POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

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| AIRPORT COMMUNITIES COALITION,<br><br>Appellant,<br><br>v.<br><br>STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and THE PORT OF SEATTLE,<br><br>Respondents. | ) | No. 01-133<br>No. 01-160<br><br>DECLARATION OF PETER J. EGLICK IN SUPPORT OF ACC'S REPLY ON MOTION FOR STAY<br><br>(Section 401 Certification No. 1996-4-02325 and CZMA concurrency statement, issued August 10, 2001, Reissued September 21, 2001, under No. 1996-4-02325 (Amended-1)) |

Peter J. Eglick declares as follows:

1. I am one of the attorneys for the Airport Communities Coalition. I make this declaration based on personal knowledge and am competent to do so.

2. Attached to this declaration are true and correct copies of the following documents:

Exhibit A: Notes regarding DOE Senior Management Team meeting, dated April 3, 2001

Exhibit B: 33 U.S.C. § 1341(d): 33 CFR § 320.4(d)

Exhibit C: *United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 348 (6th. Cir. 1998)

Exhibit D: *PUD No. 1 v. Washington Dept. of Ecology, et al.*, 511 U.S. 700, 712 (1994)

Exhibit E: *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991)

Exhibit F: *United States v. Commonwealth of Puerto Rico*, 721 F.2d 832, 834 (1st Cir. 1983)

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Exhibit G: *Ohio Forestry Association v. Sierra Club*, 523 U. S. 726, 118 S. Ct. 1665 (1998)

Exhibit H: Port Commissioners Agenda, October 31, 2000 -

Exhibit I: Order of Dismissal by Stipulation dated August 6, 2001, U.S. District Court, W.D. Washington, Case No. 00-915

Exhibit J: Chung Yee email 9/11/2000

Exhibit K: Katherine Ransel, A Sleeping Giant Awakens: PUD No 1 of Jefferson County v. Washington Dept. of Ecology, 25 Env. Law 255 (1995)

Exhibit L: Email from Assistant Attorney General Ron Lavigne to Ann Kenny, et al., dated April 30, 1999

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8 day of October, 2001, at Seattle, Washington.

Peter J. Eglick

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EXHIBIT A

DEPARTMENT OF ECOLOGY
NORTHWEST REGIONAL OFFICE

April 5, 2001

TO: Sally Perkins
Supervisor
Central Records

FROM: Ray Hellwig
Regional Director

SUBJECT: Documents Being Withheld from the ACC's Public Disclosure Request

The following is a list of additional documents, information and/or materials Ecology, Northwest Regional Office, is withholding pursuant to the "exemption" provisions of the public disclosure act. Ecology considers items listed in the first table below as deliberative in nature and exempt from disclosure under provisions of RCW 42.17.310(1)(i).

| Author's Name | Addressee's Name | Date | Statement of Subject Matter |
|---|---|---|---|
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The table below itemizes materials held back as Attorney-Client Privilege:

| Author's Name | Addressee's Name | Date | Statement of Subject Matter |
|---|---|---|---|
| Ray Hellwig | None | 4/3/01 | Two pages – one page on notes taken during discussion at an Ecology Senior Management Team meeting relating to stormwater and water rights, policy issue; and one page is typed document regarding the same subject. |
| | | | |
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AR 006828

If you have any questions regarding the above please call me at 425-649-4310.

4-3-01

# 3QCN – Petition

The question is whether or not we should require the POS to obtain a water right for its SWP. ~~Should~~ any proponent of a major project with an NPDES permit and a 401 Cert, ~~where~~ mitigation is required, and part of the mitigation is to offset impacts to base flows (not augment), have to obtain a water right?

~~Our AAG~~ (JM) has indicated she/the office will support any policy position we choose to adopt, but she is currently advising we require the water right.

She has presented several logical arguments to support her advice, but clearer answers are needed for a few key questions.

While the Port's SMP is massive including numerous facilities, sophisticated modeling shows that the Port's project will have only minor impacts to flows in Miller, Walker and DM Creeks.

Following ~~the~~ advice from a few months back, the Port is proposing to delay release of SW to offset this impact and to protect flows – flows are an element of WQ. The Port is proposing to mimic the natural system and create capacity for the streams to support specific beneficial uses.

Part of the JM argument is that this "fix" under the 401 triggers the water code, and we need certainty around the "fix" for reasonable assurance.

Also, JM says, unlike a 402 permit, the 401 calls in other state laws to help protect WQ – this requirement for mitigation may be a key point.

Where we have direct authority under 401 to protect flows – under the 402, flows are protected by indirect authority i.e., as a result of actions driven by provision of the permit – e.g., land use planning strategies

**But** – Among other issues, there are no guarantees, a water right will not necessarily add certainty in a dry water year.

Further, if flows are an element of WQ – why do we not require a water right to manage peak flows under 402?

Also, it is the WQP interprets the WQ laws and regulations to allow management plans to create capacity for steams to support beneficial uses (the draft SW manual, and draft P-I NPDES SW Muni permit.....)

At what point do we require a water right? If a major project ~~is regulated~~ under a 402, but there is no 401 – no wetland fill – but where water is detained and released and infiltrated in a way to protect flows, do we require a water right? No. For the 304th street LF – water taken to provide adequate hydrology for a ~~wetland – no water right~~.....

