggs, Attys., Dept. of Justice and Pamela P. Quinn, Atty., Environmental Protection Agency, Washington, D. C., were on the brief for appellants in No. 75-2067.

Christopher D. Williams, Washington D. C., with whom Kenneth Balcomb and Robert L. McCarty, Washington, D. C., were on the brief for appellant in No. 75-2235.

J. G. Speth, Washington, D. C., for appellee.

Theodore O. Torve, Asst. Atty. Gen., State of Washington, Olympia, Wash., filed a brief on behalf of the State of Washington as amicus curiae urging reversal in No. 75-2056.

Richard E. Schwartz, Jefferson City, Mo., filed a brief on behalf of Iron and Steel Institute, as amicus curiae urging reversal in No. 75-2067.

John L. Hill, Atty. Gen., State of Texas, and David M. Kendall, Jr., First Asst. Atty. Gen., State of Texas, Austin, Tex., filed a brief on

behalf of State of Texas as amicus curiae urging reversal in No. 75-2067.

Before BAZELON, Chief Judge, and LEVENTHAL and MacKINNON, Circuit Judges.

Opinion for the Court filed by LEVENTHAL, Circuit Judge.

Concurring Opinion filed by MacKINNON, Circuit Judge.

LEVENTHAL, Circuit Judge:

In 1972 Congress passed the Federal Water Pollution Control Act Amendments (hereafter referred to as the "FWPCA" or the "Act" [FN1]). It was a dramatic response to accelerating environmental degradation of rivers, lakes and streams in this country. The Act's stated goal is to eliminate the discharge of pollutants into the Nation's waters by 1985. This goal is to be achieved through the enforcement of the strict timetables and technology-based effluent limitations established by the Act.

FN1. 33 U.S.C. ss 1251-1376 (Supp. V 1975). Although characterized in the official title as "amendments", the 1972 FWPCA actually substitutes its provisions for those of the pre-1972 Federal Water Pollution Control Act as amended, id. ss 1151-1175 (1970).

The FWPCA sets up a permit program, the National Pollutant Discharge Elimination System (NPDES), as the primary means of enforcing the Act's effluent limitations.[FN2] At issue in this case is the authority ***1372 **150** of the Administrator of the Environmental Protection Agency to make exemptions from this permit component of the FWPCA.

FN2. This case deals with s 402 of the FWPCA, 33 U.S.C. s 1342 (Supp. V 1975), which sets out the permitting authority of the EPA Administrator as well as that of the states under EPA-approved state permit programs. The Secretary of the Army also has a permitting authority in certain circumstances. Under s 404 of the FWPCA, 33 U.S.C. s 1344 (Supp. V 1975), he may issue permits for the discharge of dredged or fill material into navigable waters.

Section 402 of the FWPCA, 33 U.S.C. s 1342 (Supp. V 1975), provides that under certain circumstances the EPA Administrator "may . . . issue a permit for the discharge of any pollutant" notwithstanding the general proscription of pollutant discharges found in s 301 of the Act. 33 U.S.C. s 1311 (Supp. V 1975). The discharge of a pollutant is defined in the FWPCA as "any addition of any pollutant to navigable waters from any point source" or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft." 33 U.S.C. s 1362(12) (Supp. V 1975). In 1973 the EPA Administrator issued regulations that exempted certain categories of "point sources" of pollution from the permit requirements of s 402.[FN3] The Administrator's purported authority to make such exemptions turns on the proper interpretation of s 402.

FN3. 40 C.F.R. s 125.4 (1975). See 38 Fed.Reg. 18000-04 (1973).

A "point source" is defined in s 502(14) as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." [FN4]

FN4. 33 U.S.C. s 1362(14) (Supp. V 1975).

The 1973 regulations exempted discharges from a number of classes of point sources from the permit requirements of s 402, including all silvicultural point sources; all confined animal feeding operations below a certain size; all irrigation return flows from areas of less than 3,000 contiguous acres or 3,000 noncontiguous acres that use the same drainage system; all nonfeedlot, nonirrigation agricultural point sources; and separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity. [FN5] The

EPA's *1373 **151 rationale for these exemptions is that in order to conserve the Agency's enforcement resources for more significant point sources of pollution, it is necessary to exclude these smaller sources of pollutant discharges from the permit program.

FN5. 40 C.F.R. s 125.4 (1975):
The following do not require an NPDES permit:
(f) Uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity, unless the particular storm runoff discharge has been identified by the Regional Administrator, the State water pollution control agency or an interstate agency as a significant contributor of pollution. (It is anticipated that significant contributors of pollution will be identified in connection with the development of plans pursuant to section 303(e) of the Act. This exclusion applies only to separate storm sewers. Discharges from combined sewers and bypass sewers are not excluded.)
(j) Discharges of pollutants from agricultural and silvicultural activities, including irrigation return flow and runoff from orchards, cultivated crops, pastures, rangelands, and forest lands, except that this exclusion shall not apply to the following:
(1) Discharges from animal confinement facilities, if such facility or facilities contain, or at any time during the previous 12 months contained, for a total of 30 days or more, any of the following types of animals at or in excess of the number listed for each type of animal:
(i) 1,000 slaughter and feeder cattle;
(ii) 700 mature dairy cattle (whether milkers or dry cows); (iii) 2,500 swine weighing over 55 pounds;
(iv) 10,000 sheep;
(v) 55,000 turkeys;
(vi) If the animal confinement facility has continuous overflow watering, 100,000 laying hens and broilers;

(vii) If the animal confinement facility has liquid manure handling systems, 30,000 laying hens and broilers;
(viii) 5,000 ducks;
(2) Discharges from animal confinement facilities, if such facility or facilities contain, or any time during the previous 12 months contained for a total of 30 days or more, a combination of animals such that the sum of the following numbers is 1,000 or greater: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 55 pounds multiplied by 0.4, plus the number of sheep multiplied by 0.1;
(3) Discharges from aquatic animal production facilities;
(4) Discharges of irrigation return flow (such as tailwater, tile drainage, surfaced ground water flow or bypass water), operated by public or private organizations or individuals, if: (1) There is a point source of discharge (e. g., a pipe, ditch, or other defined or discrete conveyance, whether natural or artificial) and; (2) the return flow is from land areas of more than 3,000 contiguous acres, or 3,000 non-contiguous acres which use the same drainage system; and
(5) Discharges from any agricultural or silvicultural activity which have been identified by the Regional Administrator or the Director of the State water pollution control agency or interstate agency as a significant contributor of pollution.

The National Resources Defense Council, Inc. (NRDC) sought a declaratory judgment that the regulations are unlawful under the FWPCA. Specifically, NRDC contended that the Administrator does not have authority to exempt any class of point source from the permit requirements of s 402. It argued that Congress in enacting ss 301, 402 of the FWPCA intended to prohibit the discharge of pollutants from all point sources unless a permit had been issued to the discharger under s 402 or unless the point source was explicitly exempted from the permit requirements by statute. The District Court granted NRDC's motion for summary judgment. It held that the FWPCA does not authorize the Administrator to exclude any class of point sources from the permit program. NRDC v. Train, 396 F.Supp. 1393 (D.D.C.1975). The EPA has appealed to this court. It is joined on appeal by a number of defendant-intervenors, National Forest Products Association (NFPA), National Milk Producers Federation (NMPF), and the Colorado River Conservation District.[FN6]

FN6. Briefs as amicus curiae were filed by the American Iron and Steel Institute, the State of Texas, and the State of Washington, Department of Natural Resources.

This case thus presents principally a question of statutory interpretation. EPA also argues that even if Congress intended to include the pertinent categories in the permit program, the regulations exempting them should be upheld on a doctrine of administrative infeasibility, i. e., the regulations should be upheld as a deviation from the literal terms of the FWPCA that is necessary to permit the Agency to realize the principal objectives of the Act.

I. LEGISLATIVE HISTORY

The principal purpose of the FWPCA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." [FN7] The Act's ultimate objective, to eliminate the discharge of pollutants into navigable waters by 1985, is to be achieved by means of two intermediate steps. As of July 1, 1977, all point sources other than publicly owned treatment works were to have achieved effluent limitations that require application of the "best practicable control technology." [FN8] These same point sources must reduce their effluent discharges by July 1, 1983, to meet limitations determined by application of the "best available technology economically achievable" for each category of point source. [FN9]

FN7. 33 U.S.C. s 1251(a) (Supp. V 1975).

FN8. 33 U.S.C. s 1311(b)(1)(A) (Supp. V 1975).

FN9. Id. s 1311(b)(2)(A).

The technique for enforcing these effluent limitations is straightforward. Section 301(a) of the FWPCA provides:

> Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.[FN10]

FN10. Id. s 1311(a).

Appellants concede that if the regulations are valid, it must be because they are authorized *1374 **152 by s 402; none of the other sections listed in s 301(a) afford grounds for relieving the exempted point sources from the prohibition of s 301. [FN11]

FN11. Section 302, 33 U.S.C. s 1312 (Supp. V 1975), permits the Administrator to set water quality related effluent limitations or control strategies where technology-based limitations are inadequate. Section 306, 33 U.S.C. s 1316 (Supp. V 1975), instructs the EPA Administrator to promulgate standards of performance for new sources of pollution constructed after those standards are proposed. Section 307, 33 U.S.C. s 1317 (Supp. V 1975), gives the EPA Administrator the authority to issue generally applicable effluent standards with respect to toxic substances and to require pretreatment of some pollutants before their introduction into treatment works. By virtue of s 318, 33 U.S.C. s 1328 (Supp. V 1975), the Administrator may "permit the discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision." Section 404, 33 U.S.C. s 1344 (Supp. V 1975), gives the Secretary of the Army authority to issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

Section 402 provides in relevant part that the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of the necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

The NPDES permit program established by s 402 is central to the enforcement of the FWPCA. It translates general effluent limitations into the specific obligations of a discharger. As this court noted in NRDC v. Train, 166 U.S.App.D.C. 312, 315, 510 F.2d 692, 695 (1975), the Act "relies primarily on a permit program for the achievement of effluent limitations . . . to attain its goals." The comments in floor debates of Senator Muskie, the leading Congressional sponsor of

the Act, makes this clear.[FN12]

FN12. "The Administrator of the Environmental Protection Agency is authorized to regulate discharge of pollutants through the use of an expanded permit program." 117 Cong.Rec. 38800 (1971) (Senator Muskie) (emphasis added), reprinted in 2 Environmental Policy Div., Congressional Reference Serv., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1259 (Senate Public Works Comm. Print 1973) (hereinafter cited as Legislative History).

The appellants argue that s 402 not only gives the Administrator the discretion to grant or refuse a permit, but also gives him the authority to exempt classes of point sources from the permit requirements entirely. They argue that this interpretation is supported by the legislative history of s 402 and the fact that unavailability of this exemption power would place unmanageable administrative burdens on the EPA.

[1] Putting aside for the moment the appellants' administrative infeasibility argument, we agree with the District Court that the legislative history makes clear that Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of s 301(a). This intention is evident in both Committee Reports. In discussing s 301 the House Report stressed:

> Any discharge of a pollutant without a permit issued by the Administrator under section 318, or by the Administrator or the State under section 402 or by the Secretary of the Army under section 404 is unlawful. Any discharge of a pollutant not in compliance with the conditions or limitations of such a permit is also unlawful.[FN13]

FN13. H.Rep.No.92-911, 92d Cong., 2d Sess. 100 (1972), reprinted in Legislative History at 787.

The Senate Report echoed this interpretation:

> (Section 301) clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program which permitted the discharge of certain amounts of pollutants under the conditions described above, this legislation would clearly establish that no one has the right *1375 **153 to pollute that pollution continues because of technological limits, not because of any inherent rights to use the nation's waterways for the purpose of disposing of wastes.
>
> The program proposed by this Section will be implemented through permits issued in Section 402. The Administrator will have the capability and the mandate to press technology and economics to achieve those levels of effluent reduction which he believes to be practicable in the first instance and attainable in the second.[FN14]

FN14. S.Rep.No.92-414, 92d Cong., 1st Sess. 42 (1971), reprinted in Legislative History at 1460; U.S.Code Cong. & Admin.News 1972, pp. 3668, 3709.

[2] The EPA argues that since s 402 provides that "the Administrator may . . . issue a permit for the discharge of any pollutant" (emphasis added), he is given the discretion to exempt point sources from the permit requirements altogether. This argument, as to what Congress meant by the word "may" in s 402, is insufficient to rebut the plain language of the statute and the committee reports. We say this with due awareness of the deference normally due "the construction of a new statute by its implementing agency." NRDC v. Train, 166 U.S.App.D.C. at 326, 510 F.2d at 706; see Zuber v. Allen, 396 U.S. 168, 192, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969); Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). The use of the word "may" in s 402 means only that the Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of s 301. This is the natural reading, and the one that retains the fundamental logic of the statute.

Under the EPA's interpretation the Administrator would have broad discretion to exempt large classes of point sources from any or all requirements of the FWPCA. This is a result that the legislators did not intend. Rather they stressed that the FWPCA was a tough law that relied on explicit mandates to

a degree uncommon in legislation of this type. A statement of Senator Jennings Randolph of West Virginia, Chairman of the Senate Committee responsible for the Act, is illustrative.

I stress very strongly that Congress has become very specific on the steps it wants taken with regard to environmental protection. We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives for administrators to follow. . . .

In the past, too many of our environmental laws have contained vague generalities. What we are attempting to do now is provide laws that can be administered with certainty and precision. I think that is what the American people expect that we do.[FN15]

FN15. 117 Cong.Rec. 38805 (1971), reprinted in Legislative History at 1272. See also the comments of Senator Montoya on the original Senate bill.

Your committee has placed before you a tough bill. This body and this Nation would not have it be otherwise. Our legislation contains an important principle of psychology: Men seldom draw the best from themselves unless pressed by circumstances and deadlines. This bill contains deadlines and it imposes rather tough standards on industry, municipalities, and all other sources of pollution. Only under such conditions are we likely to press the technological threshold of invention into new and imaginative developments that will allow us to meet the objectives stated in our bill.

117 Cong.Rec. 38808 (1971), reprinted in Legislative History at 1278.

There are innumerable references in the legislative history to the effect that the Act is founded on the "basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful." [FN16] Even when infeasibility arguments were squarely raised, ***1376 **154** the legislature declined to abandon the permit requirement.[FN17] We stand by our previous interpretation of the Act's scheme for the enforcement of effluent limitations:

FN16. 118 Cong.Rec. 10215 (1972) (Rep. Clausen), reprinted in Legislative History at 378. See, e. g., H.R.Rep.No.92-911 92d Cong., 2d Sess. 100 (1972), reprinted in Legislative History at 787; S.Rep.No.92-414; 92d Cong., 1st Sess. 42-43 (1971), reprinted in Legislative History at 1460-61; 118 Cong.Rec. 10661 (1972) (Rep. Podell), reprinted in Legislative History at 574.

FN17. The House rejected an amendment designed to avoid the problems of including irrigation return flows in the permit program. Congressman Teno Roncalio of Wyoming offered an amendment on the floor of the House that would have explicitly exempted irrigated agriculture from the NPDES permit program.

Mr. RONCALIO. . . .

I offer my amendment so that a serious omission to H.R. 11896 can be corrected before we end up with a law that would be virtually impossible to enforce. My amendment would specifically exempt irrigated agriculture from sections 301(a), 302 and 304 of the Federal Water Pollution Control Act.

I think my colleagues will agree that the type of salinity problems created by irrigation runoff are simply not as alarming as the more common pollutants discharged by industrial and municipal facilities. Substantial salinity concentrations have little effect on recreational use of water or its suitability for the propagation of fish.

My amendment is necessary, Mr. Chairman, because at the present time we could not enforce pollution control on irrigation systems. It is virtually impossible to trace pollutants to specific irrigation lands, making these pollutants a nonpoint source in most cases. Second, we do not have the technology to deal with irrigation runoff (as contrasted to industrial pollution) and if we begin making laws to control something that cannot be handled with our given technological knowledge, we will be doing many thousand farmers and ranchers a great disservice. In fact, we will be doing the Federal Government a great disservice if we actually pass a Federal water pollution control bill that cannot be fully enforced.

118 Cong.Rec. 10764-65 (1972), reprinted in Legislative History at 651. The amendment was rejected.

After dates set forth in (s 301(b)), a person must obtain a permit and comply with its terms in order to discharge any pollutant. The conditions of the permit must assure that

any discharge complies with the applicable requirements of numerous sections including the effluent limitations of section 301(b).
NRDC v. Train, 166 U.S.App.D.C. at 316, 510 F.2d at 696 (emphasis added; footnotes omitted).

We also note that all the Supreme Court decisions referring to s 402 view the permit as the only means by which a point source polluter can avoid the ban on discharges found in s 301. Strictly speaking these expressions may be dicta, for they do not touch directly on the interpretation of s 402. But they are at least a considered reading of what the Act appears to mean.

In Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976), Justice Marshall characterized the enforcement scheme of the FWPCA as follows:
(E)ffluent limitations are enforced through a permit program. The discharge of "pollutants" into water is unlawful without a permit issued by the Administrator of the EPA or, if a State has developed a program that complies with the FWPCA, by the State.
. . .
Id. at 7, 96 S.Ct. at 1941 (footnote omitted).

In EPA v. State Water Resources Control Board, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976), the issue was whether federal installations were subject to state NPDES programs. Justice White's majority opinion describes NPDES at 205, 96 S.Ct. at 2025 (footnote omitted):
Under NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits.

In E. I. du Pont de Nemours v. Train, 430 U.S. 112, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977), the Court held that under FWPCA the EPA can set uniform effluent limitations through industry-wide regulations rather than develop them on an individual basis during the permit issuance process. But the Court, per Justice Stevens, clearly indicated ***1377 **155** that those limitations were translated into obligations of the discharger through their inclusion in an NPDES permit. Id. at 119-20, 97 S.Ct. 965.

The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of s 402. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute. In holding that the FPC does not have authority to exempt the rates of small producers from regulation under the Natural Gas Act, the Supreme Court observed:

It is not the Court's role . . . to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process.
FPC v. Texaco, Inc., 417 U.S. 380, 400, 94 S.Ct. 2315, 2327, 41 L.Ed.2d 141 (1974).

II. ADMINISTRATIVE INFEASIBILITY

The appellants have stressed in briefs and at oral argument the extraordinary burden on the EPA that will be imposed by the above interpretation of the scope of the NPDES program. The spectre of millions of applications for permits is evoked both as part of appellants' legislative history argument that Congress could not have intended to impose such burdens on the EPA and as an invitation to this court to uphold the regulations as deviations from the literal terms of the FWPCA necessary to permit the agency to realize the general objectives of that act. During oral argument we asked for supplemental briefs so that the appellants could expand on their infeasibility arguments. We consider EPA's infeasibility contentions in

turn.

A. Uniform National Effluent Limitations

EPA argues that the regulatory scheme intended under Titles III and IV of the FWPCA requires, first, that the Administrator establish national effluent limitations [FN18] and, second, that these limitations be incorporated in the individual permits of dischargers. EPA argues that the establishment of such limitations is simply not possible with the type of point sources involved in the 1973 regulations, which essentially involve the discharge of runoff i. e., wastewaters generated by rainfall that drain over terrain into navigable waters, picking up pollutants along the way.

FN18. See FWPCA s 502(11), 33 U.S.C. s 1362(11) (Supp. V 1975):
The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

There is an initial question, to what extent point sources are involved in agricultural, silvicultural, and storm sewer runoff. The definition of point source in s 502(14), including the concept of a "discrete conveyance", suggests that there is room here for some exclusion by interpretation. We discuss this issue subsequently. Meanwhile, we assume that even taking into account what are clearly point sources, there is a problem of infeasibility which the EPA properly opens for discussion.

EPA contends that certain characteristics of runoff pollution make it difficult to promulgate effluent limitations for most of the point sources exempted by the 1973 regulations:
The major characteristic of the pollution problem which is generated by runoff . . . is that the owner of the discharge point . . . has no control over the quantity of the flow or the nature and amounts of the pollutants picked up by the runoff. The amount of flow obviously is unpredictable because it results from the duration and intensity of the rainfall event, the topography, the type of ground cover and the saturation point of the land due to any previous *1378 **156 rainfall. Similar factors affect the types of pollutants which will be picked up by that runoff, including the type of farming practices employed, the rate and type of pesticide and fertilizer application, and the conservation practices employed . . .
An effluent limitation must be a precise number in order for it to be an effective regulatory tool; both the discharger and the regulatory agency need to have an identifiable standard upon which to determine whether the facility is in compliance. That was the principal of the passage of the 1972 Amendments.
Federal Appellants' Memorandum on "Impossibility" at 7-8 (footnote omitted). Implicit in EPA's contentions is the premise that there must be a uniform effluent limitation prior to issuing a permit. That is not our understanding of the law.

In NRDC v. Train, we described the interrelationship of the effluent limitations and the NPDES permit program, 166 U.S.App.D.C. at 327, 510 F.2d at 707 (footnotes omitted):
The Act relies on effluent limitations on individual point sources as the "basis of pollution prevention and elimination." . . . Section 301(b) contains a broad description of phase one and phase two effluent limitations, to be achieved by July 1, 1977 and July 1, 1983, respectively. The limitations established under section 301(b) are to be imposed upon individual point sources through permits issued under the National Pollutant Discharge Elimination System (NPDES) established by section 402. Those permits are to contain schedules which will assure phased compliance with the effluent limitations no later than the final dates set forth in section 301(b). Section 304(b) calls for the publication of regulations containing guidelines for effluent limitations for classes and categories of point sources. These guidelines are intended to assist in the

establishment of section 301(b) limitations that will provide uniformity in the permit conditions imposed on similar sources within the same category by diverse state and federal permit authorities.

As noted in NRDC v. Train, the primary purpose of the effluent limitations and guidelines was to provide uniformity among the federal and state jurisdictions enforcing the NPDES program and prevent the "Tragedy of the Commons" [FN19] that might result if jurisdictions can compete for industry and development by providing more liberal limitations than their neighboring states. 166 U.S.App.D.C. at 329, 510 F.2d at 709. The effluent limitations were intended to create floors that had to be respected by state permit programs.

FN19. As one commentator has recently written:
The Tragedy of the Commons arises in noncentralized decisionmaking under conditions in which the rational but independent pursuit by each decisionmaker of its own self-interest leads to results that leave all decisionmakers worse off than they would have been had they been able to agree collectively on a different set of policies.
Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1211 (1977). The classic account of the Tragedy of the Commons can be found in Hardin, The Tragedy of the Commons, 162 Science 1243 (1968). Hardin makes the point in the context of sheep-grazing. Put simply, even over-simply, Hardin shows that if no one is authorized to set limits to preserve open pasture land as a whole, allowing sheep to graze on that land may lead to serious overgrazing, as each herdsman thinks only of his own advantage. The solution lies in some mandate, from above or by agreement, with sanctions to compel conformance.

But in NRDC v. Train it was also recognized that permits could be issued before national effluent limitations were promulgated and that permits issued subsequent to promulgation of uniform effluent limitations could be modified to take account of special characteristics of subcategories of point sources.

Prior to the promulgation of effluent limitations under section 301, the director of a state program is instructed merely to impose such terms and conditions in each permit as he determines are necessary to carry out the provisions of the Act. Once *1379 **157 an effluent limitation is established, however, the state director and the regional EPA Administrator are required to apply the specified, uniform effluent limitations, modified only as necessary to take account of fundamentally different factors pertaining to particular point sources within a given class or category. Any variation in the uniform limitations adopted for specific dischargers must be approved by the Administrator.

166 U.S.App.D.C. at 330, 510 F.2d at 710 (footnotes omitted).

Another passage in NRDC v. Train touches on the infeasibility problem. We noted that "(t)he statutory framework is not so tightly drawn as to require guidelines for each and every class and category of point source regardless of the need for uniform guidelines or to mandate that all guidelines be published prior to December 31 (1974) regardless of their quality or the burden that task would place upon the agency." Id. at 320-21, 510 F.2d at 710-11. In that case this court fully appreciated that technological and administrative constraints might prevent the Administrator from developing guidelines and corresponding uniform numeric effluent limitations for certain point sources anytime in the near future. The Administrator was deemed to have the burden of demonstrating that the failure to develop the guidelines on schedule was due to administrative or technological infeasibility. 166 U.S.App.D.C. at 333, 510 F.2d at 713. Yet the underlying teaching was that technological or administrative infeasibility was a reason for adjusting court mandates to the minimum extent necessary to realize the general objectives of the Act. [FN20] It is a number of steps again to suggest that these problems afford the Administrator the authority to exempt categories of point sources from the NPDES program entirely.

