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*511 U.S. 700, *; 114 S. Ct. 1900, **;*
*128 L. Ed. 2d 716, ***; 1994 U.S. LEXIS 4271*

PUD NO. 1 OF JEFFERSON COUNTY AND CITY OF TACOMA, PETITIONERS v. WASHINGTON DEPARTMENT OF ECOLOGY, ET AL.

No. 92-1911

SUPREME COURT OF THE UNITED STATES

511 U.S. 700; 114 S. Ct. 1900; 128 L. Ed. 2d 716; 1994 U.S. LEXIS 4271; 62 U.S.L.W. 4408; 38 ERC (BNA) 1593; 94 Cal. Daily Op. Service 3843; 94 Daily Journal DAR 7236; 24 ELR 20945; 8 Fla. L. Weekly Fed. S 172

February 23, 1994, Argued
May 31, 1994, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

DISPOSITION: 121 Wash. 2d 179, 849 P.2d 646, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioners, a city and a local utility district, desired to build a hydroelectric project on the Dosewallips River in Washington State. Respondent state environmental agency conditioned a permit for the project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The Supreme Court of Washington upheld the agency's decision. Petitioners sought certiorari.

OVERVIEW: Because a Federal Energy Regulatory Commission license was required and because the project might result in discharges into the Dosewallips River, petitioners were required to obtain state certification of the project pursuant to § 401 (33 U.S.C.S. § 1341) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), 33 U.S.C.S. § 1251 et seq. The principal dispute was whether the minimum stream flow requirement that the state imposed on the hydroelectric project was a permissible condition of a § 401 certification under the Act. The Court concluded that it was, upholding the state supreme court's judgment. The Court held that a state may include minimum stream flow requirements in a § 401 certification insofar as necessary to enforce a designated use contained in a state water quality standard. In so doing, the Court rejected petitioners' assertion that the Act was only concerned with water quality and did not allow the regulation of water quantity. Indeed, there was recognition in the Act itself that reduced stream flow, or diminishment of water quantity, could constitute water pollution.

OUTCOME: The Court affirmed the judgment of the state supreme court.

CORE TERMS: water, water quality, certification, stream, license, designated, regulation, Clean Water Act, state water, antidegradation, effluent, river, fish, navigable waters, state law, quantity, ensure compliance, wildlife, hydroelectric, recreation, deference, pollution, organisms, recommendation, licensing, unrelated, interfere, spawning, fishery, habitat

CORE CONCEPTS - Hide Concepts

Environmental Law : Water Quality
Pursuant to § 303 (33 U.S.C.S. § 1313) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), 33 U.S.C.S. § 1251 et seq., 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.S. § 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 serve the purposes of the Act. 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. Section 303 also contains an "antidegradation policy," a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation.

Environmental Law : Water Quality
See 33 U.S.C.S. § 1341.

Environmental Law : Water Quality
State water quality standards adopted pursuant to § 303 (33 U.S.C.S. § 1313) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), 33 U.S.C.S. § 1251 et seq., are among the "other limitations" with which a state may ensure compliance through the certification process under § 401 (33 U.S.C.S. § 1341) of the Act.

Environmental Law : Water Quality
Pursuant to § 401 (33 U.S.C.S. § 1341) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C.S. § 1251 et seq., states may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other appropriate requirement of state law.

Environmental Law : Water Quality
Pursuant to § 401(d) (33 U.S.C.S. § 1341(d)) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), 33 U.S.C.S. § 1251 et seq., a 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 (33 U.S.C.S. § 1313) of the Act and with any other appropriate requirement of state law. A certification requirement that an applicant operate the project consistently with state water quality standards, consistently with the designated uses of the water body and the water quality criteria, is both a "limitation" to assure compliance with limitations imposed under § 303, and an "appropriate" requirement of state law.

Environmental Law : Water Quality
Under the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), 33 U.S.C.S. § 1251 et seq., reduced stream flow, specifically diminishment of water quantity, can constitute water pollution. In particular, 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.S. § 1362(19).

Environmental Law : Water Quality
Sections 101(g) and 510(2) (33 U.S.C.S. §§ 1251(g) and 1370(2)) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C.S. § 1251 et seq., 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.

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Environmental Law : Water Quality
A state may include minimum stream flow requirements in a certification issued pursuant to § 401 (33 U.S.C.S. § 1341) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C.S. § 1251 et seq., insofar as necessary to enforce a designated use contained in a state water quality standard.

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SYLLABUS: 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 "existing 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 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. 710-723.

(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. 710-713.

(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. 713-719.

(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 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 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. 719-723.

COUNSEL: Howard E. Shapiro argued the cause for petitioners. With him on the briefs were Michael A. Swiger, Gary D. Bachman, Albert R. Malanca, and Kenneth G. Kieffer.

Christine O. Gregoire, Attorney General of Washington, argued the cause for respondents. With her on the briefs were Jay J. Manning, Senior Assistant Attorney General, and William C. Frymire, Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General Days, Acting Assistant Attorney General Schiffer, James A. Feldman, and Anne S. Almy. *

* Briefs of amici curiae urging reversal were filed for the American Forest & Paper Association et al. by John R. Molm, Winifred D. Simpson, and James A. Lamberth; for Niagara Mohawk Power Corp. by Edward Berlin, Kenneth G. Jaffe, Paul J. Kaleta, Brian K. Billinson, and Timothy P. Sheehan; for the Northwest Hydroelectric Association by Richard M. Glick and Lory J. Kraut; for Pacific Northwest Utilities by Sherilyn Peterson and R. Gerard Lutz; and for the Western Urban Water Coalition by Benjamin S. Sharp and Guy R. Martin.