It remains very unclear that it is appropriate to trigger the water code under a 401 – the intent behind the 401 and 402 are the same.

Rachael P's arguments are full of holes – e.g., all SWPs are "managed" -

Common Sense

EXHIBIT B

responsible for fish and wildlife for the state in which work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. The Army will give full consideration to the views of those agencies on fish and wildlife matters in deciding on the issuance, denial, or conditioning of individual or general permits.

*(d) **Water quality.*** Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity. The evaluation should include the consideration of both point and non-point sources of pollution. It should be noted, however, that the Clean Water Act assigns responsibility for control of non-point sources of pollution to the states. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.

*(e) **Historic, cultural, scenic, and recreational values.*** Applications for DA permits may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, historic properties and National Landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under federal or state law for similar and related purposes. Recognition of those values is often reflected by state, regional, or local land use classifications, or by similar federal controls or policies. Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.

*(f) **Effects on limits of the territorial sea.*** Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law. Generally, the coast line or base line is the line of ordinary low water on the mainland; however, there are exceptions where there are islands or lowtide elevations offshore (the Submerged Lands Act, 43 U.S.C. 1301(a) and United States v. California, 381 U.S.C. 139 (1965), 382 U.S. 448 (1966)). Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The district engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, DC 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the administrative record of the application. After completion of standard processing procedures, the record will be forwarded to the Chief of Engineers. The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

*(g) **Consideration of property ownership.*** Authorization of work or structures by DA does not convey a property right, nor authorize any injury to property or invasion of other rights.

EXHIBIT C

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 1099, et al.,Plaintiffs-Appellees, v. SOUTHWEST OHIO REGIONAL TRANSIT AUTHORITY,Defendant-Appellant.
No. 97-4126

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

163 F.3d 341; 1998 U.S. App. LEXIS 30984; 1998 FED App.0362P (6th Cir.); 160 L.R.R.M. 2409

June 15, 1998, Argued
December 10, 1998, Decided
December 10, 1998, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 97-00512. Susan J. Dlott, District Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant state agency appealed from an order of the United States District Court for the Southern District of Ohio granting plaintiff union a preliminary injunctive relief requiring defendant state agency to accept the union's proposed wrap-around bus advertisement.

OVERVIEW: Plaintiff union challenged on U.S. Const. amend. I grounds the decision of defendant state agency to reject the union's proposed wrap-around bus advertisement on the grounds that the ad was too controversial and not aesthetically pleasing. After concluding that the balance of equities favored the union, the district court granted the union's request for preliminary injunctive relief requiring defendant state agency to accept the proposed ad. The court of appeals affirmed holding that the union had a strong likelihood of success on the merits. Defendant state agency through its policies and actions demonstrated an intent to designate its advertising space a public forum. As a result, the agency's refusal to accept the union's advertisement was subject to strict scrutiny and the agency failed to show a compelling state interest for excluding the union's advertisement. Accordingly, the district court's granting of the preliminary injunction was affirmed.

OUTCOME: The district court's order granting plaintiff union's request for preliminary injunctive relief was affirmed on finding plaintiff demonstrated a likelihood of success on the merits of its U.S. Const. amend. I claim, it would suffer irreparable harm if defendant state agency continued to reject its bus advertisement and the public interest would be served by the granting of the injunction.

CORE TERMS: advertising, advertisement, public forum, space, first amendment, nonpublic, preliminary injunction, speaker, viewpoint, bus, designated, message, ridership, aesthetic, buses, aesthetically, injunctive relief, transit, pleasing, photograph, irreparable injury, injunction, permission, public interest, subjective, ordinance, adversely affect, succeed, public property, status quo

CORE CONCEPTS -

Civil Procedure: Injunctions: Preliminary & Temporary Injunctions
Civil Procedure: Appeals: Standards of Review: Abuse of Discretion
An appellate court will reverse a district court's granting of a preliminary injunction only when there has been an abuse of discretion.

Civil Procedure: Appeals: Standards of Review: Abuse of Discretion
A district court abuses its discretion when it relies on clearly erroneous findings of fact, uses an incorrect legal standard, or applies the law incorrectly.

Civil Procedure: Injunctions: Preliminary & Temporary Injunctions
In determining whether to exercise discretion to grant a preliminary injunction, the district courts consider the following four factors: (1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a

preliminary injunction. These factors are not prerequisites to issuing an injunction but factors to be balanced.

Civil Procedure: Injunctions: Preliminary & Temporary Injunctions
The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits.