FN20. In NRDC v. Train, this court stated:

> A federal equity court may exercise its discretion to give or withhold its mandate in furtherance of the public interest, including specifically the interest in effectuating the congressional objective incorporated in regulatory legislation. We think the court may forebear the issuance of an order in those cases where it is convinced by the official involved that he has in good faith employed the utmost diligence in discharging his statutory responsibilities. The sound discretion of an equity court does not embrace enforcement through contempt of a party's duty to comply with an order that calls him "to do an impossibility."
>
> 166 U.S.App.D.C. at 333, 510 F.2d at 713 (footnotes omitted). For reasons stated in this opinion, we conclude that to require the EPA Administrator to include silvicultural, agricultural, and storm sewer point sources in the NPDES program is not to require him "to do an impossibility."

With time, experience, and technological development, more point sources in the categories that EPA has now classed as exempt may be amenable to national effluent limitations achieved through end-of-pipe technology or other means of pollution control. EPA has noted its own success with runoff from mining operations:

> EPA has found that in the area of runoff from mining operations, there is sufficient predictability because of a longer history of regulation and the relatively confined nature of the operations that numerical limitations can be established. Thus, consistent with EPA's position stated earlier that it will expand the permit program where its capability of establishing effluent limitations allows, appropriate limitations have been created and the permit program expanded.

Federal Appellants' Memorandum on "Impossibility" at 8.

[3] In sum, we conclude that the existence of uniform national effluent limitations is not a necessary precondition for incorporating into the NPDES program pollution from agricultural, silvicultural, and storm water runoff point sources. The technological or administrative infeasibility of such limitations may result in adjustments in the permit programs, as will be seen, but it does not authorize the Administrator to exclude the relevant point source from the NPDES program.

B. Alternative Permit Conditions under s 402(a)

EPA contends that even if it is possible to issue permits without national effluent limitations, ***1380 **158** the special characteristics of point sources of runoff pollution make it infeasible to develop restrictions on a case-by-case basis. EPA's implicit premise is that whether limitations are promulgated on a class or individual source basis, it is still necessary to articulate any limitation in terms of a numerical effluent standard. That is not our understanding.

[4] Section 402 provides that a permit may be issued upon condition "that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308 and 403 of this Act, or prior to taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act." 33 U.S.C. s 1342(a) (Supp. V 1975) (emphasis added). This provision gives EPA considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges. The permit may proscribe industry practices that aggravate the problem of point source pollution.[FN21]

> FN21. That Congress did not regard numeric effluent limitations as the only permissible limitation on a discharger is supported by s 302(a) of the Act, 33 U.S.C. s 1312(a) (Supp. V 1975):
>
> Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under (s 301(b) of the Act), would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water,

effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.
The emphasis has been added.

EPA's counsel caricatures the matter by stating that recognition of any such authority would give EPA the power "to instruct each individual farmer on his farming practices." Federal Appellants Memorandum on "Impossibility" at 12. Any limitation on a polluter forces him to modify his conduct and operations. For example, an air polluter may have a choice of installing scrubbers, burning different fuels or reducing output. Indeed, the authority to prescribe limits consistent with the best practicable technology may be tantamount to prescribing that technology. Of course, when alternative techniques are available, Congress intended to give the discharger as much flexibility as possible in choosing his mode of compliance. See, e. g., H.Rep.No.92-911, 92d Cong., 2d Sess. 107, reprinted in Legislative History at 794. We only indicate here that when numerical effluent limitations are infeasible, EPA may issue permits with conditions designed to reduce the level of effluent discharges to acceptable levels. This may well mean opting for a gross reduction in pollutant discharge rather than the fine-tuning suggested by numerical limitations. But this ambitious statute is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all.

It may be appropriate in certain circumstances for the EPA to require a permittee simply to monitor and report effluent levels; EPA manifestly has this authority.[FN22] Such permit conditions might be desirable where the full extent of the pollution problem is not known.

FN22. FWPCA s 402(a)(3), (b)(2)(B), 33 U.S.C. s 1342(a)(3), (b)(2)(B) (Supp. V 1975). EPA concedes that it has this authority. Federal Appellants' Memorandum on "Impossibility" at 14.

C. General Permits

Finally, EPA argues that the number of permits involved in the absence of an exemption authority will simply overwhelm the Agency. Affidavits filed with the District Court indicate, for example, that the number of silviculture point sources may be over 300,000 and that there are approximately 100,000 separate storm sewer point sources. [FN23] We are and must be sensitive to ***1381 **159** EPA's concerns of an intolerable permit load. But the District Court and the various parties have suggested devices to mitigate the burden to accommodate within a practical regulatory scheme Congress's clear mandate that all point sources have permits. All that is required is that EPA makes full use of its interpretational authority. The existence of a variety of options belies EPA's infeasibility arguments.

FN23. Affidavit of William H. McCredie, Director, Industrial Forestry, of the NFPA; Affidavit of Walter G. Gilbert, Chief of the Municipal Operations Branch, Municipal Waste Water Systems Div., EPA Office of Air and Water Programs.

[5] Section 402 does not explicitly describe the necessary scope of a NPDES permit. The most significant requirement is that the permit be in compliance with limitation sections of the Act described above. As a result NRDC and the District Court have suggested the use of area or general permits. The Act allows such techniques. Area-wide regulation is one well-established means of coping with administrative exigency. An instance is area pricing for natural gas producers, which the Supreme Court upheld in Permian Basin Area Rate Cases, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968).[FN24] A more dramatic example is the administrative search warrant, which may be issued on an area basis despite the normal Fourth Amendment requirement of probable cause for searching specific premises. Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

FN24. In Permian Basin the Supreme Court observed:
The Commission has asserted, and the history of producer regulation has confirmed, that the ultimate achievement of the Commission's regulatory

> purposes may easily depend upon the contrivance of more expeditious administrative methods. The Commission believes that the elements of such methods may be found in area proceedings. "(C)onsiderations of feasibility and practicality are certainly germane" to the issues before us. . . . We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted.
> 390 U.S. at 777, 88 S.Ct. at 1365.

In response to the District Court's order, EPA promulgated regulations that make use of the general permit device. 42 Fed.Reg. 6846-53 (Feb. 4, 1977). The general permit is addressed to a class of point source dischargers, subject to notice and opportunity for public hearing in the geographical area covered by the permit. Although we do not pass on the validity of the February, 1977, regulations, they serve to dilute an objection of wholesale infeasibility. [FN25]

> FN25. It is also of some, albeit limited, significance that the House Committee on Government Operations found EPA's administrative problems with applying the permit program to animal feedlots "grossly exaggerated." It was of the opinion that the Administrator did not have authority to exempt point sources from the NPDES program. H.Rep.No.93-1012, 93d Cong., 2d Sess. 15-30 (1974).

Our approach is not fairly subject to the criticism that it elevates form over substance that the end result will look very much like EPA's categorical exemption. It is the function of the courts to require agencies to comply with legislative intent when that intent is clear, and to leave it to the legislature to make adjustments when the result is counterproductive.[FN26] At the same time, where intent on an issue is unclear, ***1382 **160** we are instructed to afford the administering agency the flexibility necessary to achieve the general objectives of the Act. Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 653, 93 S.Ct. 2448, 37 L.Ed.2d 235 (1973); United States v. Southwestern Cable Co., 392 U.S. 157, 177-78, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968); Permian Basin Area Rate Cases, 390 U.S. 747, 780, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968). These lines of authority conjoin in our approach. We insist, as the Act insists, that a permit is necessary; the Administrator has no authority to exempt point sources from the NPDES program. But we concede necessary flexibility in the shaping of the permits that is not inconsistent with the clear terms of the Act.

> FN26. The Supreme Court recently reiterated this instruction in Union Electric Co. v. EPA, 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). There the Court held that the EPA Administrator could not consider claims of technological or economic infeasibility when approving state implementation plans under the Clean Air Act Amendments of 1970, 42 U.S.C. ss 1857a-18571 (1970). Such claims were held only to be cognizable by the states in the plan design stage or by the Administrator when drawing up compliance orders. Justice Marshall, writing for the Court, emphasized that federal courts are not to ignore clear expressions of Congressional intent in order to accommodate claims of technological or economic infeasibility.
> Allowing such claims to be raised by appealing the Administrator's approval of an implementation plan . . . would frustrate congressional intent. It would permit a proposed plan to be struck down as infeasible before it is given a chance to work, even though Congress clearly contemplated that some plans would be infeasible when proposed. And it would permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution, even though Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent. Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking. Petitioner's theory would render that considered legislative judgment a nullity, and that is a result we refuse to reach.
> 427 U.S. at 268-69, 96 S.Ct. at 2531 (footnote omitted). See also Wilderness Society v. Morton, 156 U.S.App.D.C. 121, 171, 479 F.2d 842, 892 (1973), cert. denied, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (quoting United States v. City and County of San Francisco, 310 U.S. 16, 31-32, 60

S.Ct. 749, 84 L.Ed. 1050 (1940): " 'We cannot accept the contention that administrative rulings such as those relied on can thwart the plain purpose of a valid law.' ")

There is also a very practical difference between a general permit and an exemption. An exemption tends to become indefinite: the problem drops out of sight, into a pool of inertia, unlikely to be recalled in the absence of crisis or a strong political protagonist. In contrast, the general or area permit approach forces the Agency to focus on the problems of specific regions and requires that the problems of the region be reconsidered at least every five years, the maximum duration of a permit. [FN27]

FN27. 33 U.S.C. s 1342(a)(3), (b)(1)(B) (Supp. V 1975).

D. Other Interpretational Powers

[6] Many of the intervenor-appellants appear to argue that the District Court should be reversed because the categories exempted by EPA are nonpoint sources and are not, in fact, point sources.[FN28] We agree with the District Court "that the power to define point and nonpoint sources is vested in EPA and should be reviewed by the court only after opportunity for full agency review and examination." 396 F.Supp. at 1396. The only issue precisely confronted by all the parties and properly framed for our consideration is whether the Administrator has authority to exempt point sources from the NPDES program. We also think that we should, for similar reasons, not consider at this time the appropriate definition of "discharge of any pollutant" as used in s 402. The American Iron and Steel Institute as amicus curiae has pressed upon us the argument that the term "discharge" as used in s 402 was intended to encompass only "volitional flows" that add pollutants to navigable waters. Most forms of runoff, it is argued, do not involve volitional flows.

FN28. This appears to be the position of the Colorado River Water Conservation District and the NFPA with respect to silvicultural activities, and NMPF, less obviously, with respect to small dairy farms.

We would put in the same category EPA's contention that the exempt categories are best handled under the areawide waste treatment management planning process of s 208 of the FWPCA, 33 U.S.C. s 1288 (Supp. V 1975). By its terms that section is concerned with areawide waste treatment plans that identify and control "agriculturally and silviculturally related non-point sources of pollution." Id. s 1288(b)(2)(F).

[7] We assume that FWPCA, however tight in some respects, leaves some leeway to EPA in the interpretation of that statute, and in that regard affords the Agency some means to consider matters of feasibility. However, for reasons already noted, we do not consider these particular contentions as to interpretation on the merits.

III. CONCLUSION

[8] As the Supreme Court recently stated in a FWPCA case, "(t)he question . . .is ***1383 **161** not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended . . .." E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138, 97 S.Ct. 965, 980, 51 L.Ed.2d 204 (1977). We find a plain Congressional intent to require permits in any situation of pollution from point sources. We also discern an intent to give EPA flexibility in the structure of the permits, in the form of general or area permits. We are aware that Congress hoped that more of the NPDES permit program would be administered by the states at this point. [FN29] But it also made provision for continuing EPA administration. Imagination conjoined with determination will likely give EPA a capability for practicable administration. If not, the remedy lies with Congress.

FN29. See, e. g., 118 Cong.Rec. 10235 (1972) (Rep. Ichord) reprinted in Legislative History at 428.

So ordered.

MacKINNON, Circuit Judge, concurring:

I concur in the very sound and practical construction set forth in the foregoing opinion. Any person concerned with the actual application and enforcement of laws would necessarily be concerned by the application of the relevant legislation to all point sources in agriculture and particularly to irrigated agriculture. Concern would also lie in the congressional admission that present technology is inadequate to enable our citizens to meet the standards and deadlines the Act imposes; in passing the law, Congress was relying on the future "invention (of) new and imaginative developments that will allow us to meet the objectives of our bill." [FN1] In gambling parlance, Congress in enacting the law was "betting on the come." It is relying on our citizens in the near future to develop the complex technology to meet all the law's standards and objectives on time. The difficulty with that approach is that the hopes of Congress in this respect, like that of any gambler, might not be realized. The agency in this case, however, has shown that it takes a realistic view of both the situation and the task of meeting the difficult requirements and objectives of the Act. I sincerely hope that the ability of the agency to issue section 402 permits including general area permits [FN2] will permit it to meet the present and future compliance problems posed by the Act in a practical way.

FN1. Comments of Senator Montoya, 117 Cong.Rec. 38808 (1971), quoted in court's opinion at 12, reprinted in Legislative History at 1278.

FN2. As an example, an area permit with appropriate conditions and modifications could issue for the agricultural point sources within the Grand River Irrigation District, or the watershed of the Roaring Fork River and tributaries, etc.

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114 S.Ct. 1900
128 L.Ed.2d 716, 62 USLW 4408, 38 ERC 1593, 152 P.U.R.4th 190, Util. L. Rep. P 13,988, 24 Envtl. L. Rep. 20,945
(Cite as: 511 U.S. 700, 114 S.Ct. 1900)
<KeyCite Yellow Flag>

Supreme Court of the United States

PUD NO. 1 OF JEFFERSON COUNTY and City of Tacoma, Petitioners
v.
WASHINGTON DEPARTMENT OF ECOLOGY et al.

No. 92-1911.

Argued Feb. 23, 1994.
Decided May 31, 1994.

City and local utility district appealed Washington State Department of Ecology's imposition of minimum stream flow rates as part of certification requirements under Federal Clean Water Act for building hydroelectric power plant. The Pollution Control Hearings Board reversed flow rate set by Department, and parties cross-appealed. The Superior Court, Thurston County, Carol A. Fuller, J., ruled that Department was not preempted from setting minimum stream flows. City moved for direct review. The Supreme Court, 121 Wash.2d 179, 849 P.2d 646, affirmed. On petition for certiorari, the Supreme Court of the United States, Justice O'Connor, held that: (1) states could condition certification of project on any limitations necessary to ensure compliance with state water quality standards or other appropriate requirements of state law; (2) minimum flow condition was appropriate requirement of state law; and (3) state's authority to impose minimum flow requirements would not be limited on theory that it interfered with Federal Energy Regulatory Commission's authority to license hydroelectric projects.

Affirmed.

Justice Stevens filed a concurring opinion.

Justice Thomas filed a dissenting opinion in which Justice Scalia joined.

West Headnotes

[1] Health and Environment ⇐ 25.7(21.1)
199k25.7(21.1)

[1] States ⇐ 18.31
360k18.31
Clean Water Act provision, requiring that project certification set forth effluent limitations and other limitations necessary to assure that any applicant will comply with provisions of Act and appropriate state law requirement, allowed state to impose "other limitations" on project in general to assure compliance with Clean Water Act provisions and appropriate state law requirements; state's ability to impose water quality limitations did not have to be specifically tied to a "discharge." Federal Water Pollution Control Act Amendments of 1972, § 401(a, d), as amended, 33 U.S.C.A. § 1341(a, d).

[2] Health and Environment ⇐ 25.7(21.1)
199k25.7(21.1)
Clean Water Act provision requiring that project certification set forth effluent limitations and other limitations necessary to assure that applicant's compliance with provisions of the Act and appropriate state law requirements is most reasonably read as authorizing additional conditions and limitations on activity as a whole once threshold condition, the existence of a discharge, was satisfied. Federal Water Pollution Control Act Amendments of 1972, § 401(a, d), as amended, 33 U.S.C.A. § 1341(a, d).

[3] Health and Environment ⇐ 25.7(21.1)
199k25.7(21.1)

[3] Statutes ⇐ 219(6.1)
361k219(6.1)
Environmental Protection Agency (EPA) conclusion that "activities" of hydroelectric project applicant, not merely "discharges," had to comply with state water quality standards was reasonable interpretation of Clean Water Act project certification provisions, and was entitled to deference. Federal Water Pollution Control Act Amendments of 1972, § 401, as

amended, 33 U.S.C.A. § 1341.

[4] Health and Environment ⇐ 25.7(21.1)
199k25.7(21.1)

[4] States ⇐ 18.31
360k18.31
State's authority under Clean Water Act to place restrictions on hydroelectric project activity as a whole was not unbounded; state could only ensure that project complied with applicable effluent limitations and other appropriate state law requirements. Federal Water Pollution Control Act Amendments of 1972, § 401(d), as amended, 33 U.S.C.A. § 1341(d).

[5] Health and Environment ⇐ 25.7(13.1)
199k25.7(13.1)

[5] States ⇐ 18.31
360k18.31
Ensuring compliance with state water quality standards adopted pursuant to Clean Water Act was a proper function of water quality certification required under Act before federal license or permit could be issued for activity that could result in discharge into intrastate navigable waters; state water quality standards adopted pursuant to Act were among the "other limitations" with which state could ensure compliance through certification process. Federal Water Pollution Control Act Amendments of 1972, §§ 303, 401(d), as amended, 33 U.S.C.A. §§ 1313, 1341(d).

[6] Health and Environment ⇐ 25.7(21.1)
199k25.7(21.1)
State could impose minimum flow condition as condition for water quality certification for hydroelectric project under Clean Water Act provision allowing states to condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other "appropriate requirement of State law"; designated use of river as fish habitat directly reflected Act's goal in maintaining chemical, physical and biological integrity of navigable waters and Act required that, in adopting water quality standards, state take into consideration use of waters for propagation of fish and wildlife. Federal Water Pollution Control Act Amendments of 1972, §§ 101(a), 303(c)(2)(A), 401, 502(19), as amended, 33 U.S.C.A. §§ 1251(a), 1313(c)(2)(A), 1341, 1362(19).

[7] Health and Environment ⇐ 25.7(21.1)
199k25.7(21.1)
Clean Water Act provision requiring state to institute comprehensive standards establishing water quality goals for intrastate waters, consisting of designated uses of navigable waters involved and water quality criteria for those waters based on those uses, requires that a project for which water quality certification is required be consistent with both designated use and water quality criteria; project that does not comply with designated use of water does not comply with applicable water quality standards. Federal Water Pollution Control Act Amendments of 1972, §§ 303(c)(2)(A), 401, as amended, 33 U.S.C.A. §§ 1313(c)(2)(A), 1341.

[8] Health and Environment ⇐ 25.7(21.1)
199k25.7(21.1)
For purposes of state Clean Water Act water quality certification provisions, certification requirement that applicant operate hydroelectric project consistent with state water quality standards, that is, consistently with designated uses of water body and water quality criteria, is both a "limitation" to ensure "compliance with * * * limitations" imposed under state water quality standards provision and an "appropriate" requirement of state law. Federal Water Pollution Control Act Amendments of 1972, §§ 303, 401(d), as amended, 33 U.S.C.A. §§ 1313, 1341(d).

[9] Health and Environment ⇐ 25.7(17.1)
199k25.7(17.1)
Clean Water Act water quality standards provisions contemplated enforcement of water use requirements as well as more specific and objective "criteria" contained in state water quality standards, given open ended nature of criteria themselves and in light of fact that Act permitted enforcement of broad narrative criteria based on qualities such as "aesthetics." Federal Water Pollution Control Act Amendments of 1972, §§ 303, 401(d), as

amended, 33 U.S.C.A. §§ 1313, 1341(d).

[10] Health and Environment ⇐ 25.7(2)
199k25.7(2)
Under Clean Water Act, state's reliance on both "use designations" and "criteria to protect water quality" was not anomalous; specific numerical limitations embodied in criteria were convenient enforcement mechanism for identifying minimum water conditions which would generally achieve requisite water quality, while complementary requirement that activities also comport with designated uses enabled state to ensure that each "activity," even if unforeseen by criteria, would be consistent with specific uses and attributes of particular body of water. Federal Water Pollution Control Act Amendments of 1972, §§ 303, 401(d), as amended, 33 U.S.C.A. §§ 1313, 1341(d).

[11] Health and Environment ⇐ 25.7(3)
199k25.7(3)
Clean Water Act provisions governing state's obligation to institute state water quality standards did not restrict states to enforcement of only criteria component of water quality standards, which would, in essence, require states to study to level of great specificity each individual body of water to ensure that criteria applicable to that water were sufficiently detailed and individualized to fully protect water's designated uses. Federal Water Pollution Control Act Amendments of 1972, §§ 303, 401(d), as amended, 33 U.S.C.A. §§ 1313, 1341(d).

[12] Health and Environment ⇐ 25.7(21.1)
199k25.7(21.1)
State's imposition of minimum stream flow condition of water quality certification for proposed hydroelectric project was proper application of state and federal antidegradation regulations, as it ensured that existing instream water use would be maintained and protected as required under federal regulations implementing Clean Water Act provisions requiring states to provide water quality certification standards. Federal Water Pollution Control Act Amendments of 1972, §§ 303, 401(d), as amended, 33 U.S.C.A. §§ 1313, 1341(d).

[13] Health and Environment ⇐ 25.7(21.1)
199k25.7(21.1)
Clean Water Act provisions governing water quality certification requirements for hydroelectric projects allows regulation by states of water "quantity" as well as water "quality"; in many cases quantity is closely related to water quality, as sufficient lowering of quantity could destroy all designated uses of body of water, and Act recognizes that reduced stream flow could constitute water pollution. Federal Water Pollution Control Act Amendments of 1972, §§ 304(f), 502(19), as amended, 33 U.S.C.A. §§ 1314(f), 1362(19).

[14] Health and Environment ⇐ 25.7(3)
199k25.7(3)
Clean Water Act sections providing that state's authority to allocate quantities of water within its jurisdiction could not be superseded, abrogated, or otherwise impaired by the Act and that nothing in the Act could be construed as impairing or affecting state's right or jurisdiction with respect to state's waters, did not exclude water quantity issues from direct regulation under federally controlled water quality standards authorized in Clean Water Act; sections preserved state's authority to allocate water quantity as between users, but did not limit scope of water pollution controls that could be imposed on users who had obtained, pursuant to state law, water allocation. Federal Water Pollution Control Act Amendments of 1972, §§ 101(g), 510(2), as amended, 33 U.S.C.A. §§ 1251(g), 1370(2).

[15] Health and Environment ⇐ 25.7(21.1)
199k25.7(21.1)

[15] States ⇐ 18.31
360k18.31
State's authority to impose minimum flow requirement as condition of water quality certification required under Clean Water Act is not limited on theory that it interfered with Federal Energy Regulatory Commission's (FERC) licensing authority under the Federal Power Act; FERC had not yet acted on hydroelectric power project license application and it was possible that FERC would eventually deny application, or that any

FERC license would contain same conditions as state certification under Clean Water Act standards. Federal Water Pollution Control Act Amendments of 1972, §§ 303, 401(d), as amended, 33 U.S.C.A. §§ 1313, 1341(d); Federal Power Act, §§ 1 et seq., 321, as amended, 16 U.S.C.A. §§ 792 et seq., 791a.

[16] Health and Environment ⊜ 25.7(13.1)
199k25.7(13.1)

[16] Navigable Waters ⊜ 38
270k38
Requirement for state water quality certification before federal license or permit could be issued for activities that could result in discharges into navigable waters applied not only to applications for licenses from Federal Energy Regulatory Commission (FERC), but to all federal licenses and permits for activities which could result in discharge into United States navigable waters, including licenses obtained pursuant to Rivers and Harbors Appropriation Act and permits obtained from Army Corps of Engineers for discharge of dredged or fill material. Federal Water Pollution Control Act Amendments of 1972, §§ 401, 403, 404(a, e), as amended, 33 U.S.C.A. §§ 1341, 1343, 1344(a, e).

****1903** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26

S.Ct. 282, 287, 50 L.Ed. 499.