Briefs of amici curiae urging affirmance were filed for the State of Vermont et al. by Jeffrey L. Amestoy, Attorney General of Vermont, and Ronald A. Shems, Assistant Attorney General, Robert Abrams, Attorney General of New York, and Kathleen Liston Morrison, Assistant Attorney General, Grant Woods, Attorney General of Arizona, Winston Bryant, Attorney General of Arkansas, Daniel E. Lungren, Attorney General of California, Richard Blumenthal, Attorney General of Connecticut, Charles M. Oberly III, Attorney General of Delaware, Robert A. Butterworth, Attorney General of Florida, Michael J. Bowers, Attorney General of Georgia, Robert A. Marks, Attorney General of Hawaii, Larry EchoHawk, Attorney General of Idaho, Roland A. Burris, Attorney General of Illinois, Pamela Fanning Carter, Attorney General of Indiana, Bonnie J. Campbell, Attorney General of Iowa, Robert T. Stephan, Attorney General

of Kansas, Chris Gorman, Attorney General of Kentucky, Michael E. Carpenter, Attorney General of Maine, J. Joseph Curran, Jr., Attorney General of Maryland, Scott Harshbarger, Attorney General of Massachusetts, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Mike Moore, Attorney General of Mississippi, Jeremiah W. Nixon, Attorney General of Missouri, Joseph P. Mazurek, Attorney General of Montana, Don Stenberg, Attorney General of Nebraska, Frankie Sue Del Papa, Attorney General of Nevada, Jeffrey R. Howard, Attorney General of New Hampshire, Fred DeVesa, Acting Attorney General of New Jersey, Tom Udall, Attorney General of New Mexico, Michael F. Easley, Attorney General of North Carolina, Heidi Heitkamp, Attorney General of North Dakota, Lee Fisher, Attorney General of Ohio, Susan B. Loving, Attorney General of Oklahoma, Theodore R. Kulongoski, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Jefferey B. Pine, Attorney General of Rhode Island, T. Travis Medlock, Attorney General of South Carolina, Charles W. Burson, Attorney General of Tennessee, Dan Morales, Attorney General of Texas, Jan Graham, Attorney General of Utah, Stephen D. Rosenthal, Attorney General of Virginia, Darrell V. McGraw, Jr., Attorney General of West Virginia, James E. Doyle, Attorney General of Wisconsin, Joseph B. Meyer, Attorney General of Wyoming, and John Payton, Corporation Counsel of the District of Columbia; and for American Rivers et al. by Paul M. Smith.

JUDGES: 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. 723. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, post, p. 724.

OPINIONBY: O'CONNOR

OPINION: [*703] [*723] [**1905]** JUSTICE O'CONNOR delivered the opinion of the Court.

[*HR1A]** 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, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (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 **[***724]** 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 "existing 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. n1

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n1 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.

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"(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.

"(iv) 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."

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[*707] In addition to these specific standards applicable to Class AA waters, the State has adopted a statewide **[***725]** 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 "any 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.* n2

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n2 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."

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[*726]** 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). **[***727]** 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 (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, 457 N.E.2d 726, 469 N.Y.S.2d 620 (1983). We now affirm.

AR 002077

III

[*HR1B]** 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.

[*HR2A]** 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 **[***728]** requirement of State law." Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post*, at 726, 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.

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, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992); *Chevron* U.S. *A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

[*HR3A]** 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.

[*HR2B]** **[***HR3B]** 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) ("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. n3 **[***729]** **[**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.

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n3 The dissent asserts that § 301 is concerned solely with discharges, not broader water quality standards. *Post*, at 730, 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.

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B

[*HR1C]** **[***HR4A]** 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 "salmonid [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).

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."

[*HR4B]** 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 **[***730]** 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.

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 "when 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.

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*, 302 U.S. App. D.C. 80, 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 "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." WAC 173-201-045(1)(c)(vii) (1986). Similarly, the state standards specify that "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." 173-201-045(1)(c)(viii). We think petitioners' **[***731]** 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."

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.

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 **[***732]** 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).

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 . . . existing 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 "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." 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 use" will be "maintained and protected." 40 CFR § 131.12(a)(1) (1993).

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 **[***733]** 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).

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, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990), construing an analogous provision of the Federal Power Act, n4 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, 90 L. Ed. 1143, 66 S. Ct. 906, and n. 20 (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 **[***734]** 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").

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n4 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.

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IV

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.*, 495 U.S. at 498.

[*HR1D]** 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.

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). **[***735]** 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, 80 L. Ed. 2d 753, 104 S. Ct. 2105 (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.

CONCURBY: STEVENS

CONCUR: 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).

DISSENTBY: THOMAS

DISSENT: **[*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 "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 . . . that any such **[***736]** 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 "deny" 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 709. 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 711, 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 711. 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.*, **[***737]** 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 712. The Court concludes that this broader authority allows a State to impose conditions on a § 401 certification that are unrelated to discharges. *Ante*, at 711-712.

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)

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, 98 L. Ed. 2d 740, 108 S. Ct. 626 (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); **[***738]** § 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, 91 L. Ed. 12, 67 S. Ct. 13 (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, 112 L. Ed. 2d 374, 111 S. Ct. 415 (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 712. 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 712. 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, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). *Ante*, at 712.

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*, 467 U.S. at 842-843. 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. n1 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 "agency construction" directly addressing the question. *Chevron, supra*, at 842.

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n1 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.

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In fact, the regulation to which the **[***739]** 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 § 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 713. n2 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 715. 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.*

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n2 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 713 (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*, 511 U.S. at 727. Thus, the Court's reliance on § 301 as a source of authority to impose conditions unrelated to discharges is misplaced.