Civil Procedure: Injunctions: Preliminary & Temporary Injunctions
The United States Court of Appeals for the Sixth Circuit applies the traditional preliminary injunctive standard -- the balancing of equities -- to motions for mandatory preliminary injunctive relief as well as motions for prohibitory preliminary injunctive relief.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
A forum analysis is used in determining whether a state-imposed restriction on access to public property is constitutionally permissible. In determining what property constitutes the relevant forum, courts focus on the access sought by the speaker.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
The state may exclude speakers from a traditional public forum or a designated public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Access to a nonpublic forum, however, can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. In order to discern the government's intent, courts look to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum, as well as the nature of the property and its compatibility with expressive activity.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
The courts will infer an intent to designate property a public forum where the government makes the property "generally available" to a class of speakers, or grants permission as a matter of course. In contrast, the government indicates that the property is to remain a nonpublic forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission" to use it.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
The determination of whether the government intended to designate public property a public forum involves a two-step analysis. First, courts look to whether the government has made the property generally available to an entire class of speakers or whether individual members of that class must obtain permission in order to access the property. Second, courts look to whether the exclusion of certain expressive conduct is properly designed to limit the speech activity occurring in the forum to that which is compatible with the forum's purpose.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
The government's stated policy, without more, is not dispositive with respect to the government's intent in a given forum.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
A court must examine the actual policy -- as gleaned from the consistent practice with regard to various speakers -- to determine whether a state intended to create a designated public forum.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
Acceptance of political and public-issue advertisements, which by their very nature generate conflict, signals a willingness on the part of the government to open the property to controversial speech, which is inconsistent with operating the property solely as a commercial venture.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
Speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
Restrictions on access to a nonpublic forum must be reasonable and viewpoint neutral.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

Above all else, U.S. Const. amend. I means that government has no power to restrict expression because of its message or its ideas.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
The state may limit access to a nonpublic forum based on subject matter or speaker identity so long as such restrictions are "reasonable." The reasonableness of the government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. U.S. Const. amend. I does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
"Reasonable" grounds for content based restrictions include the desire to avoid controversy.

Constitutional Law: Fundamental Freedoms: Freedom of Speech: Forums
The reasonableness of excluding a particular advertisement requires a determination of whether the proposed conduct would "actually interfere" with the forum's stated purposes, as set forth in the advertising policy.

Constitutional Law: Fundamental Freedoms: Overbreadth & Vagueness
Due process requires that we hold a state enactment void for vagueness if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion.

Constitutional Law: Fundamental Freedoms: Overbreadth & Vagueness
Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom
A statute or ordinance offends U.S. Const. amend. I when it grants a public official "unbridled discretion" such that the official's decision to limit speech is not constrained by objective criteria, but may rest on ambiguous and subjective reasons.

Constitutional Law: Fundamental Freedoms: Overbreadth & Vagueness
A statute, ordinance, or resolution is unconstitutionally overbroad when there exists a realistic danger that the statute itself will significantly compromise recognized U.S. Const. amend. I protections of parties not before the court.

Constitutional Law: Fundamental Freedoms: Overbreadth & Vagueness
Underlying the overbreadth doctrine is the concern that an overbroad statute will "chill" the exercise of free speech and expression by causing those who desire to engage in legally protected expression to refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. A statute may be invalidated on its face as overbroad, however, only where the overbreadth of the statute is "substantial."

Civil Procedure: Injunctions: Preliminary & Temporary Injunctions
Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom
Even minimal infringement upon U.S. Const. amend. I values constitutes irreparable injury sufficient to justify injunctive relief.

Civil Procedure: Injunctions: Preliminary & Temporary Injunctions
Constitutional Law: Fundamental Freedoms: Freedom of Speech: Scope of Freedom
The loss of U.S. Const. amend. I freedoms constitutes irreparable injury. The irreparable injury stems from the intangible nature or the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future.

COUNSEL: ARGUED: Richard M. Goehler, FROST & JACOBS, Cincinnati, Ohio, for Appellant.

ARGUED: Robert B. Newman, NEWMAN & MEEKS, Cincinnati, Ohio, for Appellee.

ON BRIEF: Richard M. Goehler, Jill M. Vollman, Ana Maria Merico-Stephens, FROST & JACOBS, Cincinnati, Ohio, for Appellant.

ON BRIEF: Robert B. Newman, NEWMAN & MEEKS, Cincinnati, Ohio, for Appellee.

JUDGES: Before: WELLFORD, MOORE, and CLAY, Circuit Judges. MOORE, J., delivered the opinion of the court, in which CLAY, J., joined. WELLFORD, J., delivered a separate opinion concurring in the result.

OPINIONBY: KAREN NELSON MOORE

OPINION:

[*346] OPINION

KAREN NELSON MOORE, Circuit Judge. The United Food and Commercial Workers Union, Local 1099 ("UFCW" or the "Union") challenges on First Amendment grounds the decision of the Southwest Ohio Regional Transit Authority ("SORTA"), a state agency, to reject the Union's proposed wrap-around bus advertisement on the grounds that the ad was too controversial and not aesthetically pleasing. After concluding[**2] that the balance of equities favored UFCW, the district court granted UFCW's request for preliminary injunctive relief requiring SORTA to accept the proposed ad. We now affirm.

I. FACTS AND PROCEDURAL HISTORY

SORTA, a state agency, operates the Queen City Metro bus service in the Cincinnati metropolitan area. As part of its commercial venture, SORTA sells advertising space on its bus shelters and buses, including vinyl, illustrated ads that wrap-around the exterior of its Metro buses. SORTA accepts a wide variety of advertisements for its Queen City Metro bus exteriors, including public-service, public-issue, and political advertisements in addition to traditional commercial advertisements. SORTA's advertising policy (the "Policy"), however, specifically excludes "advertising of controversial public issues that may adversely affect SORTA's ability to attract and maintain ridership," n1 and requires that all ads "be aesthetically pleasing and enhance the environment for SORTA's riders and customers and SORTA's standing in the community." J.A. at 783-84 (Def.'s Ex. 501).

n1 Despite SORTA's general exclusion of controversial public issues affecting its ability to maintain its ridership, the Policy explicitly states that "it is not the intention of this Policy to exclude commercial advertisements by political candidates for public office or advertisements concerning ballot issues." J.A. at 783-84 (Def.'s Ex. 501). SORTA has never refused an advertisement supporting a political or judicial candidate. J.A. at 461 (Jablonski Test.).