***700** Section 303 of the Clean Water Act requires each State, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters, and requires that such standards "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." Under Environmental Protection Agency (EPA) regulations, the standards must also include an antidegradation policy to ensure that "[e]xisting instream water uses and the level of water quality necessary to protect [those] uses [are] maintained and protected." States are required by § 401 of the Act to provide a water quality certification before a federal license or permit can be issued for any activity that may result in a discharge into intrastate navigable waters. As relevant here, the certification must "set forth any effluent limitations and other limitations ... necessary to assure that any applicant" will comply with various provisions of the Act and "any other appropriate" state law requirement. § 401(d). Under Washington's comprehensive water quality standards, characteristic uses of waters classified as Class AA include fish migration, rearing, and spawning. Petitioners, a city and a local utility district, want to build a hydroelectric project on the Dosewallips ****1904** River, a Class AA water, which would reduce the water flow in the relevant part of the river to a minimal residual flow of between 65 and 155 cubic feet per second (cfs). In order to protect the river's fishery, respondent state environmental agency issued a § 401 certification imposing, among other things, a minimum stream flow requirement of between 100 and 200 cfs. A state administrative appeals board ruled that the certification condition exceeded respondent's authority under state law, but the State Superior Court reversed. The State Supreme Court affirmed, holding that the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows, and that § 401 authorized the stream flow condition and conferred on States power to consider all state action related to water quality in imposing conditions on § 401 certificates.

Held: Washington's minimum stream flow requirement is a permissible condition of a § 401 certification. Pp. 1908-1914.

***701** a) A State may impose conditions on certifications insofar as necessary to enforce a designated use contained in the State's water quality standard. Petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge" is contradicted by § 401(d)'s reference to an

applicant's compliance, which allows a State to impose "other limitations" on a project. This view is consistent with EPA regulations providing that activities--not merely discharges--must comply with state water quality standards, a reasonable interpretation of § 401 which is entitled to deference. State standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. Although § 303 is not specifically listed in § 401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act, and § 301 in turn incorporates § 303 by reference. EPA's view supports this interpretation. Such limitations are also permitted by § 401(d)' s reference to "any other appropriate" state law requirement. Pp. 1908-1910.

(b) Washington's requirement is a limitation necessary to enforce the designated use of the river as a fish habitat. Petitioners err in asserting that § 303 requires States to protect such uses solely through implementation of specific numerical "criteria." The section's language makes it plain that water quality standards contain two components and is most naturally read to require that a project be consistent with both: the designated use and the water quality criteria. EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria. Moreover, the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics." There is no anomaly in the State's reliance on both use designations and criteria to protect water quality. Rather, it is petitioners' reading that leads to an unreasonable interpretation of the Act, since specified criteria cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect a State's hundreds of individual water bodies. Washington's requirement also is a proper application of the state and federal antidegradation regulations, as it ensures that an existing instream water use will be "maintained and protected." Pp. 1910-1912.

(c) Petitioners' assertion that the Act is only concerned with water quality, not quantity, makes an artificial distinction, since a sufficient lowering of quantity could destroy all of a river's designated uses, and since the Act recognizes that reduced stream flow can constitute water pollution. Moreover, §§ 101(g) and 510(2) of the Act do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. Those provisions preserve each State's authority to allocate water quantity as between ***702** users, but the § 401 certification does not purport to determine petitioners' proprietary right to the river's water. In addition, the Court is unwilling to read implied limitations into § 401 based on petitioners' claim that a conflict exists between the condition's imposition and the Federal Energy Regulatory Commission's authority to license hydroelectric ****1905** projects under the Federal Power Act, since FERC has not yet acted on petitioners' license application and since § 401's certification requirement also applies to other statutes and regulatory schemes. Pp. 1912-1914.

121 Wash.2d 179, 849 P.2d 646 (1992), affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, post, p. 1914. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, post, p. 1915.

Howard E. Shapiro, Washington, DC, for petitioners.

Christine O. Gregoire, Olympia, WA, for respondents.

Lawrence G. Wallace, Washington, DC, for the U.S. as amicus curiae, by special leave of the Court.

For U.S. Supreme Court Briefs See:

1993 WL 632337 (Resp.Brief)

1994 WL 131622 (Reply.Brief)

1993 WL 632338 (Pet.Brief)

For Transcript of Oral Argument See:

1994 WL 663420 (U.S.Oral.Arg.)

***703** Justice O'CONNOR delivered the opinion of the Court.

Petitioners, a city and a local utility district, want to build a hydroelectric project on the Dosewallips River in Washington State. We must decide whether respondent state environmental agency (hereinafter respondent) properly conditioned a permit for the project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs.

***704** I

This case involves the complex statutory and regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities. The Federal Water Pollution Control Act, commonly known as the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 et seq., is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a). The Act also seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." § 1251(a)(2).

To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments. Under the Act, the Administrator of the Environmental Protection Agency (EPA) is required, among other things, to establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources. See §§ 1311, 1314. Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. §§ 1311(b)(1)(C), 1313. These state water quality standards provide "a supplementary basis ... so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205, n. 12, 96 S.Ct. 2022, 2025, n. 12, 48 L.Ed.2d 578 (1976).

A state water quality standard "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). In setting standards, the State must comply with the following broad requirements:

> "Such standards shall be such as to protect the public health or welfare, enhance the quality of water and ***705** serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational [and other purposes.]" Ibid.

See also § 1251(a)(2).

A 1987 amendment to the Clean Water Act makes clear that § 303 also contains an "antidegradation policy"--that is, a policy requiring ****1906** that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation. Specifically, the Act permits the revision of certain effluent limitations or water quality standards "only if such revision is subject to and consistent with the antidegradation policy established under this section." § 1313(d)(4)(B). Accordingly, EPA's regulations implementing the Act require that state water quality standards include "a statewide antidegradation policy" to ensure that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 CFR § 131.12 (1993). At a minimum, state water quality standards must satisfy these conditions. The Act also allows States to impose more stringent water quality controls. See 33 U.S.C. §§ 1311(b)(1)(C), 1370. See also 40 CFR § 131.4(a) (1993) ("As recognized by section 510 of the Clean Water

Act [33 U.S.C. § 1370], States may develop water quality standards more stringent than required by this regulation").

The State of Washington has adopted comprehensive water quality standards intended to regulate all of the State's navigable waters. See Washington Administrative Code (WAC) 173-201-010 to 173-201-120 (1986). The State created an inventory of all the State's waters, and divided the waters into five classes. 173-201-045. Each individual fresh surface water of the State is placed into one of these classes. 173-201-080. The Dosewallips River is classified AA, extraordinary. 173-201-080(32). The water quality ***706** standard for Class AA waters is set forth at 173-201-045(1). The standard identifies the designated uses of Class AA waters as well as the criteria applicable to such waters. [FN1]

FN1. WAC 173-201-045(1) (1986) provides in pertinent part: "(1) Class AA (extraordinary). "(a) General characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses. "(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following: "(i) Water supply (domestic, industrial, agricultural). "(ii) Stock watering. "(iii) Fish and shellfish: Salmonid migration, rearing, spawning, and harvesting. Other fish migration, rearing, spawning, and harvesting. . . . . ."(iv) Wildlife habitat. "(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment). "(vi) Commerce and navigation. "(c) Water quality criteria "(i) Fecal coliform organisms. "(A) Freshwater--fecal coliform organisms shall not exceed a geometric mean value of 50 organisms/100 mL, with not more than 10 percent of samples exceeding 100 organisms/100 mL. "(B) Marine water--fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/100 mL, with not more than 10 percent of samples exceeding 43 organisms/100 mL. "(ii) Dissolved oxygen [shall exceed specific amounts]. . . . . "(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection. "(vi) Temperature shall not exceed [certain levels]. . . . . ."(v) pH shall be within [a specified range]. "(vi) Turbidity shall not exceed [specific levels]. "(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use. "(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste."

***707** In addition to these specific standards applicable to Class AA waters, the State has adopted a statewide antidegradation policy. That policy provides:

"(a) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

"(b) No degradation will be allowed of waters lying in national parks, national recreation areas, national wildlife refuges, national scenic rivers, and other areas of national ecological importance.

. . . . .

"(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term ****1907** and irreparable harm to the environment." 173-201-035(8).

As required by the Act, EPA reviewed and approved the State's water quality standards. See 33 U.S.C. § 1313(c)(3); 42 Fed.Reg. 56792 (1977). Upon approval by EPA, the state standard became "the water quality standard for the applicable waters of that State." 33 U.S.C. § 1313(c)(3).

States are responsible for enforcing water quality standards on intrastate waters. § 1319(a). In addition to these primary enforcement responsibilities, § 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. 33 U.S.C. § 1341. Specifically, § 401 requires an applicant for a federal license or permit to conduct any activity "which may result in any discharge into the navigable waters" to obtain from the State a certification

"that any such discharge will comply with the applicable provisions of sections [1311, 1312, 1313, 1316, and 1317 of this title]." 33 U.S.C. § 1341(a). Section 401(d) further provides that "[a]ny certification ... *708 shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant ... will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] ... and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d). The limitations included in the certification become a condition on any federal license. Ibid. [FN2]

FN2. Section 401, as set forth in 33 U.S.C. § 1341, provides in relevant part: "(a) Compliance with applicable requirements; application; procedures; license suspension "(1) Any 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 any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . . "(d) Limitations and monitoring requirements of certification "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

II

Petitioners propose to build the Elkhorn Hydroelectric Project on the Dosewallips River. If constructed as presently planned, the facility would be located just outside the Olympic National Park on federally owned land within the Olympic National Forest. The project would divert water from a 1.2-mile reach of the river (the bypass reach), run the *709 water through turbines to generate electricity and then return the water to the river below the bypass reach. Under the Federal Power Act (FPA), 41 Stat. 1063, as amended, 16 U.S.C. § 791a et seq., the Federal Energy Regulatory Commission (FERC) has authority to license new hydroelectric facilities. As a result, petitioners must get a FERC license to build or operate the Elkhorn Project. Because a federal license is required, and because the project may result in discharges into the Dosewallips River, petitioners are also required to obtain state certification of the project pursuant to § 401 of the Clean Water Act, 33 U.S.C. § 1341.

The water flow in the bypass reach, which is currently undiminished by appropriation, ranges seasonally between 149 and 738 cubic feet per second (cfs). The Dosewallips supports two species of salmon, coho and chinook, as well as steelhead trout. As originally proposed, the project was to include a diversion dam which would completely block **1908 the river and channel approximately 75% of the river's water into a tunnel alongside the streambed. About 25% of the water would remain in the bypass reach, but would be returned to the original riverbed through sluice gates or a fish ladder. Depending on the season, this would leave a residual minimum flow of between 65 and 155 cfs in the river. Respondent undertook a study to determine the minimum stream flows necessary to protect the salmon and steelhead fishery in the bypass reach. On June 11, 1986, respondent issued a § 401 water quality certification imposing a variety of conditions on the project, including a minimum stream flow requirement of between 100 and 200 cfs depending on the season.

A state administrative appeals board determined that the minimum flow requirement was intended to enhance, not merely maintain, the fishery, and that the certification condition therefore exceeded respondent's authority under state law. App.

to Pet. for Cert. 55a-57a. On appeal, the *710 State Superior Court concluded that respondent could require compliance with the minimum flow conditions. Id., at 29a-45a. The Superior Court also found that respondent had imposed the minimum flow requirement to protect and preserve the fishery, not to improve it, and that this requirement was authorized by state law. Id., at 34a.

The Washington Supreme Court held that the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows. 121 Wash.2d 179, 186-187, 849 P.2d 646, 650 (1993). The court also found that § 401(d), which allows States to impose conditions based upon several enumerated sections of the Clean Water Act and "any other appropriate requirement of State law," 33 U.S.C. § 1341(d), authorized the stream flow condition. Relying on this language and the broad purposes of the Clean Water Act, the court concluded that § 401(d) confers on States power to "consider all state action related to water quality in imposing conditions on section 401 certificates." 121 Wash.2d, at 192, 849 P.2d, at 652. We granted certiorari, 510 U.S. 810, 114 S.Ct. 55, 126 L.Ed.2d 25 (1993), to resolve a conflict among the state courts of last resort. See 121 Wash.2d 179, 849 P.2d 646 (1993); Georgia Pacific Corp. v. Dept. of Environmental Conservation, 159 Vt. 639, 628 A.2d 944 (1992) (table); Power Authority of New York v. Williams, 60 N.Y.2d 315, 469 N.Y.S.2d 620, 457 N.E.2d 726 (1983). We now affirm.

III

The principal dispute in this case concerns whether the minimum stream flow requirement that the State imposed on the Elkhorn Project is a permissible condition of a § 401 certification under the Clean Water Act. To resolve this dispute we must first determine the scope of the State's authority under § 401. We must then determine whether the limitation at issue here, the requirement that petitioners maintain minimum stream flows, falls within the scope of that authority.

*711 A

There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the project will result in two possible discharges--the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity. Brief for Petitioners 27-28. Petitioners contend, however, that the minimum stream flow requirement imposed by the State was unrelated to these specific discharges, and that as a consequence, the State lacked the authority under § 401 to condition its certification on maintenance of stream flows sufficient to protect the Dosewallips fishery.

[1][2] If § 401 consisted solely of subsection (a), which refers to a state certification that a "discharge" will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a **1909 project. Section 401(d) provides that any certification shall set forth "any effluent limitations and other limitations ... necessary to assure that any applicant " will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge." The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose "other limitations" on the project in general to assure compliance with various provisions of the Clean Water Act and with "any other appropriate requirement of State law." Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, post, at 1916, we see no such anomaly. Section 401(a)(1) identifies the category of activities *712 subject to certification--namely, those with discharges.

And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.

[3] Our view of the statute is consistent with EPA's regulations implementing § 401. The regulations expressly interpret § 401 as requiring the State to find that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 CFR § 121.2(a)(3) (1993) (emphasis added). See also EPA, Wetlands and 401 Certification 23 (Apr.1989) ("In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, ... and with 'any other appropriate requirement of State law' "). EPA's conclusion that activities --not merely discharges--must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference. See, e.g., Arkansas v. Oklahoma, 503 U.S. 91, 110, 112 S.Ct. 1046, 1059, 117 L.Ed.2d 239 (1992); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[4] Although § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded. The State can only ensure that the project complies with "any applicable effluent limitations and other limitations, under [33 U.S.C. §§ 1311, 1312]" or certain other provisions of the Act, "and with any other appropriate requirement of State law." 33 U.S.C. § 1341(d). The State asserts that the minimum stream flow requirement was imposed to ensure compliance with the state water quality standards adopted pursuant to § 303 of the Clean Water Act, 33 U.S.C. § 1313.

[5] We agree with the State that ensuring compliance with § 303 is a proper function of the § 401 certification. Although § 303 is not one of the statutory provisions listed in § 401(d), ***713** the statute allows States to impose limitations to ensure compliance with § 301 of the Act, 33 U.S.C. § 1311. Section 301 in turn incorporates § 303 by reference. See 33 U.S.C. § 1311(b)(1)(C); see also H.R.Conf.Rep. No. 95-830, p. 96 (1977), U.S. Code Cong. & Admin. News 1977, pp. 4326, 4471 ("Section 303 is always included by reference where section 301 is listed"). As a consequence, state water quality standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. This interpretation is consistent with EPA's view of the statute. See 40 CFR § 121.2(a)(3) (1992); EPA, Wetlands and 401 Certification, supra. Moreover, limitations to assure compliance with state water quality standards are also permitted by § 401(d)'s reference to "any other appropriate requirement of State law." We do not speculate on what additional state laws, if any, might be incorporated by this language. [FN3] ****1910** But at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are "appropriate" requirements of state law. Indeed, petitioners appear to agree that the State's authority under § 401 includes limitations designed to ensure compliance with state water quality standards. Brief for Petitioners 9, 21.

FN3. The dissent asserts that § 301 is concerned solely with discharges, not broader water quality standards. Post, at 1918, n. 2. Although § 301 does make certain discharges unlawful, see 33 U.S.C. § 1311(a), it also contains a broad enabling provision which requires States to take certain actions, to wit: "In order to carry out the objective of this chapter [viz. the chemical, physical, and biological integrity of the Nation's water] there shall be achieved ... not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, ... established pursuant to any State law or regulations...." 33 U.S.C. § 1311(b)(1)(C). This provision of § 301 expressly refers to state water quality standards, and is not limited to discharges.

B

[6] Having concluded that, pursuant to § 401, States may condition certification upon any limitations necessary to ensure *714 compliance with state water quality standards or any other "appropriate requirement of State law," we consider whether the minimum flow condition is such a limitation. Under § 303, state water quality standards must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). In imposing the minimum stream flow requirement, the State determined that construction and operation of the project as planned would be inconsistent with one of the designated uses of Class AA water, namely "[s]almonid [and other fish] migration, rearing, spawning, and harvesting." App. to Pet. for Cert. 83a-84a. The designated use of the river as a fish habitat directly reflects the Clean Water Act's goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Indeed, the Act defines pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water." § 1362(19). Moreover, the Act expressly requires that, in adopting water quality standards, the State must take into consideration the use of waters for "propagation of fish and wildlife." § 1313(c)(2)(A).

[7] Petitioners assert, however, that § 303 requires the State to protect designated uses solely through implementation of specific "criteria." According to petitioners, the State may not require them to operate their dam in a manner consistent with a designated "use"; instead, say petitioners, under § 303 the State may only require that the project comply with specific numerical "criteria."

We disagree with petitioners' interpretation of the language of § 303(c)(2)(A). Under the statute, a water quality standard must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A) (emphasis added). The text makes it plain that water quality standards contain two components. We think the language *715 of § 303 is most naturally read to require that a project be consistent with both components, namely, the designated use and the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.

[8] Consequently, pursuant to § 401(d) the State may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards. In granting certification pursuant to § 401(d), the State "shall set forth any ... limitations ... necessary to assure that [the applicant] will comply with any ... limitations under [§ 303] ... and with any other appropriate requirement of State law." A certification requirement that an applicant operate the project consistently with state water quality standards--i.e., consistently with the designated uses of the water body and the water quality criteria--is both a "limitation" to assure "compl[iance] with ... **1911 limitations" imposed under § 303, and an "appropriate" requirement of state law.

EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria. In its regulations governing state water quality standards, EPA defines criteria as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 CFR § 131.3(b) (1993) (emphasis added). The regulations further provide that "[w]hen criteria are met, water quality will generally protect the designated use." Ibid. (emphasis added). Thus, the EPA regulations implicitly recognize that in some circumstances, criteria alone are insufficient to protect a designated use.

[9] Petitioners also appear to argue that use requirements are too open ended, and that the Act only contemplates enforcement of the more specific and objective "criteria." But

this argument is belied by the open-ended nature of the criteria *716 themselves. As the Solicitor General points out, even "criteria" are often expressed in broad, narrative terms, such as " 'there shall be no discharge of toxic pollutants in toxic amounts.' " Brief for United States as Amicus Curiae 18. See American Paper Institute, Inc. v. EPA, 996 F.2d 346, 349 (CADC 1993). In fact, under the Clean Water Act, only one class of criteria, those governing "toxic pollutants listed pursuant to section 1317(a)(1)," need be rendered in numerical form. See 33 U.S.C. § 1313(c)(2)(B); 40 CFR § 131.11(b)(2) (1993).

Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the river as a fishery, must be translated into specific limitations for individual projects. For example, the standards state that "[t]oxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use." WAC 173-201-045(1)(c)(vii) (1986). Similarly, the state standards specify that "[a]esthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste." 173-201-045(1)(c)(viii). We think petitioners' attempt to distinguish between uses and criteria loses much of its force in light of the fact that the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics."

[10] Petitioners further argue that enforcement of water quality standards through use designations renders the water quality criteria component of the standards irrelevant. We see no anomaly, however, in the State's reliance on both use designations and criteria to protect water quality. The specific numerical limitations embodied in the criteria are a convenient enforcement mechanism for identifying minimum water conditions which will generally achieve the requisite water quality. And, in most circumstances, satisfying the criteria will, as EPA recognizes, be sufficient to maintain the *717 designated use. See 40 CFR § 131.3(b) (1993). Water quality standards, however, apply to an entire class of water, a class which contains numerous individual water bodies. For example, in the State of Washington, the Class AA water quality standard applies to 81 specified fresh surface waters, as well as to all "surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas," all "lakes and their feeder streams within the state," and all "unclassified surface waters that are tributaries to Class AA waters." WAC 173-201-070 (1986). While enforcement of criteria will in general protect the uses of these diverse waters, a complementary requirement that activities also comport with designated uses enables the States to ensure that each activity--even if not foreseen by the criteria--will be consistent with the specific uses and attributes of a particular body of water.

[11] Under petitioners' interpretation of the statute, however, if a particular criterion, such as turbidity, were missing from the list **1912 contained in an individual state water quality standard, or even if an existing turbidity criterion were insufficient to protect a particular species of fish in a particular river, the State would nonetheless be forced to allow activities inconsistent with the existing or designated uses. We think petitioners' reading leads to an unreasonable interpretation of the Act. The criteria components of state water quality standards attempt to identify, for all the water bodies in a given class, water quality requirements generally sufficient to protect designated uses. These criteria, however, cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect the State's hundreds of individual water bodies. Requiring the States to enforce only the criteria component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the *718 water's designated uses.

Given that there is no textual support for imposing this requirement, we are loath to attribute to Congress an intent to impose this heavy regulatory burden on the States.

The State also justified its minimum stream flow as necessary to implement the "antidegradation policy" of § 303, 33 U.S.C. § 1313(d)(4)(B). When the Clean Water Act was enacted in 1972, the water quality standards of all 50 States had antidegradation provisions. These provisions were required by federal law. See U.S. Dept. of Interior, Federal Water Pollution Control Administration, Compendium of Department of Interior Statements on Non-degradation of Interstate Waters 1-2 (Aug. 1968); see also Hines, A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water, 62 Iowa L.Rev. 643, 658-660 (1977). By providing in 1972 that existing state water quality standards would remain in force until revised, the Clean Water Act ensured that the States would continue their antidegradation programs. See 33 U.S.C. § 1313(a). EPA has consistently required that revised state standards incorporate an antidegradation policy. And, in 1987, Congress explicitly recognized the existence of an "antidegradation policy established under [§ 303]." § 1313(d)(4)(B).

[12] EPA has promulgated regulations implementing § 303's antidegradation policy, a phrase that is not defined elsewhere in the Act. These regulations require States to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." 40 CFR § 131.12 (1993). These "implementation methods shall, at a minimum, be consistent with the ... [e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." Ibid. EPA has explained that under its antidegradation regulation, "no activity is allowable ... which could partially or completely eliminate any existing use." EPA, Questions and ***719** Answers on Antidegradation 3 (Aug. 1985). Thus, States must implement their antidegradation policy in a manner "consistent" with existing uses of the stream. The State of Washington's antidegradation policy in turn provides that "[e]xisting beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." WAC 173-201-035(8)(a) (1986). The State concluded that the reduced stream flows would have just the effect prohibited by this policy. The Solicitor General, representing EPA, asserts, Brief for United States as Amicus Curiae 18-21, and we agree, that the State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an "existing instream water us[e]" will be "maintained and protected." 40 CFR § 131.12(a)(1) (1993).

[13] Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the ****1913** water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. 33 U.S.C. § 1362(19). This broad conception of pollution--one which expressly evinces Congress' concern with the physical and biological integrity of water--refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water "quantity" and water "quality." Moreover, § 304 of the Act expressly recognizes that water "pollution" may result from "changes ***720** in the movement, flow, or circulation of any navigable waters ..., including changes caused by the construction of dams." 33 U.S.C. § 1314(f). This concern with the flowage effects of dams and other diversions is also embodied

in the EPA regulations, which expressly require existing dams to be operated to attain designated uses. 40 CFR § 131.10(g)(4) (1992).

[14] Petitioners assert that two other provisions of the Clean Water Act, §§ 101(g) and 510(2), 33 U.S.C. §§ 1251(g) and 1370(2), exclude the regulation of water quantity from the coverage of the Act. Section 101(g) provides "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). Similarly, § 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters ... of such States." 33 U.S.C. § 1370. In petitioners' view, these provisions exclude "water quantity issues from direct regulation under the federally controlled water quality standards authorized in § 303." Brief for Petitioners 39 (emphasis deleted).

This language gives the States authority to allocate water rights; we therefore find it peculiar that petitioners argue that it prevents the State from regulating stream flow. In any event, we read these provisions more narrowly than petitioners. Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. In California v. FERC, 495 U.S. 490, 498, 110 S.Ct. 2024, 2029, 109 L.Ed.2d 474 (1990), construing an analogous provision of the Federal Power Act, [FN4] we explained that "minimum stream ***721** flow requirements neither reflect nor establish 'proprietary rights' " to water. Cf. First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 176, and n. 20, 66 S.Ct. 906, 917, and n. 20, 90 L.Ed. 1143 (1946). Moreover, the certification itself does not purport to determine petitioners' proprietary right to the water of the Dosewallips. In fact, the certification expressly states that a "State Water Right Permit (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project." App. to Pet. for Cert. 83a. The certification merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act, if and when it is obtained from the State. Our view is reinforced by the legislative history of the 1977 amendment to the Clean Water Act adding § 101(g). See 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978) ("The requirements [of the Act] may incidentally affect individual water rights.... ****1914** It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations").