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[*740]** 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, . . . salmonid 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). n3 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).

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n3 Respondents concede that petitioners' project "will likely not violate any of Washington's water quality criteria." Brief for Respondents 24.

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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 713-714, 715 (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 "characteristic uses," **[*732]** including "recreation (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 F.E.R.C. P61,291, 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. n4 In the end, it is difficult to conceive of a condition that would fall outside a **[***741]** State's § 401(d) authority under the Court's approach.

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n4 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.

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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. § 791 *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: "In 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 recreational **[*733]** opportunities, 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, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (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. 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.*, 495 U.S. at 506-507 (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, 90 L. Ed. 1143, 66 S. Ct. 906 (1946), in which we warned against "vesting 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' **[***742]** 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 "term . . . of the license as a matter of law," *Department of Interior* v. *FERC*, 293 U.S. App. D.C. 182, 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. n5 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.

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n5 See, *e. g., Keating* v. *FERC*, 288 U.S. App. D.C. 344, 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 F.E.R.C. P61,291, p. 61,990 (1992) ("Since 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 F.E.R.C. P61,033, pp. 61,172-61,173 (1990).

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Although the Court notes in passing that "the limitations included in the certification become a condition on any federal license," *ante*, at 708, 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 723, because "FERC has not yet acted on petitioners' license application," *ante*, at 722. 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, **[***743]** 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 conditions to "protect, mitigate damage 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. As the Ninth Circuit observed in the course of rejecting California's effort to give *California* v. *FERC* a narrow reading, "there 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 **[***744]** 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.

AR 002091

*1985 U.S. Dist. LEXIS 23436, *; 22 ERC (BNA) 1238*

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT W. AKERS, Defendant

No. Civ. S-84-1276 RAR

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

1985 U.S. Dist. LEXIS 23436; 22 ERC (BNA) 1238

January 14, 1985, Decided; January 15, 1985, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff government sought a preliminary injunction against defendant property owner to prevent the implementation of his farming plans on wetlands subject to the Clean Water Act, 22 U.S.C.S. § 1251 et seq.

OVERVIEW: The government sought injunctive relief based on evidence that the property owner was engaged in earth moving activities, including the construction of a dike, filling in channels, and construction of a ditch and access road, on land protected by the Clean Water Act, 22 U.S.C.S. § 1251 et seq. The court granted the government request and preliminarily enjoined the property owner's activities. The government had shown likely success on the merits, irreparable injury, and that the balance of hardships were in its favor. Specifically, the property owner's land was subject to the Clean Water Act and did not fall within its exemptions for discharge of dredged or fill material or for ongoing, normal farming. The property owner's activities were not ongoing farming because they subjected the land to new uses, which were inconsistent with it remaining a wetland. Nor did the property owner's construction of a dike fall within the fill material exemption because the dike was not an irrigation ditch for drainage. Finally, the property owner did not obtain a permit, which was required for activities that fell within exemptions to the Clean Water Act.

OUTCOME: The court granted the government's request for a preliminary injunction against the property owner, and entered findings of fact and conclusions of law.

CORE TERMS: wetland, water, exemption, Clean Water Act, dike, fill, farming, channel, exempt, regulation, dredged, ditch, irrigation, preliminary injunction, conclusions of law, circulation, drainage, lawsuit, irreparable injury, navigable waters, impaired, upland, soil, farm, convert, cease and desist order, earth-moving, incidental, discing, irrigation ditch

CORE CONCEPTS - Hide Concepts

Civil Procedure : Injunctions : Preliminary & Temporary Injunctions
To establish its right to a preliminary injunction, the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. These are not separate tests, but the outer reaches "of a single continuum."

AR 002092

Constitutional Law : Congressional Powers & Duties : Commerce Clause
Environmental Law : Water Quality
Subject to certain exemptions, §§ 301 and 404 of the Clean Water Act, 33 U.S.C.S. §§ 1311, 1344, prohibit the discharge of dredged or fill material from point sources into the waters of the United States without a permit from the Corps of Engineers. By defining the term "navigable waters" in 33 U.S.C.S. § 1362(7) of the Clean Water Act to mean the waters of the United States, including the territorial seas, federal jurisdiction is

asserted over the nation's water to the maximum extent permissible under the Commerce Clause of the Constitution.

Environmental Law : Water Quality
Governments : Legislation : Construction & Interpretation
The general rule requires the one claiming the benefits of an exception to the prohibition of a statute to establish the applicability of the statutory exception.

Environmental Law : Water Quality
Section 404(f)(1) of the Clean Water Act (Act) states that: Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material (from activities specified in (A) through (F)) is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this Act (except for effluent standards or prohibitions under section 307). The specific exemptions follow. But the § 404(f)(1) exemptions are limited by § 404(f)(2), commonly referred to as the "recapture provision," which provides: Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters, into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Environmental Law : Water Quality
The exemption for "normal farming" under the Clean Water Act, 22 U.S.C.S. § 1251 et seq., applies only to activities which are part of an established (specifically, on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities bringing an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. 33 C.F.R. § 323.4(a)(1)(ii).

Environmental Law : Water Quality
Section 404(f)(1)(C) of the Clean Water Act, 33 U.S.C.S. §§ 1311 and 1344, provides that a permit is not required for a discharge of dredged or fill material for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches.

Environmental Law : Water Quality
33 C.F.R. § 323.4(a)(3)(1983) provides in relevant part that discharges associated with irrigation facilities in the waters of the United States are included within the exemption of § 404(f)(1)(C) of the Clean Water Act, 33 U.S.C.S. §§ 1311 and 1344, unless the discharges have the effect of bringing these waters into a use to which they were not previously subject and the flow or circulation may be impaired or reach reduced of such waters.