[**3]

In 1994, UFCW purchased from SORTA a wrap-around bus advertisement for a Queen City Metro bus. The ad displayed photographs of smiling union members against a blue background, and contained pro-union messages -- "Please Shop Union Grocery Stores," "Shop Union," "Union Shop," "UFCW Local 1099," "We Care About You," "Organize Today!!!," and "Union Yes!!!". J.A. at 652-53 (Pl.'s Exs. 7 & 8). Despite some reservations, the General Manager of SORTA, Paul Jablonski, approved the "Blue Bus" advertisement. J.A. at 465-67 (Jablonski Test.). Jablonski testified that SORTA did not receive any complaints about the Blue Bus advertisement. J.A. at 496 (Jablonski Test. (testifying that no rider has ever complained to him that a particular bus ad did not enhance the environment)). In January, 1997, UFCW informed SORTA of its intent to renew its contract on the Blue Bus, and was assured that the contract would be renewed so long as the exterior of the Blue Bus was in good condition. J.A. at 516, 526 (Dudley Test.).

On February 7, 1997, UFCW members staged a protest at the Hyatt Regency Hotel in downtown Cincinnati, where a meeting of management-side labor lawyers was being held. UFCW[**4] used the Blue Bus to transport its members to and from the hotel. n2 Jablonski was told that the UFCW workers had disrupted the meeting, and that when the police were called the workers quickly exited the hotel and "jumped onto the bus and left." J.A. at 468 (Jablonski Test.). Jablonski testified that he "was concerned that an issue like that would receive media attention and that, if Metro was portrayed as . . . the getaway vehicle . . . that would not enhance [SORTA's] standing in the community." Id.

n2 SORTA had a general policy of allowing anyone who purchased a wrap-around bus ad to use the bus for special events. J.A. at 468 (Jablonski Test.). The UFCW apparently had permission to use the Blue Bus to this for such purposes twice a year. J.A. at 467 (Jablonski Test.).

[*347] During this time, UFCW sought to purchase from SORTA a second wrap-around bus advertisement for use in the 1997 Cincinnati Red's Opening Day parade on April 1st. Known as the "Red Bus" advertisement, the proposed[**5] ad had a red background and carried pro-union messages similar to those contained in the Blue Bus ad. The proposed ad also displayed a photograph of union members taken during the Hyatt protest. According to UFCW, the message the Union hoped the photograph would convey was "union pride and strength through organizing" by showing everyday people who "were proud to be union members." Pl.-appellee's Br. at 6. The deadline for completing the Red Bus ad copy was March 26, 1997 for the Red Bus to be ready for the Opening Day parade.

On March 25, 1997, UFCW was informed that the Red Bus ad was rejected by Jablonski, who must approve every wrap-around bus advertisement. Jablonski determined that the Red Bus advertisement was unacceptable because it was aesthetically unpleasant and controversial, and it may therefore adversely affect SORTA's image and its ability to attract and maintain its ridership. J.A. at 456, 464 (Jablonski Test.). Specifically, SORTA objected to the ad's photograph, which it described as a "photograph of a mob of persons, many of whom are holding picket signs and certain of whose facial expressions, body positions and placement conveyed a solemn, if not angry, [**6] tone and an intimidating visual." J.A. at 70 (Mem. in Supp. of Mot. for Summ. J.). Shortly after the rejection of the Red Bus advertisement, UFCW's contract on the Blue Bus expired. The parties dispute whether UFCW was given the opportunity to renew the Blue Bus contract.

UFCW filed suit in the United States District Court for the Southern District of Ohio pursuant to *42 U.S.C. § 1983*. UFCW sought a preliminary injunction ordering SORTA to accept the Red Bus advertisement, as well as compensatory damages, a permanent injunction enjoining SORTA from enforcing its advertising policy against the Red Bus ad, a declaratory judgment that SORTA's advertising policy is unconstitutional on its face, and reasonable attorney fees. After determining that SORTA's rejection of the Red Bus ad was not reasonable, the district court concluded that UFCW demonstrated a substantial likelihood of success on the merits of its claim that the rejection of the ad violated its First Amendment rights. The district court also determined that the loss of First Amendment freedom constitutes an irreparable injury that in this case is not outweighed by harm to others or any public interest.[**7] The district court thus concluded that the balancing of equitable considerations favored UFCW, and granted its request for a preliminary injunction.

SORTA sought an emergency stay of the injunction from the Sixth Circuit pending this appeal, which was granted on November 20, 1997.