FN4. The relevant text of the Federal Power Act provides that "nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077, 16 U.S.C. § 821.

IV

[15] Petitioners contend that we should limit the State's authority to impose minimum flow requirements because FERC has comprehensive authority to license hydroelectric projects pursuant to the FPA, 16 U.S.C. § 791a et seq. In petitioners' view, the minimum flow requirement imposed here interferes with FERC's authority under the FPA.

***722** The FPA empowers FERC to issue licenses for projects "necessary or convenient ... for the development, transmission, and utilization of power across, along, from, or in any of the streams ... over which Congress has jurisdiction." § 797(e). The FPA also requires FERC to consider a project's effect on fish and wildlife. §§ 797(e), 803(a)(1). In

California v. FERC, supra, we held that the California Water Resources Control Board, acting pursuant to state law, could not impose a minimum stream flow which conflicted with minimum stream flows contained in a FERC license. We concluded that the FPA did not "save" to the States this authority. Id., at 498.

No such conflict with any FERC licensing activity is presented here. FERC has not yet acted on petitioners' license application, and it is possible that FERC will eventually deny petitioners' application altogether. Alternatively, it is quite possible, given that FERC is required to give equal consideration to the protection of fish habitat when deciding whether to issue a license, that any FERC license would contain the same conditions as the state § 401 certification. Indeed, at oral argument the Deputy Solicitor General stated that both EPA and FERC were represented in this proceeding, and that the Government has no objection to the stream flow condition contained in the § 401 certification. Tr. of Oral Arg. 43-44.

[16] Finally, the requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters. For example, a permit from the Army Corps of Engineers is required for the installation of any structure in the navigable waters which may interfere with navigation, including piers, docks, and ramps. Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1151, § 10, 33 U.S.C. § 403. Similarly, a permit must be obtained from the Army Corps of Engineers ***723** for the discharge of dredged or fill material, and from the Secretary of the Interior or Agriculture for the construction of reservoirs, canals, and other water storage systems on federal land. See 33 U.S.C. §§ 1344(a), (e); 43 U.S.C. § 1761 (1988 ed. and Supp. IV). We assume that a § 401 certification would also be required for some licenses obtained pursuant to these statutes. Because § 401's certification requirement applies to other statutes and regulatory schemes, and because any conflict with FERC's authority under the FPA is hypothetical, we are unwilling to read implied limitations into § 401. If FERC issues a license containing a stream flow condition with which petitioners disagree, they may pursue judicial remedies at that time. Cf. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 778, n. 20, 104 S.Ct. 2105, 2113, n. 20, 80 L.Ed.2d 753 (1984).

In summary, we hold that the State may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard. The judgment of the Supreme Court of Washington, accordingly, is affirmed.

So ordered.

Justice STEVENS, concurring.

While I agree fully with the thorough analysis in the Court's opinion, I add this comment ****1915** for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards. See, e.g., § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

***724** Justice THOMAS, with whom Justice SCALIA joins, dissenting.

The Court today holds that a State, pursuant to § 401 of the Clean Water Act, may condition the certification necessary to obtain a federal license for a proposed hydroelectric project upon the maintenance of a minimum flow rate in the river to be utilized by the project. In my view, the Court makes three fundamental errors. First, it adopts an interpretation that fails adequately to harmonize the subsections of § 401. Second, it places no meaningful limitation on a State's authority under § 401 to impose conditions on

certification. Third, it gives little or no consideration to the fact that its interpretation of § 401 will significantly disrupt the carefully crafted federal-state balance embodied in the Federal Power Act. Accordingly, I dissent.

I
A

Section 401(a)(1) of the Federal Water Pollution Control Act, otherwise known as the Clean Water Act (CWA or Act), 33 U.S.C. § 1251 et seq., provides that "[a]ny applicant for a Federal license or permit to conduct any activity ..., which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates ... that any such discharge will comply with ... applicable provisions of [the CWA]." 33 U.S.C. § 1341(a)(1). The terms of § 401(a)(1) make clear that the purpose of the certification process is to ensure that discharges from a project will meet the requirements of the CWA. Indeed, a State's authority under § 401(a)(1) is limited to certifying that "any discharge" that "may result" from "any activity," such as petitioners' proposed hydroelectric project, will "comply" with the enumerated provisions of the CWA; if the discharge will fail to comply, the State may "den[y]" the certification. Ibid. In addition, under § 401(d), a State may place conditions on a ***725** § 401 certification, including "effluent limitations and other limitations, and monitoring requirements," that may be necessary to ensure compliance with various provisions of the CWA and with "any other appropriate requirement of State law." § 1341(d).

The minimum stream flow condition imposed by respondents in this case has no relation to any possible "discharge" that might "result" from petitioners' proposed project. The term "discharge" is not defined in the CWA, but its plain and ordinary meaning suggests "a flowing or issuing out," or "something that is emitted." Webster's Ninth New Collegiate Dictionary 360 (1991). Cf. 33 U.S.C. § 1362(16) ("The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants"). A minimum stream flow requirement, by contrast, is a limitation on the amount of water the project can take in or divert from the river. See ante, at 1908. That is, a minimum stream flow requirement is a limitation on intake--the opposite of discharge. Imposition of such a requirement would thus appear to be beyond a State's authority as it is defined by § 401(a)(1).

The Court remarks that this reading of § 401(a)(1) would have "considerable force," ante, at 1908, were it not for what the Court understands to be the expansive terms of § 401(d). That subsection, as set forth in 33 U.S.C. § 1341(d), provides:

> "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit ****1916** will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal ***726** license or permit subject to the provisions of this section." (Emphasis added).

According to the Court, the fact that § 401(d) refers to an "applicant," rather than a "discharge," complying with various provisions of the Act "contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge.' " Ante, at 1909. In the Court's view, § 401(d)'s reference to an applicant's compliance "expands" a State's authority beyond the limits set out in § 401(a)(1), ibid., thereby permitting the State in its certification process to scrutinize the applicant's proposed "activity as a whole," not just the discharges that may result from the activity, ante, at 1909. The Court concludes that this broader authority allows a State to impose conditions on a § 401 certification that are unrelated to discharges. Ante, at 1908-

1909.

While the Court's interpretation seems plausible at first glance, it ultimately must fail. If, as the Court asserts, § 401(d) permits States to impose conditions unrelated to discharges in § 401 certifications, Congress' careful focus on discharges in § 401(a)(1)--the provision that describes the scope and function of the certification process--was wasted effort. The power to set conditions that are unrelated to discharges is, of course, nothing but a conditional power to deny certification for reasons unrelated to discharges. Permitting States to impose conditions unrelated to discharges, then, effectively eliminates the constraints of § 401(a)(1).

Subsections 401(a)(1) and (d) can easily be reconciled to avoid this problem. To ascertain the nature of the conditions permissible under § 401(d), § 401 must be read as a whole. See United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988) (statutory interpretation is a "holistic endeavor"). As noted above, § 401(a)(1) limits a State's authority in the certification process to addressing concerns related to discharges and to ensuring that any discharge resulting from a project will comply with specified provisions of the Act. It is reasonable ***727** to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while § 401(d) permits a State to place conditions on a certification to ensure compliance of the "applicant," those conditions must still be related to discharges. In my view, this interpretation best harmonizes the subsections of § 401. Indeed, any broader interpretation of § 401(d) would permit that subsection to swallow § 401(a)(1).

The text of § 401(d) similarly suggests that the conditions it authorizes must be related to discharges. The Court attaches critical weight to the fact that § 401(d) speaks of the compliance of an "applicant," but that reference, in and of itself, says little about the nature of the conditions that may be imposed under § 401(d). Rather, because § 401(d) conditions can be imposed only to ensure compliance with specified provisions of law--that is, with "applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard[s] of performance under section 1316 of this title, ... prohibition[s], effluent standard[s], or pretreatment standard[s] under section 1317 of this title, [or] ... any other appropriate requirement[s] of State law"--one should logically turn to those provisions for guidance in determining the nature, scope, and purpose of § 401(d) conditions. Each of the four identified CWA provisions describes discharge-related limitations. See § 1311 (making it unlawful to discharge any pollutant except in compliance with enumerated provisions of the Act); § 1312 (establishing effluent limitations on point source discharges); § 1316 (setting national standards of performance ****1917** for the control of discharges); and § 1317 (setting pretreatment effluent standards and prohibiting the discharge of certain effluents except in compliance with standards).

The final term on the list--"appropriate requirement[s] of State law"--appears to be more general in scope. Because ***728** this reference follows a list of more limited provisions that specifically address discharges, however, the principle ejusdem generis would suggest that the general reference to "appropriate" requirements of state law is most reasonably construed to extend only to provisions that, like the other provisions in the list, impose discharge-related restrictions. Cf. Cleveland v. United States, 329 U.S. 14, 18, 67 S.Ct. 13, 15-16, 91 L.Ed. 12 (1946) ("Under the ejusdem generis rule of construction the general words are confined to the class and may not be used to enlarge it"); Arcadia v. Ohio Power Co., 498 U.S. 73, 84, 111 S.Ct. 415, 421-422, 112 L.Ed.2d 374 (1990). In sum, the text and structure of § 401 indicate that a State may impose under § 401(d) only those conditions that are related to discharges.

B

The Court adopts its expansive reading of §

401(d) based at least in part upon deference to the "conclusion" of the Environmental Protection Agency (EPA) that § 401(d) is not limited to requirements relating to discharges. Ante, at 1909. The agency regulation to which the Court defers is 40 CFR § 121.2(a)(3) (1993), which provides that the certification shall contain "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." Ante, at 1909. According to the Court, "EPA's conclusion that activities --not merely discharges--must comply with state water quality standards ... is entitled to deference" under Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Ante, at 1909.

As a preliminary matter, the Court appears to resort to deference under Chevron without establishing through an initial examination of the statute that the text of the section is ambiguous. See Chevron, supra, at 842-843, 104 S.Ct., at 2781-2182. More importantly, the Court invokes Chevron deference to support its interpretation even though the Government does not seek ***729** deference for the EPA's regulation in this case. [FN1] That the Government itself has not contended that an agency interpretation exists reconciling the scope of the conditioning authority under § 401(d) with the terms of § 401(a)(1) should suggest to the Court that there is no "agenc[y] construction" directly addressing the question. Chevron, supra, at 842, 104 S.Ct., at 2781.

> FN1. The Government, appearing as amicus curiae "supporting affirmance," instead approaches the question presented by assuming, arguendo, that petitioners' construction of § 401 is correct: "Even if a condition imposed under Section 401(d) were valid only if it assured that a 'discharge' will comply with the State's water quality standards, the [minimum flow condition set by respondents] satisfies that test." Brief for United States as Amicus Curiae 11.

In fact, the regulation to which the Court defers is hardly a definitive construction of the scope of § 401(d). On the contrary, the EPA's position on the question whether conditions under § 401(d) must be related to discharges is far from clear. Indeed, the only EPA regulation that specifically addresses the "conditions" that may appear in § 401 certifications speaks exclusively in terms of limiting discharges. According to the EPA, a § 401 certification shall contain "[a] statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity." 40 CFR § 121.2(a)(4) (1993) (emphases added). In my view, § 121.2(a)(4) should, at the very least, give the Court pause before it resorts to Chevron deference in this case.

II

The Washington Supreme Court held that the State's water quality standards, promulgated ****1918** pursuant to § 303 of the Act, 33 U.S.C. § 1313, were "appropriate" requirements of state law under § 401(d), and sustained the stream flow condition imposed by respondents as necessary to ensure compliance with a "use" of the river as specified in those standards. As an alternative to their argument that § 401(d) conditions must be discharge related, petitioners assert that ***730** the state court erred when it sustained the stream flow condition under the "use" component of the State's water quality standards without reference to the corresponding "water quality criteria" contained in those standards. As explained above, petitioners' argument with regard to the scope of a State's authority to impose conditions under § 401(d) is correct. I also find petitioners' alternative argument persuasive. Not only does the Court err in rejecting that § 303 argument, in the process of doing so it essentially removes all limitations on a State's conditioning authority under § 401.

The Court states that, "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law" under § 401(d). Ante, at 1910. [FN2] A water quality standard promulgated pursuant to § 303 must "consist of the designated uses of the

navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). The Court asserts that this language "is most naturally read to require that a project be consistent with both components, namely, the designated use and the water quality criteria." Ante, at 1910. In the Court's view, then, the "use" of a body of water is independently enforceable through § 401(d) without reference to the corresponding criteria. Ibid.

FN2. In the Court's view, § 303 water quality standards come into play under § 401(d) either as "appropriate" requirements of state law or through § 301 of the Act, which, according to the Court, "incorporates § 303 by reference." Ante, at 1909 (citations omitted). The Court notes that through § 303, "the statute allows States to impose limitations to ensure compliance with § 301 of the Act." Ibid. Yet § 301 makes unlawful only "the [unauthorized] discharge of any pollutant by any person." 33 U.S.C. § 1311(a) (emphasis added); cf. supra, at 1916. Thus, the Court's reliance on § 301 as a source of authority to impose conditions unrelated to discharges is misplaced.

The Court's reading strikes me as contrary to common sense. It is difficult to see how compliance with a "use" of a body of water could be enforced without reference to the ***731** corresponding criteria. In this case, for example, the applicable "use" is contained in the following regulation: "Characteristic uses shall include, but not be limited to, ... [s]almonid migration, rearing, spawning, and harvesting." Wash.Admin.Code (WAC) 173-201-045(1)(b)(iii) (1986). The corresponding criteria, by contrast, include measurable factors such as quantities of fecal coliform organisms and dissolved gases in the water. 173-201-045(1)(c)(i) and (ii). [FN3] Although the Act does not further address (at least not expressly) the link between "uses" and "criteria," the regulations promulgated under § 303 make clear that a "use" is an aspirational goal to be attained through compliance with corresponding "criteria." Those regulations suggest that "uses" are to be "achieved and protected," and that "water quality criteria" are to be adopted to "protect the designated use[s]." 40 CFR §§ 131.10(a), 131.11(a)(1) (1993).

FN3. Respondents concede that petitioners' project "will likely not violate any of Washington's water quality criteria." Brief for Respondents 24.

The problematic consequences of decoupling "uses" and "criteria" become clear once the Court's interpretation of § 303 is read in the context of § 401. In the Court's view, a State may condition the § 401 certification "upon any limitations necessary to ensure compliance" with the "uses of the water body." Ante, at 1909-1910 (emphasis added). Under the Court's interpretation, then, state environmental agencies may pursue, through § 401, their water goals in any way they choose; the conditions imposed on certifications need not relate to discharges, nor to water quality criteria, nor to any objective or quantifiable standard, so long as they tend to ****1919** make the water more suitable for the uses the State has chosen. In short, once a State is allowed to impose conditions on § 401 certifications to protect "uses" in the abstract, § 401(d) is limitless.

To illustrate, while respondents in this case focused only on the "use" of the Dosewallips River as a fish habitat, this particular river has a number of other "[c]haracteristic uses," ***732** including "[r]ecreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment)." WAC 173-201-045(1)(b)(v) (1986). Under the Court's interpretation, respondents could have imposed any number of conditions related to recreation, including conditions that have little relation to water quality. In Town of Summersville, 60 FERC ¶ 61,291, p. 61,990 (1992), for instance, the state agency required the applicant to "construct ... access roads and paths, low water stepping stone bridges, ... a boat launching facility ..., and a residence and storage building." These conditions presumably would be sustained under the approach the Court adopts today. [FN4] In the end, it is difficult to conceive of a condition that would fall outside a State's § 401(d) authority under the Court's approach.

FN4. Indeed, as the § 401 certification stated in this

case, the flow levels imposed by respondents are "in excess of those required to maintain water quality in the bypass region," App. to Pet. for Cert. 83a, and therefore conditions not related to water quality must, in the Court's view, be permitted.

III

The Court's interpretation of § 401 significantly disrupts the careful balance between state and federal interests that Congress struck in the Federal Power Act (FPA), 16 U.S.C. § 791a et seq. Section 4(e) of the FPA authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for projects "necessary or convenient ... for the development, transmission, and utilization of power across, along, from, or in any of the streams ... over which Congress has jurisdiction." 16 U.S.C. § 797(e). In the licensing process, FERC must balance a number of considerations: "[I]n addition to the power and development purposes for which licenses are issued, [FERC] shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreationalopportunities, ***733** and the preservation of other aspects of environmental quality." Ibid. Section 10(a) empowers FERC to impose on a license such conditions, including minimum stream flow requirements, as it deems best suited for power development and other public uses of the waters. See 16 U.S.C. § 803(a); California v. FERC, 495 U.S. 490, 494-495, 506, 110 S.Ct. 2024, 2027, 109 L.Ed.2d 474 (1990).

In California v. FERC, the Court emphasized FERC's exclusive authority to set the stream flow levels to be maintained by federally licensed hydroelectric projects. California, in order "to protect [a] stream's fish," had imposed flow rates on a federally licensed project that were significantly higher than the flow rates established by FERC. Id., at 493, 110 S.Ct., at 2027. In concluding that California lacked authority to impose such flow rates, we stated:

"As Congress directed in FPA § 10(a), FERC set the conditions of the [project] license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would constitute a veto of the project that was approved and licensed by ****1920** FERC." Id., at 506-507, 110 S.Ct., at 2033-2034 (citations and internal quotation marks omitted).

California v. FERC reaffirmed our decision in First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 164, 66 S.Ct. 906, 911-912, 90 L.Ed. 1143 (1946), in which we warned against "vest[ing] in [state authorities] ***734** a veto power" over federal hydroelectric projects. Such authority, we concluded, could "destroy the effectiveness" of the FPA and "subordinate to the control of the State the 'comprehensive' planning" with which the administering federal agency (at that time the Federal Power Commission) was charged. Ibid.

Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in California v. FERC and First Iowa they did not possess. As the language of § 401(d) expressly states, any condition placed in a § 401 certification, including, in the Court's view, a stream flow requirement, "shall become a condition on any Federal license or permit." 33 U.S.C. § 1341(d) (emphasis added). Any condition imposed by a State under § 401(d) thus becomes a "ter[m] ... of the license as a matter of law," Department of Interior v. FERC, 952 F.2d 538, 548 (CADC 1992) (citation and internal quotation marks omitted), regardless of whether FERC favors the limitation.

Because of § 401(d)'s mandatory language, federal courts have uniformly held that FERC has no power to alter or review § 401 conditions, and that the proper forum for review of those conditions is state court. [FN5] Section 401(d) conditions imposed by States are *735 therefore binding on FERC. Under the Court's interpretation, then, it appears that the mistake of the State in California v. FERC was not that it had trespassed into territory exclusively reserved to FERC; rather, it simply had not hit upon the proper device--that is, the § 401 certification--through which to achieve its objectives.

FN5. See, e.g., Keating v. FERC, 927 F.2d 616, 622 (CADC 1991) (federal review inappropriate because a decision to grant or deny § 401 certification "presumably turns on questions of substantive state environmental law--an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence"); Department of Interior v. FERC, 952 F.2d, at 548; United States v. Marathon Development Corp., 867 F.2d 96, 102 (CA1 1989); Proffitt v. Rohm & Haas, 850 F.2d 1007, 1009 (CA3 1988). FERC has taken a similar position. See Town of Summersville, 60 FERC ¶ 61,291, p. 61,990 (1992) ("[S]ince pursuant to Section 401(d) ... all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission. The only alternatives available to the Commission are either to issue a license with the conditions included or to deny" the application altogether); accord, Central Maine Power Co., 52 FERC ¶ 61,033, pp. 61,172-61,173 (1990).

Although the Court notes in passing that "[t]he limitations included in the certification become a condition on any federal license," ante, at 1907, it does not acknowledge or discuss the shift of power from FERC to the States that is accomplished by its decision. Indeed, the Court merely notes that "any conflict with FERC's authority under the FPA" in this case is "hypothetical" at this stage, ante, at 1914, because "FERC has not yet acted on petitioners' license application," ante, at 1914. We are assured that "it is quite possible ... that any FERC license would contain the same conditions as the state § 401 certification." Ibid.

The Court's observations simply miss the point. Even if FERC might have no objection to the stream flow condition established by respondents in this case, such a happy coincidence will likely prove to be the exception, rather than the rule. In issuing licenses, FERC must balance the Nation's power needs together with the need for energy conservation, irrigation, flood control, fish and wildlife protection, and recreation. 16 U.S.C. § 797(e). State environmental agencies, by contrast, need only consider parochial environmental interests. Cf., e.g., Wash.Rev.Code § 90.54.010(2) (1992) (goal of State's water policy is to "insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington"). As a result, it is likely that conflicts will arise between a **1921 FERC-established stream flow level and a state-imposed level.

Moreover, the Court ignores the fact that its decision nullifies the congressionally mandated process for resolving such state-federal disputes when they develop. Section 10(j)(1) of the FPA, 16 U.S.C. § 803(j)(1), which was added as part *736 of the Electric Consumers Protection Act of 1986 (ECPA), 100 Stat. 1244, provides that every FERC license must include conditions to "protect, mitigate damag[e] to, and enhance" fish and wildlife, including "related spawning grounds and habitat," and that such conditions "shall be based on recommendations" received from various agencies, including state fish and wildlife agencies. If FERC believes that a recommendation from a state agency is inconsistent with the FPA--that is, inconsistent with what FERC views as the proper balance between the Nation's power needs and environmental concerns--it must "attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities" of the state agency. § 803(j)(2). If, after such an attempt, FERC "does not adopt in whole or in part a recommendation of any [state] agency," it must publish its reasons for rejecting that

recommendation. Ibid. After today's decision, these procedures are a dead letter with regard to stream flow levels, because a State's "recommendation" concerning stream flow "shall" be included in the license when it is imposed as a condition under § 401(d).

More fundamentally, the 1986 amendments to the FPA simply make no sense in the stream flow context if, in fact, the States already possessed the authority to establish minimum stream flow levels under § 401(d) of the CWA, which was enacted years before those amendments. Through the ECPA, Congress strengthened the role of the States in establishing FERC conditions, but it did not make that authority paramount. Indeed, although Congress could have vested in the States the final authority to set stream flow conditions, it instead left that authority with FERC. See California v. FERC, 495 U.S., at 499, 110 S.Ct., at 2029-2030. As the Ninth Circuit observed in the course of rejecting California's effort to give California v. FERC a narrow reading, "[t]here would be no point in Congress requiring [FERC] to consider the state agency recommendations on environmental matters and ***737** make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." Sayles Hydro Associates v. Maughan, 985 F.2d 451, 456 (1993).

Given the connection between § 401 and federal hydroelectric licensing, it is remarkable that the Court does not at least attempt to fit its interpretation of § 401 into the larger statutory framework governing the licensing process. At the very least, the significant impact the Court's ruling is likely to have on that process should compel the Court to undertake a closer examination of § 401 to ensure that the result it reaches was mandated by Congress.

IV

Because the Court today fundamentally alters the federal-state balance Congress carefully crafted in the FPA, and because such a result is neither mandated nor supported by the text of § 401, I respectfully dissent.

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988 F.2d 989
23 Envtl. L. Rep. 20,530
(Cite as: 988 F.2d 989)
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United States Court of Appeals,
Ninth Circuit.

FRIENDS OF THE PAYETTE, and Idaho Rivers United, Inc., Plaintiffs-Appellants,
v.
HORSESHOE BEND HYDROELECTRIC CO.; United States Army Corps of Engineers;
Robert Volz, District Engineer of United States Army Corps of Engineers,
Defendants-Appellees.

No. 92-36611.

Argued and Submitted Jan. 5, 1993.
Decided March 19, 1993.

Environmental organizations brought action under the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA) challenging the approval, without an Environmental Impact Statement (EIS), of a hydroelectric project. The United States District Court for the District of Idaho, Marion J. Callister, J., 811 F.Supp. 524, dismissed. Organizations appealed. The Court of Appeals, Eugene A. Wright, Senior Circuit Judge, held that: (1) the Army Corps of Engineers did not act arbitrarily and capriciously in assessing the environmental effects of the project and in deciding that no EIS was necessary, and (2) it was not an abuse of discretion to decide that wetlands were maintained by an irrigation canal and, thus, that the wetlands were beyond the jurisdiction of the Corps.