Environmental Law : Water Quality
33 C.F.R. § 323.4(a)(3) provides simply that as to construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches, discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in the exemption of § 404(f)(1)(A) of the Clean Water Act, 33 U.S.C.S. §§ 1311 and 1344.

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Environmental Law : Water Quality
Subsection 404(f)(1)(E) of the Clean Water Act, 33 U.S.C.S. §§ 1311 and 1344, provides

in relevant part that no permit is required for the discharge of dredged or fill material for the purpose of construction or maintenance of farm roads where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.

Environmental Law : Federal Interrelationships : Federal Preemption
Any argument that a grant of state water rights somehow prevents the United States from asserting jurisdiction within its constitutional limits is obviously groundless.

OPINIONBY: [*1]

RAMIREZ

OPINION: FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER GRANTING PRELIMINARY INJUNCTION

PAUL A. RAMIREZ, UNITED STATES DISTRICT JUDGE

The motion of plaintiff, UNITED STATES OF AMERICA, for a preliminary injunction came on regularly for hearing before the undersigned on October 24, 1984. John Wittenborn, Special Assistant United States Attorney, and Geoffrey Worstell, Esq., of the United States Army Corps of Engineers, appeared on behalf of plaintiff, UNITED STATES OF AMERICA. Lanny T. Winberry, Esq., appeared on behalf of defendant, ROBERT W. AKERS. Having considered the voluminous pleadings, declarations and exhibits filed in support of and in opposition to the motion, the arguments of respective counsel, the proposed findings of fact and conclusions of law, as well as the objections and counter-proposed findings of fact and conclusions of law, the Court now issues the following Findings of Fact and Conclusions of Law and Order Granting Preliminary Injunction pursuant to Rule 52 and Rule 65, Federal Rules of Civil Procedure.

FINDINGS OF FACT

I

The evidence before the Court shows that Mr. Akers is the owner of certain real property he acquired in the early part **[*2]** of 1984, consisting of approximately 9,600 acres located partly in Modoc County and partly in Lassen County California. The Army Corps of Engineers has determined that between one-fourth and one-third of the acreage, to wit, 2,889 acres known locally as the Big Swamp, is wetlands acreage subject to Corps regulation under the Clean Water Act, 22 U.S.C. § 1251, et seq. The District Engineer has also found that the primary agricultural activity in this area has been the haying of native vegetation.

II

The present lawsuit does not represent the first time that the ongoing controversy between Mr. Akers and the Corps of Engineers has been before this Court. The Court can and does take judicial notice of the case file relating to a prior lawsuit filed by Mr. Akers on May 4, 1984, entitled Akers v. United States, et al., Civ.S-84-0598 RAR. The prior lawsuit arose after Mr. Akers developed a farming plan for his property which, in effect, provided for the leveling and filling of the Big Swamp area and diversion of the waters which normally feed it. The Corps of Engineers advised Mr. Akers that he needed a permit for the proposed work, pursuant to § 404 of the Clean Water Act, 33 **[*3]** U.S.C. § 1244.

III

Mr. Akers rejected the Corps' position and filed his lawsuit, in which he sought injunctive relief to preclude the Corps from exercising regulatory jurisdiction over his land or project. After a full hearing on May 15, 1984, this Court denied Mr. Akers' motion for a preliminary injunction. The Court determined that Mr. Akers had established no likelihood of success on the merits. It also found that he had failed to demonstrate a possibility or probability of irreparable harm, as opposed to monetary injury, and had likewise failed to establish a balance of hardships tipping sharply in his favor and/or serious questions for litigation. Thereafter, Mr. Akers dismissed his lawsuit voluntarily.

IV

Prior to the voluntary dismissal of Akers' suit, the Corps had entered into a contract with the U.S. Army Corps of Engineers Waterways Experiment Station (WES) for an extensive study and determination of the extent and boundaries of the naturally occurring wetlands on the Akers' property, and for an investigation and report on the nature and extent of past agricultural practices on the land. On August 30, 1984, Col. Arthur Williams, District Engineer, Sacramento District, **[*4]** notified Mr. Akers by letter that he had determined that the land included 2,889 acres of wetlands subject to regulation under the Clean Water Act. He also notified Mr. Akers that the proposed farming plan was not exempt from the permit requirements of the Clean Water Act on the basis of the historical farming practices.

V

The wetland determination made by WES and adopted by Col. Williams was based upon an extensive analysis of vegetation, hydrology and soils and resulted from the study of maps, photographs and nine days of actual on-site investigation. Indeed, Dana Sanders states in his declaration that the wetland report of the Waterways Experiment Station (WES) was based on more technical data than is available in more than 99 percent of all wetland determinations ever made by the Corps of Engineers. Furthermore, the defendant himself conceded for purposes of the preliminary injunction hearing only that wetlands regulated by the Corps under the Clean Water Act do exist on his property.

VI

During the course of its investigation of Mr. Akers' activities and its assessments of his future plans, the Corps consulted with the United States Environmental Protection Agency (EPA) concerning **[*5]** the application of § 404(f) of the Clean Water Act. EPA concurred in the Corps' conclusion that the proposed dredging and construction work on Mr. Akers' property was not exempt from § 404 permit requirements.