## II. PRELIMINARY INJUNCTION STANDARD

We have jurisdiction over this interlocutory appeal of the grant of the plaintiff's motion for preliminary injunctive relief pursuant to *28 U.S.C. § 1292*(a)(1). This court will reverse a district court's granting of a preliminary injunction only when there has been an abuse of discretion. See *N.A.A.C.P. v. City of Mansfield, 866 F.2d 162, 166 (6th Cir. 1989)*. A district court abuses its discretion when it relies on clearly erroneous findings of fact, uses an incorrect legal standard, or applies the law incorrectly. See *id. at 166-67*. In determining whether to exercise discretion to grant a preliminary injunction, the district courts consider the following four factors:

(1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer[**8] irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

*McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 459 (6th Cir. 1997)* (en banc) (quoting *Sandison v. Michigan High Sch. Athletic Ass'n, Inc ., 64 F.3d 1026, 1030 (6th Cir. 1995))*. These factors are not prerequisites to issuing an injunction but factors to be balanced. See Unsecured Creditors' [*348]*Comm. of DeLorean Motor Co. v. DeLorean (In re DeLorean Motor Co.), 755 F.2d 1223, 1229 (6th Cir. 1985).*

The parties dispute whether the moving party bears a heightened evidentiary burden when seeking mandatory preliminary injunctive relief that requires the non-moving party to undertake affirmative action, as distinguished from prohibitory injunctive relief that simply preserves the status quo. Relying on the Tenth Circuit case *SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1097 (10th Cir. 1991)*, SORTA argues that the burden to obtain mandatory injunctive relief is more onerous, [**9] and that the moving party must show that the four preliminary injunction factors "weigh heavily and compellingly in favor of granting the injunction." *Id. at 1097* (emphasis added); cf. *Phillip v. Fairfield Univ., 118 F.3d 131, 133 (2d Cir. 1997)* (stating that when the moving party seeks a mandatory injunction, the party "must meet a higher standard than in the ordinary case by showing 'clearly' that he or she is entitled to relief"). Because the district court did not apply this heightened standard to UFCW's request for mandatory preliminary injunctive relief, SORTA argues that the district court abused its discretion. We believe, however, that the difference between mandatory and prohibitory injunctive relief does not warrant application of differing legal standards. Accordingly, we reject the Tenth Circuit's "heavy and compelling" standard and hold that the district court did not err when it balanced the four equitable factors traditionally considered to determine whether preliminary injunctive relief is warranted.

"The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's[**10] ability to render a meaningful decision on the merits. " *Stenberg v. Cheker Oil Co., 573 F.2d 921, 925 (6th Cir. 1978);* see also *Canal Authority of the State of Flor. v. Callaway, 489 F.2d 567, 576 (5th Cir.*

*1974)* (same). Recognizing that preservation of the court's ability to exercise meaningful review may require affirmative relief in order to prevent some future irreparable injury, several commentators have criticized judicial hesitancy to disturb the status quo where the conditions favoring injunctive relief are satisfied. See, e.g., 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (1995) ("It is regrettable if [judicial hesitancy to disturb the status quo] leads to the denial of an injunction when the important conditions for its issuance have been satisfied."); Developments in the Law -- Injunctions, *78 HARV. L. REV. 994, 1058 (1965)* ("The concept status quo lacks sufficient stability to provide a satisfactory foundation for judicial reasoning."). In Stenberg, the Sixth Circuit similarly rejected "any particular magic in the phrase 'status quo.'" *Stenberg, 573 F.2d at 925.*[**11] Explaining that "the focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo," Stenberg recognized that "if the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury." Id.; see also *Ortho Pharm. Corp. v. Amgen, Inc., 882 F.2d 806, 814 (3d Cir. 1989); Canal Auth., 489 F.2d at 576.* We therefore see little consequential importance to the concept of the status quo, and conclude that the distinction between mandatory and prohibitory injunctive relief is not meaningful. Accordingly, we reject the Tenth Circuit's "heavy and compelling" standard and hold that the traditional preliminary injunctive standard -- the balancing of equities -- applies to motions for mandatory preliminary injunctive relief as well as motions for prohibitory preliminary injunctive relief.

We now turn to the first of the four factors weighed by courts in determining whether to issue a preliminary injunction -- "whether the movant has a strong likelihood of success on the merits. "

III. "STRONG LIKELIHOOD OF SUCCESS[**12] ON THE MERITS"

UFCW raises several alternative grounds upon which it contends that it is substantially likely to succeed on the merits of its claim that SORTA violated its First Amendment rights. UFCW first argues that the advertising space on the outside of the Queen City Metro buses is a designated public forum, and that SORTA's actions fail the [*349] standard of strict scrutiny applicable to content-based denials of protected speech in a designated public forum. In the alternative, UFCW argues that if the advertising space is a nonpublic forum, SORTA's actions fail the reasonableness standard applicable to the denial of access to a nonpublic forum. Finally, UFCW raises a facial challenge to SORTA's advertisement policy on the grounds that SORTA's policy is unconstitutionally vague. We conclude that SORTA created a designated public forum, and that there is a strong likelihood of success on the claim that the exclusion of the Union's advertisement fails strict scrutiny. In the alternative, even if we were to conclude that the advertising space operates as a nonpublic forum, we nevertheless believe the district court correctly determined that UFCW has demonstrated a strong[**13] likelihood of success on its claim that SORTA's reasons for rejecting the Red Bus ad were unreasonable. Finally, we believe UFCW is likely to succeed on its facial challenge to the Policy under both the vagueness and overbreadth doctrines. n3