Affirmed in part and reversed in part.

West Headnotes

[1] Administrative Law and Procedure ⇐ 763
15Ak763

[1] Health and Environment ⇐ 25.15(10)
199k25.15(10)
Arbitrary and capricious standard of review, rather than reasonableness standard, applies in reviewing federal agency's decision not to prepare environmental impact statement (EIS) for project. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[2] Health and Environment ⇐ 25.10(5)
199k25.10(5)
In deciding whether to prepare environmental impact statement (EIS) for project, federal agency must take hard look at environmental consequences of its action and its decision must be founded on reasoned evaluation of relevant factors. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[3] Health and Environment ⇐ 25.10(2.1)
199k25.10(2.1)
(Formerly 199k25.10(2))
Army Corps of Engineers did not act arbitrarily and capriciously when it decided that mitigation measures required by permit for construction of hydroelectric project would be sufficient to compensate for adverse effects on wetlands and, thus, that no environmental impact statement (EIS) was necessary, even if mitigation measures would not compensate completely for effects. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[4] Health and Environment ⇐ 25.10(2.1)
199k25.10(2.1)
(Formerly 199k25.10(2))
Army Corps of Engineers did not act arbitrarily and capriciously when it relied on state certification that hydroelectric project would be in compliance with state water quality standards and on state monitoring of compliance, for purposes of deciding whether environmental impact statement (EIS) was necessary. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[5] Health and Environment ⇐ 25.10(3)
199k25.10(3)
Determination by Army Corps of Engineers that hydroelectric project would not significantly affect fisheries and, thus, that no environmental impact statement (EIS) was necessary, was not arbitrary and capricious;

permit for construction of project included mitigation measures to compensate for fish kills and loss of diversity in bypass stretch. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[6] Health and Environment ⚿ 25.10(3)
199k25.10(3)
Army Corps of Engineers did not act arbitrarily and capriciously in deciding that hydroelectric project would not have significant effect on endangered species such as bald eagles, for purposes of deciding whether environmental impact statement (EIS) was necessary; mitigation measures required under project's permit had been designed to protect eagles and their habitat. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[7] Health and Environment ⚿ 25.10(3)
199k25.10(3)
Army Corps of Engineers did not act arbitrarily and capriciously in deciding that hydroelectric project would not significantly affect recreational activities on river and, thus, that environmental impact statement (EIS) was not necessary; project plans called for mitigation measures of boat ramp upstream from project's dam, water bypass for boats and flotation devices, and removal of diversion bladder to allow boat racing. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[8] Health and Environment ⚿ 25.10(3)
199k25.10(3)
Army Corps of Engineers did not act arbitrarily and capriciously in deciding that hydroelectric project would not have significant impact on aesthetics and, thus, that environmental impact statement (EIS) was not necessary in light of mitigation measures included in project permit. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[9] Health and Environment ⚿ 25.10(2.1)
199k25.10(2.1)
(Formerly 199k25.10(2))
Army Corps of Engineers adequately considered possibility that hydroelectric project's water diversion would increase potential for ice formation, ice jams, and flooding and, therefore, decision that Environmental Impact Statement (EIS) was not necessary was not arbitrary and capricious. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[10] Health and Environment ⚿ 25.10(5)
199k25.10(5)
Army Corps of Engineers adequately considered cumulative impacts on aquatic environment in deciding whether Environmental Impact Statement (EIS) was necessary for hydroelectric project. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[11] Health and Environment ⚿ 25.10(2.1)
199k25.10(2.1)
(Formerly 199k25.10(2))
Environmental assessment (EA) prepared for hydroelectric project contained adequate analysis of alternatives to issuance of dredge-and-fill permit and, therefore, no Environmental Impact Statement (EIS) was necessary; EA discussed taking no action, increasing bypass flow, relocating powerhouse, eliminating excavation section, and providing flushing flows to eliminate loss of riparian habitat. Federal Water Pollution Control Act Amendments of 1972, § 404(b)(1), as amended, 33 U.S.C.A. § 1344(b)(1); National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[12] Health and Environment ⚿ 25.10(5)
199k25.10(5)
Army Corps of Engineers could justifiably rely on environmental assessments (EAs) prepared by Federal Energy Regulatory Commission (FERC) as lead agency in evaluating proposed hydroelectric project; Corps reviewed prior studies and conducted its own independent analysis of project's environmental impacts and responded by requiring alteration of aspects of project to lessen impacts. Federal Water Pollution Control Act Amendments of 1972, § 404(b)(1), as amended, 33 U.S.C.A. § 1344(b)(1); National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[13] Federal Courts ⚿ 12.1
170Bk12.1
(Formerly 170Bk12)
Controversy is moot when issues presented are no longer live or parties lack legally cognizable interest in outcome.

[14] Health and Environment ⚿ 25.15(5.2)
199k25.15(5.2)
Even if court challenge to hydroelectric project under National Environmental Policy Act (NEPA) became moot upon determination by Army Corps of Engineers that it had no jurisdiction over wetlands, challenge under Clean Water Act (CWA) to issuance of dredge-and-fill permit was not moot if permit contained insufficient mitigation measures to compensate for loss of wetlands. Federal Water Pollution Control Act Amendments of 1972, § 404(b)(1), as amended, 33 U.S.C.A. § 1344(b)(1); National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[15] Navigable Waters ⚿ 38
270k38
Army Corps of Engineers did not act arbitrarily and capriciously in deciding that wetlands near site of proposed hydroelectric project were maintained by irrigation canal and, thus, that Corps did not have jurisdiction over impact of dredge-and-fill operations on wetlands. Federal Water Pollution Control Act Amendments of 1972, § 404(b)(1), as amended, 33 U.S.C.A. § 1344(b)(1); National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[16] Navigable Waters ⚿ 38
270k38
Army Corps of Engineers satisfied procedural requirements in giving public notice, in setting extended comment period, and in ultimately deciding not to conduct public hearing before approving hydroelectric project; it was reasonable to conclude that public hearing would have been mere forum to allow project proponents and opponents to air their views. Federal Water Pollution Control Act Amendments of 1972, § 404(b)(1), as amended, 33 U.S.C.A. § 1344(b)(1); National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

[17] Administrative Law and Procedure ⚿ 746
15Ak746

[17] Health and Environment ⚿ 25.15(5.1)
199k25.15(5.1)
District court did not abuse its discretion in excluding expert testimony and affidavits offered by environmental organizations in action challenging refusal by Army Corps of Engineers to prepare Environmental Impact Statement (EIS) for hydroelectric project; administrative record adequately explained decision and showed that Corps considered relevant factors. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

***991** Jim Jones, Boise, ID, for plaintiffs-appellants.

D. Marc Haws, Asst. U.S. Atty., Boise, ID, David P. Hirschi, Salt Lake City, UT, for defendants-appellees.

Appeal from the United States District Court for the District of Idaho.

Before: WRIGHT, Senior Circuit Judge, and FARRIS and KLEINFELD, Circuit Judges.

EUGENE A. WRIGHT, Senior Circuit Judge:

Two environmental groups allege that the Army Corps of Engineers violated the National Environmental Policy Act by issuing a dredge-and-fill permit for a hydroelectric project without preparing an environmental impact statement. Because we conclude that the Corps' action was not arbitrary and capricious, we affirm the district court's dismissal of the action.

I

On March 10, 1992, the Horseshoe Bend Hydroelectric Company began construction of a 9.5-megawatt hydroelectric generating facility on the Payette River near Horseshoe Bend, Idaho. When completed, the facility will work as follows: An inflatable ***992** bladder diversion dam will divert up to 3,500

cubic feet of water per second from a four-and-a-half-mile stretch of the river, routing the water down a diversion canal to a power house. The water will then pass over the powerhouse turbines before returning to the river. A minimum flow of 400 cfs will remain in the river channel, also known as the bypass stretch.

The facility is being built at the site of a decommissioned run-of-the-river hydroelectric project, which operated from 1902 to 1954. The new project will expand and use the old project's diversion canal, which had contained valuable wetlands. Project construction has almost completely destroyed those wetlands.

Before starting construction, HBHC and its predecessor in interest, the Boise Cascade Corporation, had to obtain the approval of several state and federal agencies. In July 1986, the Federal Energy Regulatory Commission issued a license for the project to Boise Cascade. Before doing so, FERC prepared an environmental assessment in August 1984 and a supplemental EA in April 1986. Both concluded that the project would not significantly affect the environment. In April 1987, FERC approved Boise Cascade's transfer of its license to HBHC.

HBHC then obtained the necessary state permits allowing it to appropriate water from the river, gain construction access to state-owned lands and build the dam. Lastly, HBHC needed to secure a dredge-and-fill permit from the Army Corps of Engineers. The permit, required by section 404 of the Clean Water Act, would allow HBHC to place dredged or fill material in the river. See 33 U.S.C. § 1344 (1988). HBHC applied for the permit on December 9, 1991. The Corps issued it on March 30, 1992. Although interested parties requested a public hearing, the Corps did not hold one.

Like FERC, the Corps found that the project would not significantly impact the environment within the meaning of the National Environmental Policy Act. Therefore, the agency did not prepare an EIS, but issued instead an EA and a finding of no significant impact. The § 404 permit has 17 conditions designed to mitigate environmental harm.

Friends of the Payette and Idaho Rivers United, Inc., two environmental organizations, filed suit, claiming that the Corps' actions violated NEPA and the Clean Water Act. [FN1] They sought a declaration that the Corps had not complied with NEPA and the CWA and an injunction halting the project pending preparation of an EIS.

> FN1. The Idaho Division of Environmental Quality and FERC were defendants. The action against IDEQ was dismissed by stipulation. The district court dismissed FERC after finding that we have exclusive jurisdiction over appeals from FERC decisions.

The district court set the case for trial. Because it found that admission of almost all extra-record evidence was unwarranted, however, the court disallowed the testimony of 13 of Payette's 14 proposed witnesses. It reviewed the Corps' actions based solely on the administrative record and the testimony of William McDonald, the Corps employee who prepared the EA. The court dismissed the suit, holding that the Corps' decision was reasonable.

Payette raises four issues on appeal: (1) whether the Corps' failure to prepare an EIS was reasonable, (2) whether the court erred in holding that the agency's jurisdiction over wetlands in the diversion canal was moot, (3) whether the Corps' permit-granting procedure was flawed for failure to allow adequate public comment and (4) whether the court erred by refusing to allow extra-record evidence. Payette also asks for attorneys fees.

II

A. Decision Not to Prepare EIS

NEPA requires federal agencies to prepare a detailed EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (1988). The Corps concedes that the project

constitutes a major Federal action. The issue is whether the Corps properly determined that the project will not significantly affect the environment.

***993** [1][2] After the district court's June 1992 order dismissing the action, we adopted a new standard for reviewing an agency's decision not to prepare an EIS. We no longer employ a "reasonableness" standard. In Greenpeace Action v. Franklin, 982 F.2d 1342, 1350 (9th Cir.1992), we held that "when a litigant challenges an agency determination on grounds that, in essence, allege that the agency's 'expert review ... was incomplete, inconclusive, or inaccurate,' ... the arbitrary and capricious standard is appropriate." (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 376-77, 109 S.Ct. 1851, 1860-61, 104 L.Ed.2d 377 (1989)). We still must ensure that an agency has taken a "hard look" at the environmental consequences of its action and that its decision is "founded on a reasoned evaluation 'of the relevant factors.' " Id. at 1350 (quoting Marsh, 490 U.S. at 378, 109 S.Ct. at 1861). If we are convinced that its discretion is truly informed, however, we must defer to that discretion. Id.

Payette cites ten bases for its contention that the Corps' decision not to prepare an EIS was erroneous. We reject the contention, but will discuss each basis in turn.

1. Wetlands

[3] Payette contends that the Corps erroneously determined that wetlands will not be affected significantly. The Corps concluded that the mitigation measures required by the permit compensated for any adverse impacts.

We can consider the effect of mitigation measures in determining whether preparation of an EIS is necessary. Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 987 (9th Cir.1985). If significant measures are taken to " 'mitigate the project's effects,' they need not completely compensate for adverse environmental impacts." Id. (quoting Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 860 (9th Cir.1982)).

The Corps verified an environmental consultant's estimate that 69.45 acres of wetlands were within the project area. Without mitigation, 30.99 acres of riparian habitat would be lost. Strategic placement of boulders to raise the river stage and irrigation flows from uphill mitigation lands would reduce the loss to 24.69 acres. To compensate for this loss, the Corps required HBHC to implement a mitigation plan that would create 66.64 acres in new wetlands through use of water channels, grass seeding, and tree and shrub planting. The plan also requires monitoring and supplemental mitigation measures if revegetation goals are not met.

Although the measures may not compensate completely for adverse impacts, they are significant. The Corps' conclusion that wetlands would not be affected significantly was not arbitrary and capricious.

2. Water Quality

[4] Payette asserts that the Corps relied inappropriately on the Idaho Department of Environmental Quality's certification of compliance with state water quality standards. IDEQ granted the certification after HBHC agreed to implement a three-year water quality monitoring program following project construction. If monitoring indicates violations of state standards, HBHC must adopt a mitigation plan. Payette contends that this after-the-fact monitoring cannot supplant before-the-fact evaluation and discussion of mitigation measures. It argues that the project will have a significant impact on water quality due to a decrease in oxygen and increases in temperature, light penetration and aquatic plant stimulation.

The district court noted that although the Corps cannot know exactly how the project will affect water quality, the Corps had reviewed studies attempting to model project impacts. The Corps' reliance on these studies and on a monitoring program that should identify problems before they become serious is not arbitrary and capricious.

3. Fisheries

[5] Next, Payette argues that the EA did not adequately consider the project's impact on the fishery in the bypass stretch. The Corps concedes that decreased flows ***994** and power turbines will kill fish and that although the power canal will provide run habitat, it will lack other diversity. The Corps' permit, however, requires mitigation measures to compensate for these losses. These measures include (1) a plan to enhance fish habitat in nearby Shaffer Creek, (2) an improved monitoring plan, and (3) additional mandatory mitigation measures if monitoring shows that the mitigation plan has not achieved acceptable results. The measures were strengthened at the insistence of the Fish and Wildlife Service, which approved the project. The Corps' determination that the project would not significantly affect fisheries was not arbitrary and capricious.

4. Endangered Species

[6] Payette contends that the Corps did not evaluate the project's impact on the bald eagles that winter in the project area. We disagree. The Corps, in consultation with the FWS, included two permit conditions designed to protect the eagles and their habitat. First, every five years for the life of the project, HBHC must provide the Corps with a report on the status of the riparian cottonwood forest in the project area. The forest provides eagle habitat. If project impacts prevent the forest from maintaining itself naturally, HBHC must plant cottonwood tubelings as required by the Corps. Second, the permit requires that power transmission lines be designed to minimize shock hazard to bald eagles. Also, the EA notes that "eagles would still be able to use other riparian zones along the Payette River in the immediate vicinity for their wintering activities." We find no fault with the Corps' conclusion that the project would not significantly affect endangered species.

5. Recreation

[7] Payette also contends that the Corps gave insufficient consideration to recreation issues other than those relating to an agreement between HBHC and the Western Wildwater Association. We disagree. Project plans call for these mitigation measures: a boat ramp upstream from the dam, a portage path at the dam, a water bypass for boats and flotation devices and the removal of the diversion bladder to allow jet boats to use the main channel during annual races. In addition, HBHC, in consultation with state resource agencies, will place boulders in the bypass reach to increase the river's width. All of these mitigation measures are significant. The Corps' conclusion that the project would not significantly affect recreational activities was not arbitrary and capricious.

6. Aesthetics

[8] Payette argues that the Corps did not consider adequately the project's impact on aesthetics, particularly the unsightliness of the reduced water flow in the bypass stretch. Article 29 of HBHC's FERC license requires the company, in consultation with the Idaho Department of Parks and Recreation, to "design the readily visible surface of the project facilities to preserve or enhance the existing visual environment." Pursuant to this requirement, HBHC consultants prepared a "Visual Resources Plan." It calls for revegetation of affected areas with native plant species, installation of troughs to capture runoff for irrigation of replanted areas during droughts, use of earthtones to hide from view the partially-buried powerhouse and grading to restore the natural contours of the landscape. After considering these mitigative measures and the record as a whole, we agree that the Corps did not act arbitrarily and capriciously in determining that the project would not have a significant impact on aesthetics.

7. Icing

[9] Next, Payette maintains that the Corps did not consider adequately the possibility that water diversion would increase the potential for ice formation, ice jams and flooding. The EA acknowledges that potential ice-jam flooding is a risk in that area

of the Payette River. The Corps' hydrology branch, however, evaluated the issue and concluded that the project would not result in an increased flood hazard. Upstream, the dam would trap frazil ice (ice crystals formed in turbulent water) causing ***995** ice formation. Although the ice cover would raise the water surface up to eight feet above the normal winter low water mark, the Corps concluded that no damage would occur because the lowest upstream structure is 12 feet above the mark. Although the reduced flow could increase ice formation downstream, it would cause ice jams only rarely.

8. Cumulative Impacts

[10] Corps regulations require it to evaluate a project's cumulative impacts. 33 C.F.R. § 320.4(a)(1) (1992). The Corps concluded that the project would not have a substantial cumulative impact on the aquatic environment. In doing so, the Corps relied primarily on FERC's analysis of the impact of past and future hydroelectric projects within the Payette River Basin. That analysis, the sole subject of FERC's supplemental EA, concluded that the project would not contribute to cumulative adverse impacts on important resources. We agree with the district court that the Corps sufficiently considered the project's cumulative impacts.

9. Alternatives Analysis

[11] Payette also asserts that the Corps' alternatives analysis was inadequate. Section 404(b)(1) guidelines provide that no dredge-and-fill permit shall be issued "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." Id. § 230.10(a)(2). NEPA guidelines require an EA to include brief discussions of alternatives. 40 C.F.R. § 1508.9(b). Agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1988).

The Corps' EA discusses these alternatives: taking no action, increasing bypass flow, relocating the powerhouse, eliminating an excavation section and providing flushing flows to eliminate the riparian habitat loss. The Corps' alternatives analysis satisfies both CWA and NEPA requirements.

10. Corps' Reliance on the FERC EA

[12] Lastly, Payette argues that the Corps improperly relied on FERC's EA and supplemental EA. Both EPA and FWS highlighted inadequacies in the earlier studies, upon which FERC's EAs were based. The Corps responds that it justifiably relied on the FERC documents based on a memorandum of understanding giving FERC lead agency status for environmental matters involving hydroelectric project licensing. Under the memorandum, the Corps must accept FERC's resolution of environmental issues.

We find no error in the Corps' approach. The Corps reviewed the studies and then conducted its own independent analysis of the project's environmental impacts. The Corps responded to FWS and EPA concerns by requiring HBHC to alter aspects of the project to lessen its impacts and by including specific agency concerns as conditions of the final permit. We also find significant the agencies' approval of the project and their refusal to veto the Corps' decision to issue the permit.

B. Characterization of Canal Wetlands

Next, Payette argues that the Corps concluded erroneously that the canal wetlands were not within its jurisdiction for purposes of the § 404 permit process and, consequently, did not require adequate mitigation for their destruction. The district court found that because project construction had already destroyed the wetlands, the mitigation issue was moot.

1. Mootness

[13] The Corps' "burden of demonstrating mootness 'is a heavy one.' " County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 ***996** L.Ed. 1303 (1953)). A controversy is moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Headwaters, Inc. v. Bureau of Land Management, 893 F.2d 1012, 1015 (9th Cir.1989) (quoting Northwest Envtl. Defense Ctr. v. Gordon, 849 F.2d 1241, 1244 (9th Cir.1988)). We review de novo questions of mootness. Williams v. United States General Servs. Admin., 905 F.2d 308, 310 (9th Cir.1990).

[14] The district court erred in part in finding this issue moot. Payette sought an injunction to stop the project until the Corps complied with NEPA and the CWA. It did not seek to stop destruction of the wetlands. Rather, it challenged the Corps' determination that the wetlands were not within its jurisdiction. That issue became moot for NEPA purposes, see Headwaters, 893 F.2d at 1015, but not for CWA purposes. If the wetlands were within the Corps' jurisdiction, the § 404 permit might contain insufficient mitigation measures to compensate for wetlands loss.

2. Corps Jurisdiction

[15] The Corps determined that because the canal wetlands were maintained by irrigation water, they were not subject to its jurisdiction. [FN2] Generally, the Corps does not consider "[a]rtificially irrigated areas which would revert to upland if the irrigation ceased" as subject to § 404 permit requirements. See 51 Fed.Reg. 41,217, § 328.3 (1986) (discussion of public comments and changes accompanying final regulations for Corps regulatory programs). The Corps may, in its discretion and on a case-by-case basis, determine that a body of water within this category is within its jurisdiction. Id.

FN2. The canal has been used as an irrigation canal since power production ended in 1954.

Payette has presented no evidence showing that the canal wetlands would remain wetlands if irrigation stopped. [FN3] The Corps' classification of the wetlands as "non-jurisdictional" was not arbitrary and capricious. See Citizens for Clean Air v. EPA, 959 F.2d 839, 844 (9th Cir.1992). We also find it significant that the FERC license requires mitigation for destruction of these wetlands.

FN3. The record contains a January 1983 letter from Russel Manwaring, an Agriculture Department district conservationist, to Boise Cascade. Manwaring writes that "parts of the canal ... are wet throughout the year and may have standing water of up to 3 feet in depth." (emphasis added). He adds that the water comes from "various sources, such as runoff into the canal, springs, and Kennedy's (an individual with water rights to the canal) irrigation water." This does not necessarily contradict the Corps' conclusion that the area would revert to upland if irrigation ceased.

C. Corps Process

[16] Payette maintains that the Corps' decision-making process was flawed because the Corps was racing to meet the March 12th construction deadline mandated by HBHC's FERC license. Consequently, Payette asserts, public notice was deficient, the public comment period was inadequate and the Corps abused its discretion by not holding a public hearing. We disagree.

1. Public Notice

The public notice provided "sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment" as required by Corps regulations. 33 C.F.R. § 325.3(a). It described the project, discussed wetlands impacts and fish habitat mitigation, and notified the public of the Corps' intent to consult with other agencies regarding potential effects on endangered species, cultural resources and water quality.

2. Public Comment Period

The Corps filed the notice on December 18, 1991, and, at the request of agencies and interested individuals, subsequently extended the public comment period from January 17 to January 31, 1992. This six-week period provided sufficient time for interested parties to comment.

3. Public Hearing

The Corps' § 404 permit regulations require it to hold a public hearing, upon proper ***997** request, "unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing." [FN4] 33 C.F.R. § 327.4(b).

> FN4. NEPA regulations require agencies to hold a public hearing when required by statutes applicable to the agency. 40 C.F.R. § 1506.6(c).

The Corps received more than 250 requests for a hearing. District Engineer Volz denied one saying, "Many technical issues have been raised ... and to hold a public hearing or to further extend the comment period is not considered warranted to gather more technical data." He noted that public meetings held by HBHC and several governmental bodies and the Corps' notice adequately informed the public. Volz concluded that a hearing would be useful only as a forum to enable project proponents and opponents to air their views. He also concluded that because the Corps was aware of strong support on both sides, a hearing was unnecessary.

In light of the facts identified by Volz and his thorough analysis of all the relevant factors, we hold that the Corps did not abuse its discretion in denying requests for a public hearing.

D. District Court Exclusion of Extra-Record Evidence

[17] Finally, Payette argues that the district court erred by refusing to admit its experts' testimony and affidavits regarding the project's effects on water quality, fisheries, bald eagles, recreation and aesthetics. We review for abuse of discretion the court's decision to exclude evidence. Roberts v. College of the Desert, 870 F.2d 1411, 1418 (9th Cir.1988).

Generally, review of agency action, including review under NEPA, is limited to the administrative record but may be expanded beyond the record if necessary to explain agency decisions. Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir.1988). When a failure to explain action frustrates judicial review, the reviewing court may obtain from the agency, through affidavit or testimony, additional explanations for the agency's decisions. Id. The extra-record inquiry is limited to determining whether the agency has considered all relevant factors and has explained its decision. Id. The district court may also look outside the record when the agency has relied on documents not in the record and when supplementing the record is necessary to explain technical terms or complex subject matter. Id.

The court excluded the testimony of 13 of Payette's 14 proposed witnesses but allowed William McDonald, the Corps employee who wrote the document, to testify about the agency's review of HBHC's application. The court did not abuse its discretion in excluding the proffered evidence. Much of it addressed concerns that the same witnesses had already raised during the public comment period. The administrative record sufficiently explained the Corps' decision and showed that the agency considered the relevant factors. No additional information was necessary for the court's review.