VII

In late July, the Corps issued a cease and desist order to stop Mr. Akers from building a dike across the western portion of the wetland. Relying on Mr. Akers' attorney's representation that Mr. Akers was merely reconstructing an existing dike, the Corps withdrew its cease and desist order. In September 1984, the Corps investigated reports that earth-moving activities were being conducted on Mr. Akers' property in Big Swamp. The Corps' aerial inspections confirmed the on-going construction of an earthen dike, running east-west the length of the wetlands, dividing them roughly in half, as well as other activities, as described more fully below. On September 13, 1984, the Corps issued a cease and desist order to Mr. Akers. The cease and desist order did not mention channels of the Pit River. Nevertheless, Mr. Akers continued to fill in channels of Ash Creek on the east side of his land, apparently based upon his own interpretations of the exemptions to the Clean Water Act. **[*6]**

VIII

There is persuasive evidence that Mr. Akers or his agents have recently engaged in the following earth-moving activities in Big Swamp, to wit: (1) the construction of an east-west dike, now approximately three miles long, which bisects the wetland; (2) the leveling of portions of the wetland area south of the east-west dike, including the filling of certain Ash Creek channels by use of discing equipment; (3) construction of a road across the northwest portion of his property which blocks several overflow channels of the Pit River; and (4) construction of a large ditch and the filling of several Ash Creek channels on the east side of the property. Heavy earth-moving equipment was used to disc and scrape wetland soil from wide swathes on either side of the three mile dike. The soil was then used to construct the three mile dike. Various sections of the southern wetlands were disced with farm equipment. Prior to the discing, the areas were ripped with a chisel plow (or "ripper") which was used to slice through the soil so that the discing would more effectively pulverize the soil.

IX

The road in the northwest portion of the property has not been culverted, bridged or otherwise **[*7]** designed so as to prevent restriction of flood flows; in fact, it closes overflow channels of the Pit River. The three mile east-west dike and the dikes and ditches running north to south at either end of the three mile dike may, if not broken or dismantled, prevent the natural flow of water to the southern wetlands, causing them to dry up.

X

It appears likely that if this work is allowed to remain in place, or allowed to be expanded, an extensive a rea of the Big Swamp wetlands will be converted to non-wetland, thereby significantly reducing the reach of Big Swamp. In addition, the flow and circulation in Ash Creek and the overflow channels of the Pit River may be impaired. Furthermore, many highly significant aquatic functions now performed by the Big Swamp wetlands area will be lost or impaired.

XI

Mr. Akers does not have, and has not applied for, a § 404 Clean Water Act permit from the Corps of Engineers for any work on his property.

XII

The government has submitted evidence to establish that the Big Swamp is considered an important waterfowl wintering area and that it attracts significant numbers of waterfowl in the spring and summer months for nesting and staging activities. **[*8]** Bald eagles and peregrine falcons, both federally listed endangered species, are known to occur in the area, as are golden eagles, which are federally listed as rare species. Cackling geese, whose numbers in California have dwindled seriously in recent years, use the Big Swamp as a staging area in the spring. More common waterfowl species also use and inhabit the Big Swamp in large numbers.

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XIII

The defendant asks this Court to look at each of his earth-moving activities individually, rather than to scrutinize the overall cumulative impact of his activities. But this Court does not agree with either the proposed methodology or the conclusion to which the defendant contends it should lead. Moreover, although Mr. Akers had contended that his recent work is only intended to be an intensification of his past farming activities, experts and others who

have witnessed his work and assessed its effects, have persuaded this Court that the work will subject his property to new uses potentially detrimental to the Waters of the United States.

XIV

This Court finds that Mr. Akers has either misunderstood or callously disregarded the potential environmental consequences of his activities. The **[*9]** evidence supports an inference that Mr. Akers' activities, if not enjoined, will have the effect of splitting the Big Swamp into northern and southern halves, with the potential eventual effect of drying up the southern portion. Unless Mr. Akers has a different plan not disclosed to this Court, it appears that he intends this effect in order to pursue new and previously untried agricultural activities in the Big Swamp area.

XV

Although the defendant contends vigorously that isolated instances of farming of upland crops has taken place during the past decades in various sectors of his land, he has not persuasively disputed the Corps' contention that the only established farming operation in wetland portion of his land prior to his recent construction work was the haying of native wetland grasses. The record also supports the Corps' finding that the ongoing irrigation practices on the land consisted of the use of temporary low spreader dams placed annually in various channels on his property to spread water more evenly over the, acreage.

XVI

The United States filed suit against Mr. Akers on October 3, 1984, seeking permanent injunctive relief, restoration of the property to its **[*10]** natural condition and civil penalties. The government also sought temporary and preliminary injunctive relief to restrain Mr. Akers from depositing dredged or fill material into the wetlands and channels on his land during the pendency of this lawsuit, alleging that otherwise the wildlife, plant life and hydrological regime in the area would be threatened with irreparable injury.

XVII

The government's application for a temporary restraining order (hereinafter "TRO") was heard and granted on October 6, 1984. Mr. Akers was restrained from discharging dredged or fill material into the waters on his property unless and until he invited the Corps to determine, and the Corps did determine, which waters he could work in without a permit. Waters are not subject to Corps regulations if they are not "waters of the United States" within the meaning of the Clean Water Act.

XVIII

The United States now seeks a preliminary injunction to extend the application of the prohibitory provisions of the restraining order throughout the pendency of this lawsuit. The court is persuaded by the government's arguments in reaching its decision to issue the preliminary injunction. The findings now made **[*11]** by this Court regarding plaintiff's preliminary injunction motion necessarily follow closely the findings set forth in the temporary restraining order, since the same standard and facts are involved. Due to the extensive briefing by both sides since the hearing regarding the TRO, however, the Court now has a much clearer and more detailed understanding of the facts underlying this dispute and the manner in which counsel for both sides view and interpret the law. Therefore, the Court now has the opportunity and ability to make these detailed findings of fact and to set forth the following conclusions of law.