n3 SORTA argues that UFCW seeks "a limited reversal of the district court's determination as to [some of] the issues" raised below, see Pl.- appellee's Br. at 28, and because this court cannot review determinations by the district court challenged by the appellee absent the filing of a cross-appeal, any such request is improper. Although UFCW stated that it sought a "limited reversal," its arguments reveal that it does not seek an actual "reversal" of the district court's preliminary injunction order, but simply asks this court to affirm the district court's order on alternative grounds rejected by the district court. "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams, 397 U.S. 471, 475 n.6, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970).* This rule stems from the Supreme Court's decision in *United States v. American Ry. Express Co., 265 U.S. 425, 68 L. Ed. 1087, 44 S. Ct. 560 (1924),* where a unanimous Court stated:

It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought there by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

*Id. at 435* (emphasis added) (citations omitted). Thus, we have repeatedly held that matters raised below as

alternative grounds in support of a district court judgment are properly before us on appeal even though the appellee did not file a cross-appeal. See, e.g., *Pusey v. City of Youngstown, 11 F.3d 652, 658 (6th Cir. 1993)* (affirming district court decision granting summary judgment to defendant-appellee for reasons other than that relied upon by the district court), cert. denied, *512 U.S. 1237, 129 L. Ed. 2d 862, 114 S. Ct. 2742 (1994); Pilarowski v. Macomb County Health Dep't, 841 F.2d 1281, 1286* (6th Cir.) (stating appellee's collateral-estoppel argument was properly before the court where appellee raised the issue in its motion for summary judgment, even though district court relied on alternative ground), cert. denied, *488 U.S. 850, 102 L. Ed. 2d 106, 109 S. Ct. 133 (1988); Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co., 772 F.2d 214, 216 (6th Cir. 1985)* (affirming summary judgment for defendant-appellee on reason argued below by defendant but not considered by the district court). Accordingly, we may properly review any reason advanced by UFCW in support of the district court's preliminary injunction that was presented to the district court.

[**14]

A. Forum Analysis

SORTA, the regional transit authority for Southern Ohio, is "a political subdivision of the state." OHIO REV. CODE ANN. § 306.31 (Banks-Baldwin 1997). As such, its actions are taken under color of state law, and its property constitutes public property. The Supreme Court has adopted a forum analysis for use in determining whether a state-imposed restriction on access to public property is constitutionally permissible. In determining what property constitutes the relevant forum, courts focus on the access sought by the speaker. See *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 801, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985)*. Because UFCW seeks access to the advertising space encompassing the outside of SORTA's Queen City Metro buses, this advertising space constitutes the relevant forum. See *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth., 148 F.3d 242, 248 (3d Cir. 1998)* (where plaintiff sought access to defendant's advertising space, the advertising space was the forum at issue); Air [*350] *Line Pilots Ass'n, Int'l v. Department of Aviation, 45 F.3d 1144, 1151-52 (7th Cir. 1995)*[**15] (holding that where plaintiff sought access to display cases in O'Hare Airport terminal, the display case and not the airport was the relevant forum); cf. *Cornelius, 473 U.S. at 801-02* (holding that where plaintiff sought access to the Combined Federal Campaign charity drive aimed at federal employees, and not the federal workplace in general, the Combined Federal Campaign was the relevant forum).

The state may exclude speakers from a traditional public forum or a designated public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius, 473 U.S. at 800.* "Access to a nonpublic forum, however, can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view." Id. (quotation omitted). The advertising space on the Queen City Metro buses clearly is not a traditional public forum, archetypical examples of which include streets and parks, and we do not understand UFCW to contend otherwise. The parties disagree, however, with respect to whether [**16]SORTA designated the advertising space on the buses a public forum, or whether SORTA's advertising space constitutes a nonpublic forum.

1. Type of Forum Created

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius, 473 U.S. at 802.* In order to discern the government's intent, courts "look[] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum," as well as "the nature of the property and its compatibility with expressive activity." Id.

The courts will infer an intent to designate property a public forum where the government makes the property "'generally available' to a class of speakers," *Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 1642, 140 L. Ed. 2d 875 (1998)* (quoting *Widmar v. Vincent, 454 U.S. 263, 264, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981))*; or grants permission "as a matter of course." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).*[**17] In contrast, the government indicates that the property is to remain a nonpublic forum "when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." *Arkansas Educ. Television, 118 S. Ct. at 1642* (quoting *Cornelius, 473 U.S. 788 at 804).* Thus, the Supreme Court has been reluctant to hold that the government intended to create a designated public forum when it followed a policy of selective access for individual speakers rather than allowing general access for an entire

class of speakers. See, e.g., *Arkansas Educ. Television Comm'n, 118 S. Ct. at 1642- 43* (election debate on public broadcasting station was a nonpublic forum where commission made "candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate"); *Cornelius, 473 U.S. at 804* ("The Government's consistent policy has been to limit participation in the [Combined Federal Campaign, a charity drive aimed at federal employees,] to 'appropriate' voluntary agencies and to require agencies[**18] seeking admission to obtain permission from federal and local Campaign officials."); Perry *Educ. Ass'n, 460 U.S. at 47* (outsiders seeking to use school mailboxes and interschool delivery system must secure from building principal permission to use the system in order to communicate with teachers).