III

We conclude that the district court did not err in dismissing this action. It did err in holding that whether the Corps had jurisdiction over the canal wetlands was moot. Because the Corps' decision that the wetlands were non-jurisdictional was not arbitrary and capricious, however, we need not remand for further proceedings.

We AFFIRM the district court on all issues

except the mootness issue on which we REVERSE. Because Payette and Idaho Rivers are not prevailing parties, we deny their request for attorneys fees.

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684 F.2d 1041
17 ERC 2023, 12 Envtl. L. Rep. 20,903
(Cite as: 684 F.2d 1041)
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United States Court of Appeals,
First Circuit.

ROOSEVELT CAMPOBELLO INTERNATIONAL PARK COMMISSION, et al., Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent,
The Pittston Company, et al., Intervenors.
CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC., et al., Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent,
The Pittston Company, et al., Intervenors.
CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC., et al., Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent,
The Pittston Company, et al., Intervenors.

Nos. 81-1548, 81-1560 and 81-1773.

Argued April 6, 1982.
Decided Aug. 10, 1982.

Environmental groups challenged final decision of Environmental Protection Agency Administrator to issue national pollutant discharge elimination system permit to oil refinery. The Court of Appeals, Coffin, Chief Judge, held that: (1) there was no need to supplement environmental impact statement in order to accommodate most recent data and policy shift in energy conservation and use; (2) no purpose would be served by requiring Agency to study exhaustively all environmental impacts at each alternative site after Agency had concluded alternative sites were not substantially preferable to proposed site; (3) Agency did not fail to consider all alternatives which were feasible and reasonably apparent at time of drafting environmental impact statement; (4) Agency's consideration of alternative sites was not inadequate, nor was its conclusion to reject those sites arbitrary and capricious; and (5) administrative law judge's failure to require, that "real time simulation" studies be done to assure low risk of oil spill prior to granting of permit was error.

Vacated and remanded.

West Headnotes

[1] Health and Environment ⚿ 25.10(6.1)
199k25.10(6.1)
(Formerly 199k25.10(6))
Where at time that environmental impact statement was drafted, there was forecasted need for type of refinery planned by refiner, it was federal policy to encourage construction of such refineries, and there was demand for domestic refineries capable of processing high sulfur crude oil into low sulfur products, there was no need to supplement environmental impact statement in order to accommodate most recent data and federal policy shifts.

[2] Health and Environment ⚿ 25.5(9)
199k25.5(9)
Environmental Protection Agency's role in reviewing privately sponsored projects such as privately owned oil refinery is to determine whether proposed site is environmentally acceptable and to search for alternatives that would be "substantially preferable" from environmental standpoint.

[3] Health and Environment ⚿ 25.5(9)
199k25.5(9)
Where Environmental Protection Agency had reasonably concluded that no alternative would be substantially preferable to proposed site for oil refinery, and guidelines adopted by Agency to limited study of alternatives were consistent with rule of reason, no purpose would be served by requiring Agency to study exhaustively all environmental impacts at each alternative site considered.

[4] Health and Environment ⚿ 25.10(8)
199k25.10(8)
Environmental Protection Agency's duty under National Environmental Policy Act is to

study all alternatives that appear reasonable and appropriate for study at time of drafting environmental impact statement, as well as "significant alternatives" suggested by other agencies or public during comment period. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[5] Health and Environment ⚿ 25.15(10)
199k25.15(10)
(Formerly 199k25.15(6))
Under National Environmental Policy Act, in order to preserve alternative issues for review, it is not enough simply to make facially plausible suggestion of alternative, but rather, intervenor must offer tangible evidence that alternative site of project might offer substantial measure of superiority than proposed site. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[6] Health and Environment ⚿ 25.10(8)
199k25.10(8)
Where environmental groups did not suggest any reasonable alternatives to Environmental Protection Agency during comment period on proposed oil refinery, alternative of monobuoy off mid-Atlantic coast was raised for first time at adjudicatory hearing and too late for inclusion in environmental impact statement, and Agency had rejected offshore monobuoy in New England due to fierce public opposition to similar proposals, Agency did not fail to consider alternatives which were feasible and reasonably apparent at time of drafting environmental impact statement for proposed oil refinery.

[7] Health and Environment ⚿ 25.10(8)
199k25.10(8)
Where environmental impact statement for proposed oil refinery contained comparative analysis of effects of proposed project on air quality, water quality, present land and sea uses, terrestrial and aquatic flora and fauna, and aesthetics at various sites, one area was eliminated because its shallow channel was unable to accommodate very large crude carriers, second area was eliminated due to lack of suitable land, and third area was eliminated because heavy tourism as well as lobster, clam and fishing industry in area made that site undesirable, Environmental Protection Agency's consideration of sites was not inadequate nor was its conclusion to reject alternative sites arbitrary and capricious.

[8] Fish ⚿ 12
176k12

[8] Game ⚿ 3.5
187k3.5
(Formerly 187k31/2)
Although 1979 Amendments to Endangered Species Act softened obligation of agency from requiring agency to insure species would not be jeopardized to requiring agency to insure that jeopardy was not likely, agencies still are under substantial mandate to use all methods and procedures which are necessary to prevent loss of any endangered species, regardless of cost. Endangered Species Act of 1973, § 7(a)(2), (g, h) as amended 16 U.S.C.A. § 1536(a)(2), (g, h).

[9] Fish ⚿ 12
176k12

[9] Game ⚿ 3.5
187k3.5
(Formerly 187k31/2)
Agency's duty under Endangered Species Act to consult with Secretary of Commerce or Interior, depending on particular endangered species, does not divest agency of discretion to make final decision that it has taken all necessary action to insure that actions will not jeopardize continued existence of endangered species. Endangered Species Act of 1973, § 2 et seq. as amended 16 U.S.C.A. § 1531 et seq.

[10] Fish ⚿ 12
176k12

[10] Game ⚿ 3.5
187k3.5
(Formerly 187k31/2)
Initial determination of whether species is endangered is within Secretary of Interior's exclusive authority, and administrative law judge reviewing agency action under Endangered Species Act has no authority to review that finding. Endangered Species Act

of 1973, § 4(c)(1) as amended 16 U.S.C.A. § 1533(c)(1).

[11] Fish ⇐ 12
176k12

[11] Game ⇐ 3.5
187k3.5
(Formerly 187k31/2)
In light of Environmental Protection Agency's duty to insure that construction of oil refinery was unlikely to jeopardize endangered whales or eagles, administrative law judge's failure to require, at minimum, that real time simulation studies be done to assure low risk of oil spill prior to granting refinery permit violated duty to use best scientific data available where Agency, state of Maine, and Coast Guard all viewed real time simulation studies as necessary to finding of determination of safety. Endangered Species Act of 1973, § 7(a)(2) as amended 16 U.S.C.A. § 1536(a)(2).

[12] Health and Environment ⇐ 25.5(9)
199k25.5(9)
Proper forum to review appropriateness of state's certification is state court, and federal courts and agencies are without authority to review validity of requirements imposed under state law or in state's certification, therefore, Environmental Protection Agency lacked authority to review conditions imposed by state of Maine on construction of oil refinery. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), §§ 301(b)(1)(C), 401(a, d), 510, 511(c)(2) as amended 33 U.S.C.A. §§ 1311(b)(1)(C), 1341(a, d), 1370, 1371(c)(2).

[13] Health and Environment ⇐ 25.5(9)
199k25.5(9)
Where state at no time waived its right to certify proposed charge from oil refinery, administrative law judge lacked authority to exclude previously imposed state conditions from federal permit, but rather, those conditions were required to be included in national pollutant discharge elimination system permit for oil refinery.

***1043** Bruce J. Terris, Washington, D. C., and Alan Wilson, Boston, Mass., with whom Karen H. Edgecombe, Washington, D. C., Kenneth T. Hoffman, Douglas I. Foy, and Kathleen C. Farrell, Boston, Mass., were on brief, for petitioners.

Gregory W. Sample, Asst. Atty. Gen., with whom James E. Tierney, Atty. Gen., and Kay R.H. Evans, Asst. Atty. Gen., Augusta, ***1044** Me., were on brief, for the State of Maine, amicus curiae.

Jonathan B. Hill, with whom John P. Schnitker, Dow, Lohnes & Albertson, Washington, D. C., Bruce W. Chandler, and Marden, Dubord, Bernier & Chandler, Waterville, Me., were on brief, for the Pittston Co., intervenor.

Rosanne Mayer, Atty., Dept. of Justice, with whom Carol E. Dinkins, Asst. Atty. Gen., Land and Natural Resources Div., Donald W. Stever, Jr., Atty., Dept. of Justice, Washington, D. C., and Susan Studlien, Atty., E. P. A., Boston, Mass., were on brief, for U. S. E. P. A., respondent.

Wayne S. Henderson, Boston, Mass., for New England Legal Foundation, et al., intervenor.

Before COFFIN, Chief Judge, BOWNES and BREYER, Circuit Judges.

COFFIN, Chief Judge.

In these three consolidated appeals petitioners challenge the final decision of the EPA Administrator to issue a National Pollutant Discharge Elimination System (NPDES) permit to the Pittston Company pursuant to s 402 of the Clean Water Act, 33 U.S.C. s 1342. The permit authorizes the Pittston Co. to construct and operate a 250,000 barrel per day oil refinery and associated deep water terminal at Eastport, Maine, in accordance with specified effluent limitations, monitoring requirements, and other conditions. Petitioners contend that EPA's actions violated the National Environmental Policy Act (NEPA), 42 U.S.C. s 4321 et seq., the Endangered Species Act, 16 U.S.C. s 1531

et seq., and the Clean Water Act, 33 U.S.C. s 1251 et seq.

Pittston proposes to construct an oil refinery and marine terminal in Eastport, Maine, a relatively pristine area of great natural beauty near the Canadian border. The area is known for being the foggiest on the East Coast, experiencing some 750-1000 hours of fog a year; daily tides approximate twenty feet. The plan contemplates that crude oil shipments will arrive several times a week in supertankers, or Very Large Crude Carriers (VLCCs), as long as four football fields, or slightly less than a quarter of a mile. The tankers will travel through Canadian waters [FN1] around the northern tip of Campobello Island, where the Roosevelt Campobello International Park is located, see 16 U.S.C. s 1101 et seq., down Head Harbor Passage to a refinery near Eastport where they will be turned and berthed. Numerous barges and small tankers will carry the refined product from Eastport to destination markets in the Northeast.

FN1. The Canadian government has consistently, since 1973, opposed the transit of large quantities of oil through Head Harbor Passage. The resolution of this issue is obviously beyond the realm of this court.

The protracted procedural history of this case begins in April 1973, when Pittston applied to the Maine Board of Environmental Protection (BEP) for permission to locate the refinery in Eastport. After public hearings, the BEP approved the proposal under the Maine Site Location of Development Law, 38 M.R.S.A. s 481 et seq., subject to a number of pre-construction and pre-operation conditions designed primarily to reduce the risk of oil spills. Pittston subsequently filed an application with EPA to obtain an NPDES permit, and submitted an Environmental Assessment Report to aid EPA in its duty to prepare an Environmental Impact Statement (EIS) pursuant to NEPA. See 33 U.S.C. s 1371(c)(1); 42 U.S.C. s 4332(2)(C). EPA promulgated a draft EIS recommending issuance of the permit as conditioned by the Maine BEP, held a joint public hearing with the Army Corps of Engineers in Eastport, and received approximately 600 responses during a public comment period. In September 1977, the Maine Department of Environmental Protection certified, under s 401(a)(1) of the Clean Water Act, 33 U.S.C. s 1341(a)(1), that the proposed discharge would satisfy the appropriate requirements of state and federal law. In June 1978, the final EIS was issued, again recommending that the permit be issued pursuant to the BEP conditions.

***1045** Several months later, the National Marine Fisheries Service (NMFS) of the Department of Commerce and the Fish and Wildlife Service (FWS) of the Department of Interior initiated consultations with EPA concerning the proposed refinery's impact on endangered species-the right and humpback whales, and the northern bald eagle, respectively-under s 7 of the Endangered Species Act (ESA), 16 U.S.C. s 1536. In November, the NMFS issued a threshold determination that there were insufficient data to conclude that the project was not likely to jeopardize the continued existence of the endangered whales. In December, the FWS concluded that the project was likely to jeopardize the bald eagle. In light of these opinions and of the value of the natural resources in the Eastport area as noted in the EIS, EPA's Region I issued a notice of determination to deny Pittston's application for an NPDES permit in January 1979. Pittston thereafter sought an adjudicatory hearing and administrative review of this decision.[FN2]

FN2. Pittston also sought an exemption from the requirements of the ESA pursuant to 16 U.S.C. s 1536(g)(1), but this application was ruled not ripe for review until final action by EPA denying a permit. Pittston Co. v. Endangered Species Comm., 14 Env't Rep.Cas. (BNA) 1257 (D.D.C.1980).

Prior to the hearing, extensive consultation between EPA, NMFS, FWS, and Pittston took place to consider mitigation measures proposed by Pittston. In May, NMFS concluded on the basis of the best scientific data available that EPA was unable to comply

with the statutory mandate that it "insure that (the project) is not likely to jeopardize the continued existence of" endangered whales. 16 U.S.C. s 1536(a)(2). In June FWS reaffirmed its previous determination that the refinery was likely to jeopardize the bald eagle. EPA Region I amended its decision to include these new findings.

The adjudicatory hearing took place over five weeks in January and February of 1980. More than fifty witnesses testified and were cross-examined; several hundred exhibits were introduced. In January 1981, the ALJ rendered EPA's Initial Decision, overturning EPA Region I and ordering that the NPDES permit issue. He concluded that the EIS was adequate to comply with NEPA, and that no supplemental EIS was necessary; that the risk of oil spills was "minute" and that the refinery was therefore not likely to jeopardize any endangered species; and that the conditions imposed by the Maine BEP, and assumed by the EIS, were not required to be conditions of the federal permit. Petitioners subsequently sought review before the EPA Administrator, and also moved to reopen the record to admit a recent study showing an increased number of endangered whales in the Eastport region. Both motions were denied, and in September 1981 EPA Region I issued the NPDES permit to the Pittston Company. Petitioners now seek review in this court pursuant to s 509(b)(1)(F) of the Clean Water Act, 33 U.S.C. s 1369(b)(1)(F).

I. The National Environmental Policy Act

A. The Standard of Review

It is now well settled that there are two aspects to a court's review of agency action subject to the requirements of NEPA:

> "First, the court makes a substantive review of the agency's action to determine if such action is arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. s 706. This substantive review, although conducted on the basis of the entire administrative record, is quite narrow in scope. The court should only assure itself that the agency has given good faith consideration to the environmental consequences of its actions and should not pass judgment on the balance struck by the agency among competing concerns.
> Second, a reviewing court must assess the agency's compliance with the duties NEPA places upon it. These duties are 'essentially procedural'. The primary procedural mechanism embodied in NEPA is the requirement that an agency prepare 'a detailed statement' discussing, ***1046** inter alia, 'alternatives to the proposed action', 42 U.S.C. s 4332(2)(C). Requiring an agency to discuss alternatives within the EIS serves numerous goals. The detailed statement aids a reviewing court to ascertain whether the agency has given the good faith consideration to environmental concerns discussed above, provides environmental information to the public and to interested departments of government, and prevents stubborn problems or significant criticism from being shielded from internal and external scrutiny." Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980) (citations & footnote omitted). See also Silva v. Lynn, 482 F.2d 1282, 1283-84 (1st Cir. 1973).

B. The Need for the Project

In order to weigh the benefits of the project against the potential environmental costs, the EIS contained an analysis of the justification for the project and the anticipated economic benefits. The project was deemed consistent with a longstanding federal policy of encouraging the construction of domestic refining capacity in order to promote national security. New England, heavily dependent on imported oil, had no regional refining capacity. The project was designed to accommodate VLCCs, thus taking advantage of the cost savings offered by economies of scale. Constructing a refinery in the United States rather than abroad had the additional advantage of retaining jobs and investments in this country. Finally, the project was particularly attractive because it was designed to handle high sulfur crude oil and refine it into low sulfur fuels, thus facilitating compliance with new environmental

standards. Such a refinery was "of an entirely different design" than most existing domestic refineries, which were built to handle domestic and steadily depleting sources of low sulfur crude.

(1) Petitioners argue that the EIS was faulty because it failed to consider the possibility of conservation and the use of alternative fuels instead of the construction of additional oil refining capacity. We note first that petitioners failed to raise this concern in a meaningful way during the comment period. In any case, it is clear that at the time the EIS was drafted, there was a forecasted need for the type of refinery planned by Pittston, and that it was federal policy to encourage the construction of such refineries. Nor are we persuaded by petitioners' argument that the discussion in the EIS of the need for the project is "totally outdated and of no present use." Even accepting their contention-based, we might add, primarily on statements of energy policy under President Carter, which might themselves be considered outdated-that there is no longer a strong need for additional refining capacity, it remains uncontested that there is still a demand for domestic refineries capable of processing high sulfur crude into low sulfur products. Given this continuing national and regional need, we see no need to supplement the EIS in order to accommodate the most recent data and federal policy shifts. Cf. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 96-98 (1st Cir. 1978).

C. Adequacy of Consideration of Alternatives

Petitioners contend that the EIS failed to discuss adequately a number of alternatives to the proposed refinery at Eastport. First, they argue that EPA erred by conducting a less searching analysis of alternatives to this privately sponsored project than it would have had the project been publicly funded. Second, they urge that EPA unreasonably limited its consideration of alternative sites to three locations in Maine. Finally, they allege that EPA's comparison of the various sites was inadequate.

(2) EPA's evaluation of alternatives was explicitly based on the premise that its role in reviewing privately sponsored projects "is to determine whether the proposed site is environmentally acceptable", and not, as in the case of a publicly funded project, "to undertake to locate what EPA would consider to be the optimum site for a new facility." Therefore, EPA considered ***1047** its purpose in this case to be to search for alternatives "that would be substantially preferable from an environmental standpoint." EPA concluded that "(t)his different purpose affects the extent of the information on alternatives necessary to make a decision."

(3) We are unable to fault EPA's reasoning. Petitioners concede that the substantive standard-"substantially preferable"-was correctly stated. Cf. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d at 95-96 ("obvious superiority"). No purpose would be served by requiring EPA to study exhaustively all environmental impacts at each alternative site considered once it has reasonably concluded that none of the alternatives will be substantially preferable to the proposed site. Moreover, the guideline adopted by EPA to limit its study of alternatives appears, in this case, to be consistent with the "rule of reason" by which a court measures federal agency compliance with NEPA's procedural requirements. See, e.g., Grazing Fields Farm, 626 F.2d at 1074; Massachusetts v. Andrus, 594 F.2d 872, 884 (1st Cir. 1979).

EPA's choice of alternative sites was focused by the primary objectives of the permit applicant, the Pittston Co. Pittston stated that its basic consideration was to find a port with deep water near shore in order to accommodate VLCCs. Only by using such supertankers could Pittston take advantage of economies of scale, thereby making the project economically feasible. Therefore, after Pittston had reviewed and rejected a number of sites lacking such deep water, EPA limited its consideration to the only ports providing deep water access. Three alternative areas in Maine were considered: Portland, Machias, and Penobscot/Blue Hill.[FN3]

FN3. The EIS also considered two alternative modifications of the project at Eastport: the use of an offshore monobuoy, and the use of smaller tankers. Both alternatives were rejected as being not substantially preferable to the current proposal, and petitioners do not challenge the adequacy of these comparisons.

(4)(5) EPA's duty under NEPA is to study all alternatives that "appear reasonable and appropriate for study at the time" of drafting the EIS, as well as "significant alternatives" suggested by other agencies or the public during the comment period. In order to preserve an alternatives issue for review, it is not enough simply to make a facially plausible suggestion; rather, an intervenor must offer tangible evidence that an alternative site might offer "a substantial measure of superiority" as a site. See Seacoast Anti-Pollution League v. NRC, 598 F.2d 1221, 1228-33 (1st Cir. 1979).

(6) In light of this standard, petitioners' argument that EPA erred by restricting its consideration to alternative sites in Maine must fail, because they did not suggest any reasonable alternatives to EPA during the comment period. One alternative-a monobuoy off the mid-Atlantic coast-was raised for the first time at the adjudicatory hearing, too late for inclusion in the EIS. Although petitioners now contend that EPA should reasonably have been aware of such an alternative earlier, their citation to a 1976 study by the Office of Technology falls far short of persuading us; nor have they explained their failure to bring the report to EPA's attention in a timely manner. Another possibility, an offshore monobuoy in New England, was rejected by EPA in spite of its potential environmental benefits because of fierce public opposition to similar proposals off the coast of Massachusetts and New Hampshire. We cannot say that EPA acted unreasonably in concluding that such an option was not feasible. In short, we are not convinced that EPA failed to consider all alternatives which were feasible and reasonably apparent at the time of drafting the EIS.

(7) Petitioners next urge that EPA's consideration of these alternative sites was inadequate. The EIS contained comparative analysis of the effects of the proposed project on air quality, water quality, present land and sea uses, terrestrial and aquatic flora and fauna, and aesthetics at the various sites. The Portland area was ***1048** eliminated by Pittston because its shallow channel is unable to accommodate VLCCs and suitable land for a refinery site and marine terminal was not available. EPA considered an offshore monomooring system near Portland, but rejected it due to the vulnerability of the proposed location to the elements and the chronic spills associated with monomooring which would interfere with the nearby fishing and recreation industries. [FN4] The Machias site was considered substantially similar to Eastport from an environmental perspective, but was eliminated by Pittston because suitable land was unavailable. EPA also noted that the harbor at Machias was more exposed to wind and weather than that at Eastport, thus making a tanker approach more hazardous. Heavy tourism at Penobscot/ Blue Hill made a refinery undesirable; the area is also a center for Maine's lobster, clam and fishing industry. Finally, the tanker approach at the area is quite long with numerous islands, increasing the risk of mishap close to shore and inhabited areas. Consequently, EPA concluded that none of the alternative sites would provide a significantly greater degree of environmental protection than the Eastport site. Having carefully reviewed the record, we cannot say that EPA's consideration of these sites was inadequate, or that its conclusion to reject them was arbitrary and capricious.

FN4. Petitioners rely on two planning studies done for the State of Maine to argue that Portland is preferable to Eastport as an oil port. This information was considered in the EIS, which recognized that an advantage of Portland was that it is already a busy marine terminal, whereas Eastport is relatively pristine. But EPA could reasonably rely in part on the facts that Maine had approved the Eastport site for the project, and had not suggested any alternative sites during the comment period, to conclude that the state did not consider any alternative site to be substantially preferable.

We defer our consideration of additional NEPA issues raised by petitioners-the adequacy of the risk spill analysis in the EIS, and the need for a supplemental EIS-until after our discussion of the risk of oil spills in the context of the Endangered Species Act.

II. The Endangered Species Act

A. The Procedural History

As noted earlier, EPA Region I originally issued a notice of determination not to issue the permit based on the opinion of the NMFS and the FWS that EPA could not insure that the project was not likely to jeopardize the right and humpback whales, and the bald eagle, respectively. The ALJ, in his Initial Decision, rejected these biological opinions and held that the project was not likely to jeopardize the continued existence of these species. While administrative review was being sought, the National Oceanic and Atmospheric Administration (NOAA) moved to reopen the record, proffering a 1980 study indicating the presence in the Eastport region during the summer of a significant portion of the north Atlantic right whale population. The acting Administrator of EPA, assuming arguendo the validity of the study, concluded that the new information was not significant because of the ALJ's supportable finding that any risk of a major oil spill was minute. At the same time, he summarily affirmed the initial decision, and EPA Region I subsequently issued the NPDES Permit to Pittston.

B. Legal Standards

The obligation imposed on EPA by section 7(a)(2) of the ESA, 16 U.S.C. s 1536(a)(2) is to "insure that any action authorized, funded, or carried out ... is not likely to jeopardize the continued existence of any endangered species." An action would "jeopardize" the species if it "reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild." 50 C.F.R. s 404.02 (1980).