CONCLUSIONS OF LAW

To establish its right to a preliminary injunction, the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. These are not separate tests, but the outer reaches "of a single continuum." Los Angeles Memorial Coliseum Com's v. National Football League, 634 F.2d 1197 (9th Cir. 1980).

II

The plaintiff has established a strong likelihood of success on the merits **[*12]** of its claims under the Clean Water Act, 33 U.S.C. § 1251, et seq.

III

The objective of the Clean Water Act is to restore and maintain the physical, chemical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a).

IV

Subject to certain exemptions, §§ 301 and 404 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1344, prohibit the discharge of dredged or fill material from point sources into the waters of the United States without a permit from the Corps of Engineers. By defining the term "navigable waters" in the Clean Water Act to mean "the Waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7), Congress intended to assert federal jurisdiction over the nation's water "to the maximum extent permissible under the Commerce Clause of the Constitution." Natural Resources Defense Council v. Callaway, 392 F.Supp 685 (D.D.C. 1975); Leslie Salt Co. v. Froehlke, 578 F.2d 742, 754-756 (9th Cir. 1978); Utah v. Marsh, 740 F.2d 799, 802-804 (10th Cir. 1984); Avoyelles Sportman's League v. Marsh, 715 F.2d 897, 914-916 (5th Cir. 1983); United States v. Byrd, 609 F.2d 1204, 1209-1211 (7th Cir. 1978). The term specifically includes **[*13]** adjacent wetlands. 33 C.F.R. § 323.2. Avoyelles, supra; Byrd, supra. This Court concludes that plaintiff has established a strong likelihood that a substantial portion of the property in question constitutes waters of the United States subject to the Clean Water Act.

V

The construction of the dikes, road, ditches, and channel fills, and possibly some of the discing (to the extent it may level that land so as to fill channels or convert wetlands to uplands) involve the discharge of dredged or fill material. The heavy equipment used to move and deposit the earth are point sources. Avoyelles Sportman's League v. Marsh, supra.

VI

The defendant contends that his recent activities fall within any of several exemptions to the permit requirement set forth in § 404(f)(1) of the Clean Water Act, 33 U.S.C. § 1344(f). Mr. Akers bears the burden of establishing that his activities are all exempt. United States v. Frezzo Bros., Inc., 546 F. Supp. 713 (E.D. Penn. 1980), appeal after remand, 703 F.2d 62 (3rd Cir. 1983). The general rule requires the one claiming the benefits of an exception to the prohibition of a statute to establish the applicability of the statutory **[*14]** exception. U.S. First City National Bank of Houston, 386 U.S. 361, 366, 87 S.Ct. 1088, 1092 (1967). The Court finds a strong likelihood that Mr. Akers will not be able to do so.

VII

Section 404(f)(1) states that:

Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material [from activities specified in (A) through (F)] is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this Act (except for effluent standards or prohibitions under section 307).

The specific exemptions follow. But the 404(f)(1) exemptions are limited by § 404(f)(2), commonly referred to as the "recapture provision," which provides:

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters, into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Thus, in order to be exempt from regulation, a discharge must not only fall within § 404(f)(1), but must also **[*15]** escape recapture under § 404(f)(2).

VIII

The legislative history of the 1977 Amendments to the Clean Water Act evidences a strong Congressional intent to limit the scope of the § 404(f)(1) exemptions. As Senator Muskie, sponsor of the legislation explained, "New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively." 3 Leg. Hist. 474 (emphasis added). See also statements by Rep. Harsha, id. at 420, and Senator Wallop, id. at 530. The numerous statements in the legislative history concerning what § 404 does not exempt are also telling. For example, Senator Muskie explained, "[T]he exemptions do not apply to discharges that convert extensive areas of water to dry land or impede circulation or reduce the reach or size of the water body." 3 Leg. Hist. 474; see also statement of Senator Baker, id. at 523. As Senator Stafford stated, "[P]ermits will continue to be required for those farm, forestry, and mining activities that involve the discharge of dredged or fill material that connect [sic - presumably intended **[*16]** to be "convert"] water to dry land including, for example, those occasional farm or forestry activities that involve dikes, levees or other fills in wetland or other waters." 3 Leg. Hist. 485. See also, Senate Report, 4 Leg. Hist. 710 (permit review necessary for discharges to convert a hardwood swamp to another use through dikes or drainage channels).

IX

The defendant attempts first and foremost to rely upon the exempti on set forth in § 404(f)(1)(A) which applies to the discharge of dredged or fill material:

from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products or upland soil and water conservation practices . . .

Defendant contends that because his recent activities are related to his intentions to farm crops, they are exempt as "normal farming" activities.

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X

Defendant's contention is patently incorrect. The exemption for "normal farming" applies only to activities which are:

part of an established (i.e., on-going) farming, silviculture, or ranching operation. Activities

on areas lying fallow as part of a conventional **[*17]** rotational cycle are part of an established operation. Activities bringing an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. 33 C.F.R. § 323.4(a)(1)(ii).

The plaintiff has amply demonstrated that the area of the Big Swamp has never been subjected to any established upland farming operation. Accordingly, defendant's proposed farming plans with its extensive diking and ditching is not within the scope of the "normal farming" exemption.

XI

Defendant has failed to show that his dike and road-building activities are either enumerated in § 404(f)(1)(A) or are similar in nature to those listed. Indeed, as the statement of Senator Stafford cited above indicates, dikes and levees in wetlands are not exempt. See also, 33 C.F.R. § 323.4(a)(1)(iii)(C)(2)

XII

The plaintiff has offered ample evidence to prove that the recent work has significantly modified the hydrological regime in the wetlands area, and the defendant himself **[*18]** has consistently argued that unless he is allowed to complete the work he has started, he will be unable to engage in the farming activities he plans. By his own admission, therefore, defendant's proposed work is not part of an "ongoing" or "established" farming practice. Indeed, it appears that major hydrologic modifications will be required for defendant's farming plan to succeed. Consequently, the defendant is unlikely to establish that his activities fall within the exemptions for "normal farming.