Discerning whether the government permits general access to public property or limits access to a select few does not end our inquiry, however, for we must also assess the nature of the forum and whether the excluded speech is compatible with the forum's multiple purposes. See *Cornelius, 473 U.S. at 802.* The government's decision to limit access to the property is not [*351] dispositive in answering whether or not the government created a designated public forum. See *id. at 805.* Rather, we must also examine the relationship between the reasons for any restriction on access and the forum's purpose. A contrary rule that focused solely on whether a speaker must obtain permission to access government property "would allow every designated public forum to be converted into a non-public forum the moment the government did what is [**19]supposed to be impermissible in a designated public forum, which is to exclude speech based on content." *New York Magazine v. Metropolitan Transp. Auth ., 136 F.3d 123, 130* (2d Cir.), cert. denied, *U.S. , 119 S. Ct. 68, 142 L. Ed. 2d 53 (1998).*

"In cases where the principal function of the property would be disrupted by expressive activity, the Court [has been] particularly reluctant to hold that the government intended to designate a public forum." *Cornelius, 473 U.S. at 804.* The court's decision in Cornelius illustrates this principle. Before 1957, multiple charitable organizations solicited support from federal employees at their work sites "on an ad hoc basis." *Id. at 791.* As an increasing number of charities sought access to federal work sites, the multiplicity of solicitations for contributions disrupted the workplace and confused employees who were unfamiliar with many charities seeking contributions. See *id. at 792.* In response, the President established the Combined Federal Campaign ("CFC") "to bring order to the solicitation process and to ensure[**20] truly voluntary giving by federal employees," id., as well as "to minimize the disturbance of federal employees while on duty." Id. The government limited access to the CFC to "appropriate" charitable agencies, as defined in the campaign guidelines. In determining that the government did not create a public forum in establishing the CFC, the Court emphasized that the limitations on access to the CFC were designed to further the government's goal of minimizing disruption to the workplace, thereby suggesting that the government operated the CFC as a nonpublic forum. See *id. at 805-06.*

More recently, in holding that an election debate aired on public television is not a public forum, the Court explained that the logistical difficulties of including all ballot-qualified candidates in the debate would undermine the educational value and quality of the debates, frustrating public television's mission of scheduling programming that best serves the public interest. See *Arkansas Educ. Television Comm'n, 118 S. Ct. at 1643;* cf. *Lehman v. City of Shaker Heights, 418 U.S. 298, 304, 41 L. Ed. 2d 770, 94 S. Ct. 2714 (1974)* (upholding[**21] a limitation of access to transit system's advertising space to commercial speech and the exclusion of political speech in order to prevent decline in revenue generated by long-term commercial advertising as well as "to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience").

In contrast, the courts will infer an intent on the part of the government to create a public forum where the government's justification for the exclusion of certain expressive conduct is unrelated to the forum's purpose, even when speakers must obtain permission to use the forum. See, e.g., *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975)* (even though permission was required to use municipal theaters, the Court applied heightened scrutiny where the reason for exclusion of plaintiff was not related to the public forum's purpose or the preservation of rights of other individuals); *Christ's Bride Ministries, 148 F.3d at 251* (transit authority's advertising space was a public forum where standards for inclusion and exclusion were promulgated "without reference to[**22] the purpose of the forum"); *New York Magazine, 136 F.3d at 129-30* (because transit authority's restriction on access to its advertising space was unrelated to transit authority's proprietary interests, advertising space was a designated public forum). These cases illustrate that our forum analysis must involve a careful scrutiny of whether the government-imposed restriction on access to public property is truly part of "the process of limiting a nonpublic forum to activities compatible with the intended purpose [*352] of the property." n4 *Perry, 460 U.S. at 49.* When the government merely reserves the right to exclude a

speaker "for any reason at all" or "without reference to the purpose of the forum," the potential for government censorship is at its greatest. *Christ's Bride Ministries, 148 F.3d at 251.* Consequently, if the "concept of a designated open forum is to retain any vitality whatever," we will hold that the government did not create a public forum only when its standards for inclusion and exclusion are clear and are designed to prevent interference with the forum's designated purpose. Id. [**23] (quotation omitted).

n4 The Supreme Court has indicated that other limited government interests, independent of the government's interest in preserving the forum for its other intended uses, may also support placing restrictions on access. See, e.g., *Lehman, 418 U.S. at 304* (captive audience); *Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988)* (controversial speech likely to be attributed to government).

In sum, the determination of whether the government intended to designate public property a public forum involves a two-step analysis. First, we look to whether the government has made the property generally available to an entire class of speakers or whether individual members of that class must obtain permission in order to access the property. Second, we look to whether the exclusion of certain expressive conduct is properly designed to limit the speech activity occurring in the forum to that which is compatible with the[**24] forum's purpose.

SORTA's advertising policy states in relevant part as follows:

It is SORTA's policy that its buses, bus shelters and billboards are not public forums. All advertising materials on SORTA's buses, bus shelters and billboards are subject to approval by SORTA. To the fullest extent possible, such advertising materials must be aesthetically pleasing and enhance the environment for SORTA's riders and customers and SORTA's standing in the community.