(8) Although the 1979 Amendments to ESA softened the obligation on an agency from requiring the agency to "insure" the species would not be jeopardized to requiring the agency to "insure" that jeopardy is ***1049** not "likely", Pub.L.No.96-159, s 4(1)(C), 93 Stat. 1225, 1226 (1979), the legislative intent was that the Act "continues to give the benefit of the doubt to the species." H.Conf.Rep.No.96-697, 96th Cong., 1st Sess. 12, reprinted in (1979) U.S.Code Cong. & Ad.News, 2557, 2572, 2576. Agencies continue to be under a substantive mandate to use "all methods and procedures which are necessary", TVA v. Hill, 437 U.S. 153, 185, 98 S.Ct. 2279, 2297, 57 L.Ed.2d 117 (1978) (quoting 16 U.S.C. ss 1531(c), 1532(2), emphasis added by the court), "to prevent the loss of any endangered species, regardless of the cost." Id. at 188 n.34, 98 S.Ct. at 2299 n.34 (emphasis in original). The Act does, however, create a special "exemption" procedure (not at issue here, see note 2, supra) designed to allow necessary actions even if they threaten the loss of an endangered species. See 16 U.S.C. ss 1536(g), (h).

(9) An agency's duty to consult with the Secretary of Commerce or Interior, depending on the particular endangered species, does not divest it of discretion to make a final decision that "it has taken all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species". National Wildlife Federation v. Coleman, 529 F.2d 359, 371 (5th Cir. 1976). The consultation process, however, is not merely a procedural requirement. Not only is a biological opinion required of the Secretary of Commerce or Interior, "detailing how the agency action affects the species or its critical habitat", 16 U.S.C. s 1536(b), but the 1979 Amendments to ESA require that in fulfilling its consultation duty and in insuring the absence of likelihood of jeopardy "each agency shall use the best scientific and commercial data available." 16 U.S.C. s 1536(a)(2). Moreover, the legislative history emphasizes that "(c)ourts have given substantial weight to these biological opinions as evidence of an agency's compliance" with the Act, that "(t)he Amendment would not alter this state of the

law or lessen in any way an agency's obligation" under s 7, and that a federal agency which "proceeds with (an) action in the face of inadequate knowledge or information ... does so with the risk that it has not satisfied the standard of" s 7(a)(2). H.Conf.Rep. at 12, reprinted in (1979) U.S.Code Cong. & Ad.News at 2576. See also H.R.Rep.No.95-1625, 95th Cong., 2d Sess. 12, reprinted in (1978) U.S.Code Cong. & Ad.News 9453, 9462.

In reviewing an agency's decision after consultation our task is "to ascertain whether 'the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' " National Wildlife Federation v. Coleman, 529 F.2d at 372 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 823-824, 28 L.Ed.2d 136 (1971)). We must also inquire into whether the ALJ "followed the necessary procedural requirements." Overton Park, 401 U.S. at 417, 91 S.Ct. at 824.

C. The Administrative Law Judge's Initial Decision

1. The Bald Eagle

The FWS biological opinion concerning the risk of jeopardy to the bald eagle began with its identification of Cobscook Bay (adjacent to the proposed Eastport refinery) as the most productive of three areas essential to conservation of the species in Maine and the northeastern United States. The specific threats included air pollution containing mercury emissions and increased acidification of lakes dangerously adding to the already high concentrations of heavy metals in eagle eggs and the food chain; the intrusion of economic development and human population; and a number of problems caused by oil spills, including the mortality of embryos and young eagles, reduction in the fish and bird food supply of eagles, fouling of wings, and ingestion problems.

The ALJ found that the FWS claim as to mercury emissions rested on an assumed daily emission of 200 grams. After a review of the evidence, he determined that, on a "worst case" basis, there might be a daily emission of 17.6 grams. He concluded that this amount, as well as negligible amounts of lead and vanadium, would not ***1050** affect the eagle's food chain. The ALJ also found that refinery emissions would have no important impact on the acidity of lakes, one year's exposure to such emissions being equivalent to that in six hours of rainfall. The threats based on human activity were found to be inconsequential in view of the difficulty of access to nesting areas, the demonstrated tolerance of human presence by eagles, the recreation-inhibiting inclement spring weather during the time of greatest eagle sensitivity, and proposed mitigation measures.

(10) We cannot say that these findings were not adequately supported, that the relevant factors were not considered, or that the ALJ made a clear error of judgment.[FN5] But there was one additional finding: that although a significant oil spill would have an adverse impact on eagles and their reproduction, the risk of such a spill was "very small or minute", so that the species was not jeopardized. The validity of this finding will be considered below.

FN5. There is controversy as to whether the ALJ's determination that the bald eagle population to be considered included not only the northeastern United States population as referred to by FWS in its biological opinion but also that of New Brunswick, Nova Scotia, and Cape Breton Island, played any part in his decision. Although at one point he stated that the question of the population segment to be considered was "controlling", his ultimate conclusion of absence of risk of a significant oil spill would seem to render the definition determination superfluous. In the event definition becomes relevant in any further proceedings, we observe that EPA has not attempted to defend the ALJ's definition on the merits. It seems clear to us that under 16 U.S.C. s 1533(c)(1) the Secretary of the Interior is given the exclusive duty and power to publish a list specifying "with respect to each ... species over what portion of its range it is endangered". Certainly the initial determination of whether the species is endangered

is within the Secretary's exclusive authority, TVA v. Hill, 437 U.S. at 171-72, 98 S.Ct. at 2290-2291, and the ALJ has no authority to review this finding. We see no reason why the Secretary should not have similar authority to ascertain the appropriate range in which the species is endangered or why the ALJ should not lack authority to alter this determination. In any case, the legislative history appears to authorize the Secretary to deem a species endangered in the United States, or a portion thereof, even if it is abundant elsewhere. See H.R.Rep.No.93-412, 93rd Cong., 1st Sess. 10 (1973); S.Rep.No.96-151, 96th Cong., 1st Sess. 7 (1979). Even if testimony that Canadian eagles migrated to the United States or interbred with eagles nesting in the United States could make consideration of the Canadian eagle population relevant, the ALJ refused to base his conclusion of no jeopardy on any such factual basis.

2. Right and Humpback Whales

The NMFS biological opinion singled out right and humpback whales as being subject to adverse impact, their population being limited and their migratory pattern placing them in the Eastport area during spring and summer. The anticipated harm from oil spills included illness from ingestion, skin irritation, fouling of baleen plates, and contamination of food.

The ALJ accepted an estimate of a total north Atlantic right whale population of between 70 and 100, and a humpback whale population of 2000 or more. He concluded, based on the combination of the brief periods when the whales were in Eastport waters and, given the navigational safeguards and restrictions to be imposed on Pittston by both the State of Maine and the Coast Guard, the low probability of a massive oil spill, that there was no reasonable likelihood that the continued existence of the two whale populations would be jeopardized.

The low risk of spills was also central to EPA's determination not to reopen the record to receive a 1980 New England Aquarium study estimating that a minimum of 48 right whales, or approximately one half the total population, had been in or near the proposed tanker approaches to Eastport in that year. Repeating the analysis relied upon by the ALJ, the EPA acting Administrator concluded that the new study was not sufficiently probative to open the record. In his words, the "(a)bsence of risk, rather than the absence of whales" underlay the ALJ's decision, and his own decision to affirm the granting of the permit.

We now proceed to outline the ALJ's reasoning leading to his finding, crucial to ***1051** both ESA issues, of the unlikelihood of a significant oil spill.

3. The Finding as to Risk of Oil Spill

The ALJ's conclusion that the risk of a major oil spill was minute was based primarily on three items of evidence. First, the ALJ relied heavily on assurances from the Coast Guard which, after reviewing the testimony of Pittston's witnesses before the BEP and other data, wrote EPA on March 28, 1977, that the channel in Head Harbor Passage was "adequate for safe navigation by 250,000 DWT tankers" if four conditions were met. These conditions were

> "(1) that the channel passage area depths, configurations and current data shown on nautical charts and surveys be confirmed by hydrographic survey, (2) provision for a navigation system wherein the existence and movement of all traffic in the area could be monitored, communicated with and scheduled, (3) provision for means to control movement of tankers in the event of steering and/or propulsion failure during transit and (4) development and strict adherence to an operating procedure for tanker passage."

In response to a request by the Council on Environmental Quality that the Coast Guard assist Pittston in carrying out "real time simulation" studies [FN6] in order to ascertain the precise conditions for safe navigation prior to granting the permit, Rear Admiral Fugaro of the Coast Guard responded in August 1977 that it could not divert scarce resources until "final clearance had been granted for construction of a refinery ... (so that) no possibility exists that these efforts may be wasted." After explaining the Coast Guard's

"function in port development",[FN7] he concluded:

> FN6. Real time simulation studies are tests run with actual tanker pilots on a device capable of simulating the responses of a ship to certain conditions of wind, tide, fog, current, etc. What it adds to completely computerized tests is the human reaction factor. The Council on Environmental Quality had included in its comments on the draft EIS the recommendations that "EPA complete its analysis of real time tanker simulation studies, and the twelve trial tanker voyages through Head Harbor passage (required by Maine's Board of Environmental Protection as one of the conditions for granting a refinery permit) before making its permit decision."
>
> FN7. For the sake of completeness, we reproduce the explanation: "It is the Coast Guard's function in port development to review the adequacy of waterways for the safe navigation of shipping. To this end we consider all the factors involved to insure that only a minimum risk is involved. Coast Guard efforts are directed towards minimizing these risks by the imposition of additional requirements where found necessary for the safety of navigation. With the vagaries of the environment in which vessels are operated and the possibility of personnel error, there is no way that a failsafe guarantee could be provided for any port in the United States. There is always an element of risk in any transportation system. Other modes of transportation where highly sophisticated safeguards are in place still have an occasional accident."

"The Coast Guard feels it can be premised that tank vessels can safely navigate the channel approaches to Eastport under certain conditions-and the Coast Guard fully intends to determine those conditions and see to their implementation. Although we will continue to work closely with the Pittston Company, the Environmental Protection Agency, and the State of Maine and other affected and concerned groups as required and within available resources, we feel that further delay of the project for the purpose of studying the issue of channel adequacy appears unjustified at this time. In that any major Federal action taken to implement operational restrictions and control procedures would necessarily be the subject of an additional EIS, I believe that both the spirit and letter of NEPA are well served." (emphasis added)

Subsequently, on December 31, 1979, the Coast Guard clarified its position as to item 2 in its March 28, 1977, letter (provision for a navigation system) by saying that notwithstanding the capability of any navigation system, there would be some meteorological conditions, e.g., fog producing poor visibility, which would preclude safe transit.

*1052 Second, the ALJ found confirmation of the Coast Guard's assurance in the computer simulation studies of Dr. Eda, who concluded that a loaded 250,000 DWT tanker could maintain a trajectory close to a desired track in Head Harbor Passage without tug assistance in a 60 knot wind. Although these studies could not account for the human factor, i.e., could not test any difficulty on the part of the human pilot in perceiving the location, heading and rate of change of heading of the ship, the ALJ understood there was "an encouraging correlation" between computer simulation and actual sea trial. The ALJ accepted Dr. Eda's statement that "for obtaining an overall perspective of the suitability of a particular channel for ship traffic of specific sizes under particular conditions, off-line computer studies are adequate."

Also cited with approval by the ALJ was a second study by Frederick R. Harris, Inc. premised on provision for a more adequate turning basin for the VLCCs than an earlier study which had approved the project subject to severe restrictions and "a high order of seamanship and prudence." This study, the ALJ found, deemed the proposed approach "satisfactory for the type and size of vessels specified providing navigational aides are installed, and providing recommended operational procedures were followed." These included tug assistance from entry into channel, lighted buoys and radar reflectors, an electronic guidance system involving land based radar and electronic range finders,

confining berthing and deberthing to slack tide, limiting Head Harbor transit to daylight or clearly moonlit hours, proscribing entrance to the Passage if visibility is less than a mile, and barring tankers awaiting a berth from anchoring in Eastport waters.

Finally, the ALJ made rather minute review of testimony concerning prevailing currents and cross-currents, fog, wind, and duration of oil spill effects, concluding in general that currents were not excessive for shipping, that the expected presence of fog was not so great as to bar shipping during most of the time, that winds were in general within tolerable limits, and that the effects of large known oil spills had not been long lasting over a period of years. [FN8]

FN8. The ALJ also cited to the discussion in the EIS of the British port of Milford Haven, which has experienced no major spills in nine years of operation. Pittston's witnesses testified that Eastport was less hazardous than Milford Haven because of better channel configuration, an improved navigation system, and planned operating restrictions. The ALJ defended the use of this comparison in the EIS, noting that the dense fog at Eastport and its rockier bottom than Milford Haven would be compensated for by the "specific operating procedures (which) will be established by the Coast Guard after real time simulation and whatever other studies are considered necessary." The extensive comparison of Eastport and Milford Haven in the EIS for the purpose of estimating "oil spills during routine transfer operations", as opposed to the risk of a major spill, has not been challenged by petitioners.

D. Analysis of the Assessment of Risks

(11) We have set forth in some detail and full strength all of the strands of the decision of the ALJ because we conclude that, in light of EPA's duty to insure that the project is unlikely to jeopardize endangered whales or eagles, the ALJ's failure to require, at a minimum, that "real time simulation" studies be done to assure the low risk of an oil spill prior to granting the permit violated his duty to "use the best scientific ... data available." [FN9] Given the Supreme Court's statement that the ESA is designed to prevent the loss of any endangered ***1053** species, "regardless of the cost", TVA v. Hill, 437 U.S. at 188 n.34, 98 S.Ct. at 2299 n.34, we cannot see how the permit can issue when real time simulation studies, which EPA, the State of Maine, and the Coast Guard all view as being necessary to a final determination of safety, are to be delayed until the Coast Guard has adequate funds to undertake them.

FN9. We read the requirement that the agency, here EPA, use such quality of data in the consultation process, as applying not only to such matters as the presence, vulnerability, and criticality of the endangered species, but also to the likelihood of an occurrence that might jeopardize it. We see no basis for requiring a first class effort on the former and not on the latter. Where a more limited use of such "best scientific and commercial data" is intended, the statute speaks clearly; e.g., 16 U.S.C. s 1536(c)(1) ("If the Secretary advises, based on the best scientific and commercial data available, that such species may be present...." (emphasis added.)). Cf. 16 U.S.C. s 1536(h)(2) (B) ("An exemption shall be permanent ... unless (i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species....").

We begin with the linchpin-the Coast Guard opinion. From what we have reported above, we think it quite clear that the Coast Guard was not purporting to do a risk analysis. It was, in effect, signifying its willingness to accept the problem of devising procedures to minimize navigation risks for vessels of certain characteristics transiting via Head Harbor Passage to Eastport. That this is a correct reading is confirmed by the testimony of Rear Admiral Fugaro, who candidly stated of the Coast Guard opinion that "(i)t's not designed to provide a risk analysis." His letter to EPA, which we have quoted, makes clear that he expected any set of Coast Guard orders and procedures to go through the EIS process.[FN10]

FN10. His testimony at the adjudicatory hearing proceeded as follows: "Q. And do you(r) records indicate whether there is a plan to require that quantification when your role does become

involved? A. The records do not indicate that, but that would be a responsibility of my division, and there is absolutely no doubt in my mind that we would undertake a regulatory project if the permit were to issue. In that case, we'd go through the full processes including the environmental assessment, the full regulatory processes, under the Administrative Procedures (sic) Act."

This was also the understanding of Wallace Stickney, the EPA Region One Director responsible for drafting the EIS, who viewed the Coast Guard evaluation not as describing "what the actual risks were intrinsically", but as purely a comparison to other supertanker ports. We see the Coast Guard "assurances" as falling short of what Coast Guard Admiral Barrow, relied on by the ALJ when he rejected the use of world-wide statistics relating to oil spills (see note 12, infra), prescribed: "(A)ny comprehensive and meaningful oil spill study for the development of spill probability and expected spill size must be concerned with site specific factors such as tanker fleet composition, density, navigation systems, route characteristics, operational conditions, regulatory regimes etc."

We cannot presume to know what issues may be posed as the result of real time simulation studies, or, for that matter, real sea trials by VLCCs under ballast. Risks of collisions or grounding may be identified whose assured prevention may entail costs unacceptable to Pittston or measures involving other environmental intrusions or, simply, unacceptable risks which may persist despite the most stringent and expensive procedures and equipment. That those further studies are conceded to be vital is demonstrated by the following testimony of EIS drafter Stickney:

"Q. So, basically, then you decided that that (results of real time simulation studies) wasn't information that was needed to determine whether this refinery should be built or not?
A. We felt the information was needed and that if the facility failed the real time simulation study it would never be built.
Q. It will be too late, will it not, if that study, for example, shows some problems that you haven't anticipated in the final EIS, it will be too late for EPA to say at that point, now the weighing of risk versus benefit is different than we originally thought? Will it not be too late for that?
A. No, sir."

We see absolutely no justification for issuing an NPDES permit before a closer and feasible risk assessment is made.[FN11]

FN11. We can sympathize with the always penurious Coast Guard in not eagerly volunteering to run costly tests, but we have seen no reason why Pittston has not financed both the hydrographic survey and real time simulation studies and perhaps the real tanker trial runs it will need to comply with the Maine BEP permit. EPA has reported in its responses to comments on the EIS that Pittston has contracted with the National Marine Research Facility of the Department of Commerce for the studies. This seems to us well within the concept of "best scientific ... data available". Particularly does this seem true when the whole structure of reasoning about the hazard to two endangered species depends on the force of the conclusion that there is an almost complete absence of risk of a catastrophic oil spill.

***1054** Additionally, we note the Coast Guard's requirements of a hydrographic survey to make sure that the depth figures on the navigation chart fairly represent the entire length, width, and depth of the channel, face of pinnacles and outcroppings, so that VLCCs with draft beginning at 65 feet may pass without danger of grounding during the lowest of tides. Never, we suspect, has there been occasion to make sure that the bottom is from 70 to 90 or 100 feet under low water at all times of the year at all points beneath a broad channel seven miles long in Head Harbor Passage. Should the hydrographic survey reveal embarrassing obstructions, this fact and ways of dealing with it must receive the most careful scrutiny.

The other grounds relied on by the ALJ leading to his conclusion of small or minute risk are even less persuasive than the Coast Guard undertaking. Dr. Eda's computer simulations were avowedly valuable for

obtaining "an overall perspective of ... suitability"; they could not approach even a rough approximation of risk, nor could they account for human error in confronting diverse weather conditions. The second Harris study merely pronounced a route "acceptable" if fairly rigorous conditions were complied with, but none of these conditions were incorporated in the federal permit. Finally, the ALJ's analyses of current, wind, fog, and duration of spills gave only general assurance that prudence, procedures, and equipment can, most of the time and absent human error, compensate for difficult conditions of tide, current, fog, wind and weather.

We stress that our disagreement with the ALJ does not involve challenging his credibility judgments, although we do not share his view that the "overwhelming weight" of evidence pointed to the feasibility of safe transit. [FN12] Were the issue whether, by a preponderance of the evidence, it had been established that VLCCs could make the transit through Head Harbor Passage to Eastport with reasonable safety, the ALJ's ***1055** decision might be accepted. But the issue is a harder one: whether, after using the best data available, it is established that the risk of significant oil spills from the proposed tanker traffic is so small as to insure that there is no likelihood of jeopardizing the two endangered species. All witnesses have agreed that real time simulation studies would contribute a more precise appreciation of risks of collision and grounding. We think the same could be said of a hydrographic survey of the depth of the channel, and perhaps of trial runs by VLCCs in ballast. If so, such methodologies obviously represent as yet untapped sources of "best scientific and commercial data".

FN12. In addition to the evidence referred to above, upon which the ALJ primarily relied, a number of witnesses testified favorably both at the adjudicatory hearing and at the hearing before the Maine BEP. These witnesses included a number of Captains, Coast Guard Admirals, and weather observers. There was substantial negative evidence which the ALJ refused to credit. He rejected efforts to consider world-wide statistics as to oil spills, an approach which has been used in studying other ports, see, e.g., Sierra Club v. Sigler, 532 F.Supp. 1222 (S.D.Tex.1982), concluding that such statistics were unreliable or meaningless and that a site-specific focus was more appropriate. A study by Engineering Computer Opteconomics, using such data, had calculated a 48% probability of a major oil spill (loss of 365,000 barrels or more) over an assumed 25 year life of the refinery. He did not accept a 1976 report of the Canadian Coast Guard, highly negative as to the feasibility of safe supertanker traffic in Head Harbor Passage, observing that three years earlier the Canadian government had opposed the project. He rejected an adverse rating of the Atlantic Pilotage Authority for "extreme inconsistency". Two VLCC captains, Huntley and Crook, were discredited for the inaccuracy of their observations and for being too conservative. A contrary witness, Captain Peacock, was credited in his testimony that piloting a VLCC through the Passage was not "insurmountable", but his later testimony that he would want trial runs in ballasted tankers before construction was deemed "inexplicable". A 1972 study by Frederick R. Harris, Inc., a company commissioned by Pittston, which had conditioned its approval on severe restrictions and a "high order of seamanship and prudence", was discounted as a limited budget study based on a premise, since abandoned, of a confined turning area. Additional negative evidence or critical witnesses included the statement of the Maine Board of Environmental Protection, in issuing its permit, that "the combination of currents, tides, fog, extremes of weather and rocky shores make Eastport one of the more difficult ports of the world.... VLCCs are extremely hazardous vessels which ought not to be operated in these difficult waters"; a study by the Corps of Engineers; a study by Arthur D. Little ("severely wanting"); an evaluation by National Bulk Carriers ("more difficult than any other location"); Captain Musse of Texaco ("not feasible"); National Salvage Association ("hairy navigation problem"); Captain Mills ("I can't think of anything to compare with this"); Captain Kennedy ("call(s) for a degree of accuracy ... heretofore unheard of"). Finally, we note that the EIS itself concluded that the proposed refinery "ultimately will experience its share of severe spills, as have other comparable refineries."

It may very well be that, after conducting real time simulation studies and any other

tests and studies which are suggested by the best available science and technology, the most informed judgment of risk of a major oil spill will still have a large component of estimate, its quantitative element being incapable of precise verification. But at least the EPA will have done all that was practicable prior to approving a project with such potentially grave environmental costs.

We also conclude, for many of the same reasons, that the real time simulation studies and other new data must be the subject of a supplemental EIS, both to assess the magnitude of risk and, if acceptable, to establish appropriate conditions of navigation. The testimony quoted above demonstrates that EPA and the Coast Guard have acknowledged the need for such a supplemental EIS on this issue. See also Alaska v. Andrus, 580 F.2d 465, 477-80 (D.C.Cir.), other portion of holding vacated on other grounds sub nom. Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922, 99 S.Ct. 303, 58 L.Ed.2d 315 (1978). The EIS itself recognizes that "real time simulation studies ... will help to settle the navigation (safety) issue." Given the importance of the studies to the crucial issue of the risk of oil spills, NEPA provides an additional ground for overturning the issuance of a permit until the studies have been conducted, circulated, and discussed. See NRDC v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975); Silva v. Lynn, 482 F.2d at 1287-88.

III. The Clean Water Act

Petitioners' final argument is that the ALJ erred by ruling that conditions imposed on the project by the Maine BEP under state law are not incorporated into the federal NPDES permit. They allege that the certification issued by the State of Maine pursuant to s 401(a)(1) of the Clean Water Act, 33 U.S.C. s 1341(a)(1), though making no explicit mention of the conditions previously imposed by the Maine BEP, incorporated these terms by implication. Therefore, these requirements must also be "a condition on any Federal license or permit." s 401(d), 33 U.S.C. s 1341(d). The State of Maine, as amicus curiae, makes a somewhat different argument. It argues that the prior certification is irrelevant, because the proposal as approved by the state had been substantially modified by the ALJ. But the state contends that it has been denied its right to certify the new proposed discharge, and therefore the NPDES permit is invalid. Respondents argue that the state has waived its right to certify the proposed modified discharge because it failed to intervene in the hearing before the ALJ or to certify the discharge within 30 days of receiving notice that the prior proposal had been amended. 40 C.F.R. s 125.32(e)(8)(v) & (vi) (1978). They also urge that the ALJ's finding that the prior state certification did not incorporate the BEP conditions was not clearly erroneous, and must be upheld.

The ALJ considered testimony and evidence to determine whether the state certification implicitly incorporated the conditions previously imposed by the Maine BEP. Contrary to respondents' contention, he found as a factual matter that "the conditions of the Maine BEP Order are conditions precedent to the effectiveness of" the state's certification. He further ruled, however, as a matter of law, that s 401(d) ***1056** of the Act precludes the state from including in its certification requirements of state law which do not relate to "water quality standards, effluent limitations or schedules of compliance." See s 301(b)(1)(C), 33 U.S.C. s 1311(b)(1)(C). Finally, he concluded that "conditions of the Maine BEP relating to test runs with tankers prior to delivering oil, limiting the size of tankers ..., requiring real time simulation studies, stating times and conditions of navigation of Head Harbor Passage, and other matters unrelated to water quality may not legally be regarded as part of the State of Maine's Sec. 401 certification, irrespective of the intention of the issuer of the certification."