XIII

Even if Mr. Aker's activities did fall within the "normal farming" exception of § 404(f)(1)(A), they would remain subject to permit requirements under the exception to the exemption contained in subsection (f)(2). Read together, these two subparagraphs of § 404(f) provide a narrow exemption for agricultural and silvicultural activities that have little or no adverse effect on the nation's waters. Avoyelles Sportman's League, Inc. v. Marsh, 715 F.2d 897, 926 (5th Cir. 1983). It is clear that Mr. Akers' activities are bringing the southern wetlands into a use to which they have not previously been subject, and which is resulting in an impairment of water flow and circulation **[*19]** as well as a reduction of the wetlands' reach.

XIV

Mr. Akers argues that his activities will not bring Big Swamp into a use to which it was not previously subject, on the ground that upland crops could have been grown there, whether or not they actually were. This Court declines to adopt such a strained interpretation of the term "subject to in § 404(f)(2). The proper inquiry is not what could have been done but what was done in th e past and its relationship to what Mr. Akers is attempting to do now. Furthermore, Mr. Akers argument ignores the question of whether there will be a change in Big Swamp from wetlands (i.e., waters of the United States) to dry land (no longer waters of the United States). Whether or not there have been isolated incidents of attempted farming of upland crops in the swamp during dryer periods, there is little doubt that the area is still a wetland within the meaning of the Clean Water Act. Mr. Akers' activities taken as a whole appear to this Court to be incidental to an effort to convert the area so that it may be farmed in a way which is inconsistent with its remaining a wetland.

XV

Furthermore, § 404(f)(2) indicates that a permit is necessary **[*20]** even for discharges that are only "incidental to" an activity which is intended to or will foreseeably bring about the destruction of the wetland (or other change in use. Where the reach of the waters will be reduced or their flow or circulation impaired. In order to trigger § 404(f)(2), the discharges themselves need not be the sole cause of the change in use or impairment of reach, flow, or circulation. Therefore, this Court rejects defendant's request that it look at each activity in isolation or assess their impacts individually. While this Court cannot look into the mind of Mr. Akers to discern his full intentions, the reasonably foreseeable consequence of his activities as a whole is the destruction of a significant wetland.

XVI

Accordingly, plaintiff has established a probability of success on its claim that defendant's recent activities are not encompassed within the reach of § 404(f)(1)(A) and, in any event, would fall within the subsection (f)(2) exception to the (f)(1)(A) exception.

XVII

Defendant also argues that his activities are exempt under § 404(f)(1)(C) which provides that a permit is not required for a discharge of dredged or fill material:

for the purpose **[*21]** of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches . . . .

The primary problem with defendant's attempt to invoke the irrigation ditch exemption is that his recent activities have not involved the construction of any irrigation ditch in the wetlands. Instead, his major structure is a dike approximately three miles in length. Defendant nevertheless contends that his work, including his dike, constitutes "irrigation facilities" within the meaning of 33 C.F.R. § 323.4(a)(3)(1983) which provides in relevant part:

Discharges associated with irrigation facilities in the waters of the United States are included within the exemption unless the discharges have the effect of bringing these waters into a use to which they were not previously subject and the flow or circulation may be impaired or reach reduced of such waters.

Defendant's proposed reading of the language of the regulation is obviously overbroad. The regulation cannot expand the scope of the statutory exemption, and the statute exempts from permit requirements only stock ponds, irrigation ditches, and the maintenance of drainage ditches. Obviously, **[*22]** then, the term "irrigation structures" as used in the interpretive regulation constitutes no more than a shorthand term for the activities set out at greater length in the statute. Moreover, defendant's attempt to argue that a dike can be an "irrigation facility" within the meaning of 33 C.F.R. § 323.4(a)(3) is at direct odds with the language of the interpretive regulation defining "minor drainage" as that term is used in the "normal farming" exemption, § 404(f)(1)(A). That regulation, 33 C.F.R. § 323.4(a)(1)(iii)(C)(2) provides in relevant part:

In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a . . . wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit. [Emphasis added]

Indeed, the text of 33 C.F.R. § 323.4(a)(3) set forth above has just been changed in order to clarify "the types of appurtenant structures to irrigation facilities for which the discharges

associated **[*23]** with such structures are exempt from the provisions of these regulations." 49 F.R. at 39479. The new text of the regulation was published in the Federal Register on October 5, 1984, and it confirms that "discharges associated with major dams and diversion projects and other large-scale facilities which are not subsidiary to irrigation ditches are clearly not included in the exemption." Id. The complete new text of 33 C.F.R. § 323.4(a)(3) provides simply:

Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance [but not construction] of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

Defendant's three mile dike is not one of the types of structures specified in the new regulation and is clearly not subsidiary to any irrigation ditch.

XVIII

Finally, even if defendant's activities otherwise qualified for exemption under the "irrigation ditch" provision, the exemption is further qualified by subsection (f)(2) which, as discussed above, subjects the **[*24]** defendant's activities to permit requirements even if the (f)(1) exemptions apply.

XIX

Defendant also asserts that § 404(f)(1)(E) serves to exempt his road-building activity in the northwest area of his property, but the very text of the exemption belies his claim. Subsection (f)(1)(E) provides in relevant part that no permit is required for the discharge of dredged or fill material:

for the purpose of construction or maintenance of farm roads where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized . . . .

Defendant has neither claimed nor established that any attempt was made by him to minimize the adverse effects of his road construction and the result of his activity has been to block over-flow channels of the Pit River, which feed the wetlands of his property.

XX

These statutory criteria have been translated by regulation into a number of required best management **[*25]** practices (BMP's) which must be complied with for the exemption to apply. 33 C.F.R. § 323.4(a)(6). Among those BMP's is a requirement that roads be culverted, bridged or otherwise designed to prevent restriction of flood flows. The evidence clearly indicates that Akers failed to comply with any such management practices. Accordingly, defendant has not demonstrated that his road is exempt under 404(f)(1)(E).

XXI

Moreover, the road construction exemption, like all the subsection (f)(1) exemptions, is further subject to the (f)(2) exception which requires a permit for defendant's activities for the reasons discussed above.

XXII

Defendant also argues that the Clean Water Act either constitutes an impermissible violation of his state water rights or that the Act automatically exempts activities which can be traced to the exercise of state water rights. This argument, as presented by counsel for defendant in his briefs and at oral argument, is meritless. Clearly, the Clean Water Act itself does not impermissibly violate state water rights. Moreover, any argument that a grant of state water rights somehow prevents the United States from asserting jurisdiction within its constitutional **[*26]** limits is obviously groundless. See United States v. Ciampitti, 583 F.Supp. 483, 495-96 (D.N.J 1984).

XXIII

Nor does the Clean Water Act automatically exempt from regulation any activities which have some bearing on individual exercise of state-allocated water rights. As the legislative history of § 101(g) of the Act makes clear,

The requirements of section 402 and 404 permits may incidentally affect individual water rights . . . It is not the purpose of this amendment to prohibit those incidental effects . . .

It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes. It does not interfere with the legitimate purposes for which the act was designed. (Emphasis added)

Statement of Senator Wallop (sponsor of § 101(g)), 3 Leg. Hist. 532.

XXIV

Having determined that the government is likely to prevail on the merits of its claim, the Court turns its attention to the question of resulting injury. There is some authority for the proposition that the government need not even make a showing of irreparable injury in order to qualify for **[*27]** injunction relief under the Clean Water Act. See, e.g., United States v. Ciampitti, supra, 585 F.Supp. at 498, n.12. This Court need not grapple with the issue, however, because the government has clearly made a showing of irreparable injury in this case.

XXV

Wetlands serve a variety of on-going ecological and aesthetic functions, and the Big Swamp wetland is no exception. They are particularly notable for their role in supporting migratory birds and in controlling erosion and protecting down-stream water quality. In numerous declarations of hydrological and wetland experts, the United States has established that Mr Akers' recent earth-moving activities have already, at least temporarily, cut off the southern half of the wetlands on his property from their natural water sources. These recent activities as well as those which Mr. Akers could reasonably be expected to carry out during the pendency of this litigation if not enjoined, have disrupted and/or are likely to continue to disrupt significantly the ecological functions of Big Swamp. Disruption of those functions constitutes an irreparable injury to a valuable public resource. Should Mr. Akers continue his activities, **[*28]** including the leveling of his land through discing, the placement of fill material in channels and the construction of dikes and other structures, damage to the area will be compounded.

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XXVI

Since the Court has determined that the United States is likely to prevail on the merits of its claims and has demonstrated the probability of irreparable injury if the preliminary injunction is denied, it remains only to be considered whether the granting of the injunction will cause a balance of hardships tipping sharply in Mr. Akers' favor. The Court finds that it will not. Mr.

Akers claims that the injunction will cause him such financial damage that he "might" lose his property which "could conceivably result in bankruptcy. Such speculative statements fall far short of a showing of irreparable injury. Furthermore, as this Court observed during the course of Mr. Akers' prior related case, Mr. Akers either knew or should have known when he purchased the property that he might become involved in a regulatory dispute with the Corps of Engineers. His tactics in proceeding with the work without authorization have brought him to his current financial situation. Therefore, any injury is self-inflicted. **[*29]** The Court notes that had Mr. Akers applied for a permit at the conclusion of the prior case, the dispute might well have been resolved by now.

XXVII

To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, or to the extent that any of the foregoing Conclusions of Law are deemed to be Findings of Fact, the same shall be deemed Conclusions of Law or Findings of Fact as the case may be.

Therefore,

IT IS HEREBY ORDERED that Mr. Akers, his agents, employees and all persons under his control and supervision, are restrained from engaging in any and all deposits of dredged or fill material into the waters on his property, including the wetlands previously delineated by the Corps of Engineers, as well as all channels, unless he:

(1) Obtains a permit from the Corps of Engineers; or

(2) Submits a proposal for dredge or fill activities, which he asserts are not within the Corps of Engineer's regulatory jurisdiction, and

(a) is informed in writing by the District Engineer that a permit is not necessary for the work he proposes; or
(b) is not informed in writing by the District Engineer whether a permit is necessary for the work he **[*30]** proposes within fifteen (15) days of receipt of his proposal by the District Engineer (including weekends and holidays).

Notwithstanding any provision of this Order, Mr. Akers shall comply in good faith with all lawful cease and desist orders issued to him by the Corps of Engineers with respect to dredge and fill activities on his property. n1

n1 Thus, in the event that Mr. Akers submits a proposal for dredge and fill activities which he asserts are not within the Corps' jurisdiction, to which the Corps does not respond in writing within fifteen (15) days, Mr. Akers may immediately begin work on the activities within his proposal. However, should a subsequent cease and desist order by the Corps of Engineers order him to halt work on these activities, Mr. Akers must comply with this and all other lawful orders of the Corps.

IT IS SO ORDERED.

DATED: January 14, 1985.

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