(12) Petitioners argue, with some force, that the conditions listed above are related to water quality, since they are designed to minimize the risk of an oil spill which would severely impair water quality. We believe that the ALJ made a more fundamental error by seeking to determine which requirements of state law were appropriately affixed to the

state's certification. Section 401(a) of the Clean Water Act empowers the state to certify that a proposed discharge will comply with the Act and "with any other appropriate requirement of State law." Any such requirement "shall become a condition on any Federal license or permit." s 401(d). EPA has interpreted this provision broadly to preclude federal agency review of state certification. "Limitations contained in a State certification must be included in a NPDES permit. EPA has no authority to ignore State certification or to determine whether limitations certified by the State are more stringent than required to meet the requirements of State law." EPA, Decision of the General Counsel No. 58 (March 29, 1977); see also Decision of the General Counsel No. 44 (June 22, 1976). The NPDES regulations state that "(r)eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made" through the procedures established in the federal regulations. 40 C.F.R. s 124.55(e) (1981). The courts have consistently agreed with this interpretation, ruling that the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification. See United States Steel Corp. v. Train, 556 F.2d 822, 837-39 & n.22 (7th Cir. 1977); Lake Erie Alliance v. U.S. Army Corps of Engineers, 526 F.Supp. 1063, 1074 (W.D.Pa.1981); Mobil Oil Corp. v. Kelley, 426 F.Supp. 230, 234-35 (S.D.Ala.1976).

Our conclusion that EPA lacked authority to review the conditions imposed by the State of Maine is also supported by the statutory scheme of the Clean Water Act. Section 511(c)(2) of the Act, 33 U.S.C. s 1371(c)(2), makes clear that "(n)othing in the National Environmental Policy Act ... shall be deemed to authorize any Federal agency ... to review any effluent limitation or other requirement established pursuant to this Act or the adequacy of any certification under section 401 of this Act." (emphasis added). Section 510 of the Act, 33 U.S.C. s 1370, specifically preserves the right of a state to "adopt or enforce ... any requirement respecting control or abatement of pollution", even if it is more stringent than those adopted by the federal government. Finally, it is clear that even in the absence of state certification, EPA would be bound to include in the federal permit "any more stringent limitations ... established pursuant to any State law or regulations (under authority preserved by section 510)." s 301(b)(1)(C), 33 U.S.C. s 1311(b)(1)(C); see United States Steel Corp., 556 F.2d at 837-39; Decision of the General Counsel No. 44, at 5.

(13) The regulations cited by respondents do not compel a different result. The 1978 regulation cited by EPA-which provided that failure to certify a proposed permit, within thirty days after the state is notified that the permit has been modified, "shall be deemed a waiver of such certification rights"-was no longer in force in 1980 when the decision to modify the proposal was made by the ALJ. The new regulation, ***1057** 40 C.F.R. s 124.55(d) (1981), states that "(a) condition in a draft permit may be changed during agency review in any manner consistent with" state certification without requiring recertification. This regulation clearly does not authorize EPA to amend a permit in a manner inconsistent with state certification by deleting conditions imposed by the state during the certification process. Although the new regulations also require the state to cite to state law when imposing more stringent conditions on a draft permit, 40 C.F.R. s 124.53(e)(1) (1981), and to indicate the extent to which the condition can be relaxed without violating state law, 40 C.F.R. s 124.53(e)(2) (1981), it would be inequitable to hold that the state has waived its rights here by failing to comply with these requirements when no similar requirements were in force in 1977 when state certification took place. Since the state at no time waived its rights to certify the proposed discharge, and the ALJ lacked authority to exclude the previously imposed state conditions from the federal permit, these conditions must be included in any NPDES permit for the Pittston project to be issued in the future, unless the conditions are modified according to law. See 40 C.F.R. s 124.55(b)

(1981).

IV. Conclusion

Accordingly, we vacate EPA's decision to issue the NPDES permit to Pittston, and remand the case to EPA to conduct further proceedings consistent with this opinion. EPA's jeopardy determination under the Endangered Species Act must be reconsidered in light of the results of real time simulation studies and a hydrographic survey of Head Harbor Passage, and any other studies, such as the 1980 whale study by the New England Aquarium, which EPA determines to be necessary to meet its statutory obligation to use the best scientific data available. If, in light of the studies, EPA decides to recommend approval of the project, this proposal shall be the subject of a supplemental EIS relating to the conditions of navigation necessary to minimize the risk of oil spills. Finally, the conditions imposed by the State of Maine in its certification of the proposed discharge must be included in any federal permit unless the conditions are subsequently modified according to law.[FN13]

FN13. In light of our holding, it is unnecessary to address in detail petitioners' argument that a supplemental EIS is necessary to consider significant changes in the project and new information. With respect to Pittston's decision to dispose of the refinery's sludge by burial rather than incineration, we direct petitioners to request EPA, rather than this court, to require a supplemental EIS once a specific proposal is made. See, e.g., EDF v. Marsh, 651 F.2d 983, 992 (5th Cir. 1981); Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (9th Cir. 1980). With respect to new data about the economic value of the commercial fishing industry, we do not view this information as being sufficiently significant to reopen the record. We assume that any new, significant information relating to endangered species and the risk of spills will be considered by EPA on remand.

So ordered.

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867 F.2d 96
29 ERC 1145, 19 Envtl. L. Rep. 20,683
(Cite as: 867 F.2d 96)
<KeyCite Citations>

United States Court of Appeals,
First Circuit.

UNITED STATES of America, Appellee,
v.
MARATHON DEVELOPMENT CORPORATION and Terrence Geoghegan, Defendants, Appellants.

No. 88-1619.

Heard Jan. 9, 1989.
Decided Feb. 8, 1989.

Defendants were convicted in the United States District Court of the District of Massachusetts, John J. McNaught, J., of violating Clean Water Act, and they appealed. The Court of Appeals, Levin H. Campbell, Chief Judge, held that Army Corps of Engineers' headwaters nationwide permit was not applicable in Massachusetts, precluding defendants charged with violating Clean Water Act for filling five acres of federally protected wetlands without obtaining permit from presenting evidence of nationwide permit as a defense.

Affirmed.

West Headnotes

[1] Navigable Waters ⇐ 38
270k38
Army Corps of Engineers' headwaters nationwide permit was not applicable in Massachusetts, precluding defendants charged with violating Clean Water Act for filling five acres of federally protected wetlands without obtaining permit from presenting evidence of nationwide permit as a defense; Massachusetts had denied water quality certification that was requisite to granting of federal permit several months before Corps' promulgation of nationwide permit. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 309(c), 404(e), 33 U.S.C.A. §§ 1251 et seq., 1319(c), 1344(e).

[2] Health and Environment ⇐ 25.7(13.1)
199k25.7(13.1)
(Formerly 199k25.7(13))
Section of Clean Water Act providing for state water quality certification applied to general as well as to individual permits. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 401(a), (a)(1), 404, 502, 33 U.S.C.A. §§ 1311(a), 1341(a), (a)(1), 1344, 1362.

[3] Health and Environment ⇐ 25.7(13.1)
199k25.7(13.1)
(Formerly 199k25.7(13))
"Comment" in Army Corps of Engineers regulation concerning headwaters nationwide permit, which advised applicants that some states had denied water quality certification for some nationwide permits, merely provided notice of Clean Water Act provision prohibiting issuance of nationwide permit if relevant water quality certification had been denied, and did not have substantive effect. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 301(a), 309(c), 404, 502, 33 U.S.C.A. §§ 1251 et seq., 1311(a), 1319(c), 1344, 1362.

[4] Constitutional Law ⇐ 250.5
92k250.5

[4] Health and Environment ⇐ 21
199k21
Provisions of Clean Water Act allowing states to impose their own more stringent water quality standards did not violate equal protection; provisions enabled state to assess its need for stronger environmental policies in context of its own unique environmental problems. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 301(a), 309(c), 404, 502, 33 U.S.C.A. §§ 1251 et seq., 1311(a), 1319(c), 1344, 1362; U.S.C.A. Const.Amend. 14.

***97** Stephen R. Delinsky with whom Treazure R. Johnson and Fine & Ambrogne were on brief, for appellants.

Richard E. Welch, III, Asst. U.S. Atty., with

whom Frank L. McNamara, Jr., U.S. Atty., Andrew E. Lauterback, Sp. Asst. U.S. Atty., Edward J. Shawaker, Dept. of Justice, Ann Williams-Dawe, Sr. Asst. Regional Counsel, Region I, E.P.A., and Martin R. Cohen, Asst. Chief Counsel for Litigation, Army Corps of Engineers, were on brief, for appellee.

Roberta K. Schnoor, Asst. Atty. Gen., Environmental Protection Division, and James M. Shannon, Atty. Gen., on brief for the Com. of Mass., the States of Alaska, Md., Mo., Wis., Vt., the Pennsylvania Dept. of Environmental Resources, the Rhode Island Dept. of Environmental Management and the National Wildlife Federation, amici curiae.

Before CAMPBELL, Chief Judge, COFFIN and BOWNES, Circuit Judges.

Levin H. CAMPBELL, Chief Judge.

Marathon Development Corporation ("Marathon"), a Rhode Island real estate development corporation, and Terrence Geoghegan, its senior vice-president, were indicted on 25 counts of violating the Clean Water Act of 1977, 33 U.S.C. §§ 1251 et seq. (1982). See 33 U.S.C. § 1319(c) (specifying criminal penalties). [FN1] According to the government, Marathon, acting through Geoghegan, was engaged in developing a large shopping mall in southeastern Massachusetts, on a site that contained more than 20 acres of federally protected wetlands. In February 1986, Marathon was notified by the Army Corps of Engineers ("the Corps"), which administers relevant aspects of the Clean Water Act, that under the Act, Marathon could not deposit dredged or fill material into the wetlands without first obtaining a permit from the Corps. Despite this notification, Marathon, between June and September 1986, bulldozed more than five acres of wetlands clear of all vegetation, and piled debris and deposited gravel onto the wetlands. According to the government, the area leveled by Marathon roughly approximated the area designated for the shopping mall's parking lot.

FN1. The criminal enforcement provisions of the Clean Water Act were amended by the Water Quality Act of 1987. The amendments are not applicable to this case.

Before trial, defendants raised the defense that their activities were protected by a "headwaters nationwide permit" set forth in the Corps' regulations, 33 C.F.R. § 330.5(a)(26) (1986). If such a nationwide permit were applicable to their activities, defendants would not be required to obtain an individual permit from the Corps. The government filed a motion in limine to exclude any evidence relating to the alleged ***98** nationwide permit. The government argued that the evidence would be irrelevant because the headwaters nationwide permit was not applicable in Massachusetts at the time of defendants' actions. The district court granted the motion in limine.

[1] Defendants then entered conditional pleas of guilty under Fed.R.Crim.P. 11(a)(2), preserving for appeal the single issue of whether the headwaters nationwide permit was applicable in Massachusetts. In pleading guilty, defendants admitted to the conduct charged in the indictment. The district court fined Marathon $100,000. The court imposed on Geoghegan a suspended six-month sentence, one year of probation, and a $10,000 fine. Marathon and Geoghegan now appeal to us on the single issue they preserved. We agree with the district court's conclusion that the headwaters nationwide permit was not applicable in Massachusetts, and affirm the convictions.

The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Under 33 U.S.C. §§ 1311(a) and 1362, any discharge of dredged or fill material, such as dirt and gravel, into the nation's waters is unlawful unless authorized by a permit issued by the Corps, pursuant to section 404 of the Act ("Permits for dredged or fill material"). The nation's waters protected by the Act have been broadly construed so as to include wetlands. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131-39, 106 S.Ct. 455, 461-65, 88 L.Ed.2d 419 (1985).

Wetlands are areas inundated or saturated with surface or ground water, including swamps, marshes, and bogs. The Army Corps of Engineers has recognized that wetlands "play a key role in protecting and enhancing water quality." Riverside Bayview Homes, 474 U.S. at 133, 106 S.Ct. at 463. As this court has noted,

> Freshwater wetlands are ecologically valuable for various reasons. They act as a natural flood control mechanism by slowing and storing storm water runoff. They help supply fresh water to recharge groundwater supplies. They serve as biological filters by purifying water as it flows through the wetlands. They provide seasonal and year-round habitat for both terrestrial and aquatic wildlife.

United States v. Cumberland Farms of Connecticut, Inc., 826 F.2d 1151, 1153 (1st Cir.1987) (citing 33 C.F.R. § 320.4(b) (1986)), cert. denied, 484 U.S. 1061, 108 S.Ct. 1016, 98 L.Ed.2d 981 (1988).

In monitoring the discharge of dredged or fill materials under the Clean Water Act, the Corps issues both individual permits, which require the making of individual applications, and general permits, which do not require individual applications. The general permits, established pursuant to section 404(e) of the Act, 33 U.S.C. § 1344(e), allow categories of activities that the Corps determines will do little or no harm to the environment. General permits that have been established nationwide are called "nationwide permits." The "headwaters nationwide permit" on which defendants base their appeal is set forth in the Corps' regulations at 33 C.F.R. § 330.5(a)(26):

> § 330.5 Nationwide permits.[[FN2]]
>
> FN2. These regulations for nationwide permits were promulgated on October 5, 1984, and were in force at the time of the conduct in question. Amended regulations became effective January 1, 1987, but are not applicable to the present convictions.
>
> (a) Authorized activities. The following activities, including discharges of dredged or fill material, are hereby permitted provided the conditions listed in paragraph (b) of this section and the notification procedures, where required, of § 330.7 are met. Comment. Because some states have denied water quality certification/coastal zone consistency for some nationwide permits reissued herein and many states have granted conditional water quality certification, applicants should check with the district engineer regarding eligibility under the nationwide permits.
>
> ....
>
> (26) Discharges of dredged or fill material into the waters listed in paragraphs ***99** (a)(26)(i) and (ii) of this section except those which cause the loss or substantial adverse modification of 10 acres or more of waters of the United States, including wetlands. For discharges which cause the loss or substantial adverse modification of 1 to 10 acres of such waters, including wetlands, notification of the district engineer is required in accordance with § 330.7 of this part.
>
> (i) Non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.
>
> (ii) Other non-tidal waters of the United States, including adjacent wetlands, that are not part of a surface tributary system to interstate waters or navigable waters of the United States (i.e., isolated waters).

As noted above, defendants wished to present evidence at trial that their activities were allowed by this headwaters nationwide permit. They claim that the wetlands in question were adjacent to a channelized stream located above the headwaters, [FN3] and that their activities caused the "loss or adverse modification" of less than one acre, so that no individual permit or notification was required. If they had been permitted to show this, defendants argue, they would have had a complete defense to the charged crime. The government disputes defendants' contention that their activities fell within the terms of the headwaters nationwide permit, claiming that the wetlands in question were in fact adjacent to the Runnins River (a large,

interstate waterway that is not located above the headwaters) and that more than five acres were adversely affected. But this factual dispute need not detain us here because we agree with the government that the headwaters nationwide permit was not in any event applicable in the Commonwealth of Massachusetts, as Massachusetts had denied the water quality certification that is requisite to the granting of a federal permit.

FN3. The term "headwaters" is defined as the "point on a nontidal stream above which the average annual flow is less than five cubic feet per second." 33 C.F.R. § 323.2(h) (1986).

Under the Clean Water Act, states are empowered to set more stringent water quality standards than those set by the Act and its attendant regulations. Under section 401 of the Act ("Certification"), if a state determines that discharges from a certain category of activity will not meet state water quality requirements, the federal government is prohibited from authorizing the activity by federal permit: "No license or permit shall be granted if certification has been denied by the State...." 33 U.S.C. § 1341(a)(1). A state's ability to impose more stringent water quality standards is also ensured by 33 U.S.C. § 1370, which provides that any state may generally adopt a more stringent--although not a less stringent--"standard or limitation respecting discharges of pollutants" than that provided on a nationwide basis by the Clean Water Act. The Commonwealth of Massachusetts and its fellow amici curiae [FN4] contend that a state's authority to grant or deny water quality certification is central to its ability to ensure the protection of water resources within its borders.

FN4. The Commonwealth of Massachusetts was joined as amicus curiae by the states of Alaska, Maryland, Missouri, Wisconsin, and Vermont, the Pennsylvania Department of Environmental Resources, the Rhode Island Department of Environmental Management, and the National Wildlife Foundation. Each amicus state, in addition to Massachusetts, has either denied or set conditions upon the headwaters nationwide permit because it determined that the permit would authorize activities that would damage the water quality of the state's freshwater wetlands.

The ability of states to enforce their own more stringent water quality standards by denying certification for a nationwide permit is consistent with the legislative purpose and history of the Clean Water Act. In stating the overall goals of the Act, Congress declared its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). The legislative history of section 401 of the Act ("Certification") confirms that Congress intended to give the states veto power over the grant of federal ***100** permit authority for activities potentially affecting a state's water quality. The predecessor of section 401 was section 21(b) of the Water and Environmental Quality Improvement Act of 1970. When it enacted section 21(b), Congress described its impact as follows:

> No Federal license or permit shall be granted unless this [state] certification has first been obtained or there has been a waiver of this requirement as provided by this subsection. Denial of certification by a State ... results in a complete prohibition against the issuance of the Federal license or permit.

H.R.Conf.Rep. No. 940, 91st Cong., 2d Sess., reprinted in 1970 U.S.Code Cong. & Admin.News 2712, 2741. Section 401 subsequently was enacted as part of the Federal Water Pollution Control Act Amendments of 1972. The Senate Committee that prepared this provision observed,

> This section is substantially section 21(b) of existing law.... It should also be noted that the Committee continues the authority of the State ... to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State....

S.Rep. No. 414, 92d Cong., 2d Sess., reprinted in 1972 U.S.Code Cong. & Admin.News 3668, 3735.

This court has agreed with this

interpretation of the state's power. See Roosevelt Campobello International Park Commission v. Environmental Protection Agency, 684 F.2d 1041, 1056 (1st Cir.1982) ("Section 401(a) of the Clean Water Act empowers the state to certify that a proposed discharge will comply with the Act and 'with any other appropriate requirement of State law.' Any such requirement 'shall become a condition on any Federal license or permit.' § 401(d)."). Accord 1 Grad, Treatise on Environmental Law § 3.03, at 3-219 (1983) ("The certification requirement provides the states with a first line of defense against federally licensed or permitted activities that may have adverse effects on the state's waters").

Neither the language nor the history of section 404(e) of the Clean Water Act ("General permits [for dredged or fill material] on State, regional, or nationwide basis"), 33 U.S.C. § 1344(e), suggests that states have any less authority in respect to general permits than they have in respect to individual permits. Indeed, at the same time that Congress authorized the Corps to issue general permits for dredged or fill material, it added a provision to section 404 which underlined the authority of states over dredge and fill activities:

> Nothing in [section 404] shall preclude or deny the right of any State ... to control the discharge of dredged or fill material in any portion of the navigable waters [[FN5]] within the jurisdiction of such State....
>
> FN5. References to "navigable waters" in the Clean Water Act have generally been interpreted to refer to all of the nation's waters, including wetlands. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131-39, 106 S.Ct. 455, 461-65, 88 L.Ed.2d 419 (1985).

33 U.S.C. § 1344(t). Although Congress reviewed section 401 ("Certification") when it authorized general permits in section 404 of the Clean Water Act of 1977, it did not amend section 401 so as to limit state authority over nationwide or other general permits. When sections 401 and 404 are read together, their plain terms provide that the state certification requirement of section 401 applies to section 404(e) nationwide permits in the same way that it applies to any other section 404 permit.

In this case, there is no dispute that Massachusetts had denied water quality certification of the headwaters nationwide permit, several months before its promulgation. When the Corps published its 1984 regulations, which included the headwaters nationwide permit, the Corps gave public notice that this permit was not applicable in Massachusetts:

> The state of Massachusetts has denied 401 water quality certification ... for nationwide permits ... [including] (26) [the headwaters permit]. Department of the Army authorization to undertake these activities ... within the state of Massachusetts has been denied without prejudice. Individuals wishing to undertake ***101** these activities must obtain the 401 certification ... from the appropriate state office prior to seeking Department of the Army authorization.

Defendants do not contend that they were not notified of the state's denial or of the Corps' requirements.

In response to the abundant evidence that the nationwide permit was not applicable in Massachusetts, defendants make three arguments, which we now discuss. We find no merit in any of them.

[2] First, defendants argue that section 401(a) of the Clean Water Act, which provides for state water quality certification, applies only to individual permits, not to general permits. They note that the first sentence of section 401(a)(1) refers to "applicants" for permits:

> Any applicant for a Federal license or permit to conduct any activity ... which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, ... that any such discharge will comply with the applicable provisions ... of this title.

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33 U.S.C. § 1341(a)(1) (emphasis added). Defendants observe that while people must "apply" for individual permits, the general permits (including nationwide permits) require no such "application" to the Corps. As a result, they contend, people who seek to engage in activity under a general permit cannot be considered "applicants."

To this argument there is a simple and, we believe, conclusive answer. The last sentence of section 401(a)(1) provides, "No license or permit shall be granted if certification has been denied by the State...." 33 U.S.C. § 1341(a)(1) (emphasis added). Defendants do not mention this sentence in their brief. At oral argument defendants' counsel said that he read the sentence as still referring to "applicants." But if that were the case, the sentence would be pure surplusage, adding nothing to the meaning of the section. Instead, we interpret the sentence as meaning exactly what it says: that no license or permit--whether individual or general--shall be granted if the state has denied certification. Such an interpretation accords not only with the plain meaning of the sentence, but also with the legislative purpose and history outlined above. Such an interpretation also accords with the Corps' own consistent interpretation of the statute. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131, 106 S.Ct. 455, 461, 88 L.Ed.2d 419 (1985) (citations omitted).

[3] Second, defendants argue that the Corps regulation concerning the headwaters nationwide permit does not condition its applicability on state water quality certification. Although the regulations include a "Comment" advising applicants that some states have denied water quality certification for some nationwide permits, 33 C.F.R. § 330.5(a) (see page 98, supra), this "Comment" is not part of the regulation itself and, therefore, has no substantive effect. [FN6] But the fact that the regulation does not explicitly condition the applicability of the headwaters nationwide permit on state water quality certification does not help defendants. As noted above, the statute itself prohibits the issuance of a nationwide permit if the relevant water quality certification has been denied. The "Comment" is simply one way in which the Corps provided notice of this provision of the law.

FN6. In the 1987 amendment of the regulations, this "Comment" was incorporated into the regulations themselves. We do not agree with defendants' suggestion that the fact of this amendment shows that prior to the amendment the "Comment" must have purported to have substantive force.

[4] Finally, defendants argue that those provisions of the Clean Water Act that allow states to impose their own more stringent water quality standards violate the constitutional guarantee of equal protection of the laws. Defendants observe that if individual states can prevent the grant of a nationwide permit, "identical ***102** discharges, occurring in two different states, would result in drastically different consequences for the individuals responsible for the respective discharges." Although this observation may well be correct, it hardly amounts to a denial of equal protection. Permitting states to impose, in the context of a federal law, their own more stringent environmental standards is not unique and has never been held to be irrational or unconstitutional. See, e.g., Clean Air Act, 42 U.S.C. §§ 7410, 7413(c)(1)(A) (1982) (states may set more rigorous air quality standards than federal minimum and federal government may prosecute knowing violations of those standards). See also United States Steel Corp. v. Train, 556 F.2d 822, 835 (7th Cir.1977) (Clean Water Act); Union Electric Co. v. Environmental Protection Agency, 515 F.2d 206 (8th Cir.1975), aff'd, 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976) (Clean Air Act). Far from being irrational, such provisions enable a state to assess its need for stronger environmental policies in the context of its own unique environmental problems.

We also reject defendants' argument that

the discretionary nature of the Massachusetts certification process poses special constitutional concerns. Any defect in a state's section 401 water quality certification can be redressed. The proper forum for such a claim is state court, rather than federal court, because a state law determination is involved. See Roosevelt Campobello International Park Commission v. Environmental Protection Agency, 684 F.2d 1041, 1056 (1st Cir.1982).

Because we conclude that the headwaters nationwide permit was not applicable in Massachusetts at the time of defendants' actions, we hold that the district court was correct in granting the government's motion in limine to exclude any evidence relating to the permit. Any such evidence would have been entirely irrelevant, and could have led only to confusion and delay.

AFFIRMED.

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