Examples of advertising material that will be refused under this Policy include, but are not limited to, the following:

. . . .

6. Advertising of controversial public issues that may adversely affect SORTA's ability to attract and maintain ridership. (It is not the intention of this Policy to exclude commercial advertisements by political candidates for public office or advertisements concerning ballot issues.)

J.A. at 783 (Def.'s Ex. 501). n5 We do not believe SORTA's stated intent to operate its advertising space as a nonpublic forum, without more, is dispositive, for we must look to both "the policy and practice of the government to ascertain whether it intended to [*353] [**25] designated a place . . . as a public forum." *Cornelius, 473 U.S. at 802* (emphasis added); see also *Air Line Pilots Ass'n, Int'l v. Department of Aviation, 45 F.3d 1144, 1153 (7th Cir. 1995)* ("The government's stated policy, without more, is not dispositive with respect to the government's intent in a given forum."); *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5, 941 F.2d 45, 47 (1st Cir. 1991)* (in determining whether the government has designated public property a public forum, "actual practice speaks louder than words"). Were we to hold otherwise, the government could circumvent what in practice amounts to open access simply by declaring its "intent" to designate its property a nonpublic forum in order to enable itself to suppress disfavored speech. We therefore must closely examine whether in practice SORTA has consistently enforced its written policy in order to satisfy ourselves that SORTA's stated policy represents its actual policy. Cf. *Air Line Pilots Ass'n, 45 F.3d at 1154* ("[A] court must examine the actual policy -- as gleaned from the consistent practice with regard to various [**26]speakers -- to determine whether a state intended to create a designated public forum.").

n5 Other categories of advertisements that will be excluded include:

1. Advertising that is unlawful, obscene or indecent, or contains explicit messages or graphic representations pertaining to sexual contact, or contains an offensive level of sexual overtone, innuendo, or double entendre.

2. Advertising of contraceptive products or hygiene products of an intimately personal nature.

3. Advertising of products or services with sexual overtones such as massage parlors, escort services, or establishments featuring X-rated or pornographic movies.

4. Advertising containing foul or offensive language.

5. Advertising that is harmful to children or is of a nature to frighten children, either emotionally or physically.

a. The term "harmful to children" means language or pictures that (i) describe or depict sexual contact, or nudity; (ii) make use of foul language; (iii) describe or depict violent physical torture, destruction, or death of a human being; or (iv) describe or depict criminal activity in a way that tends to glorify or glamorize the activity and that, with respect to children under the age of 18, has a tendency to corrupt.

b. The term "of a nature to frighten children, either emotionally or physically" means language or pictures that describe or depict violent or brutal activities, whether such violence or brutality was intended or not, in a manner that causes children under the age of 18 physical or emotional distress or fear for his personal safety or for the safety of others.

. . .

7. Advertising of tobacco products on any bus traveling on or any bus shelter located in any public right of way, street or highway under the jurisdiction and control of the City of Cincinnati or any of its boards or commissions.

J.A. at 783-84.

[**27]

Pursuant to its policy, SORTA has rejected the following advertisements: an advertisement stating that "Monday is a Bitch," J.A. at 785-86 (Def. Ex. 503-04); an advertisement for Rush Limbaugh's radio talk show displaying a caricature of President Bill Clinton with his pants down showing a tatoo stating "I Love Rush," J.A. at 787-90 (Def. Ex. 506-09); an advertisement for Enjoy the Arts stating "Look Around This Bus and Find Someone to Do It With," J.A. at 791 (Def.'s Ex. 511); an advertisement containing an outline of a breast, J.A. at 792 (Def.'s Ex. 511); and a clothing ad determined to be "in bad taste" and "too controversial in content," J.A. at 795 (Def. Ex. 514).

Because UFCW has not identified any advertisements accepted by SORTA that arguably violated the Policy, we have no reason based on the record at this time to believe SORTA applies its written policy on an ad hoc basis. n6 SORTA's apparently consistent policy of limiting access to its advertising space to those advertisements that conform to its written policy indicates an intent to follow this policy. Cf. *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 823-24 (9th Cir. 1991)*[**28] (school district did not intend to open its publications for indiscriminate use where school district's policies explicitly reserved the right to control content of school publications, including advertisements, and school district's practices were not inconsistent with these policies). Although the rejection of only six proposed advertisements under the Policy suggests that SORTA may permit virtually unlimited access to its advertising space or grants permission as a matter of course, the district court concluded otherwise. J.A. at 41-42 (Dist. Ct. Op. and Order at 11-12); cf. *Planned Parenthood of S. Nev., 941 F.2d at 825-26* (holding that although plaintiff Planned Parenthood was the only potential advertiser excluded from defendant school district's school publications, this did not demonstrate that school district granted permission to advertise as a matter of course).

n6 Should UFCW introduce evidence at trial demonstrating that SORTA has not consistently followed its written policy, but instead has maintained an ad hoc policy where the acceptability of an advertisement depends on the whim of the decision-maker, this would strongly suggest that SORTA has created a public forum.

[**29]

We review the district court's factual conclusions only for clear error. Because we do not believe the district court's factual finding is clearly erroneous, we will assume that those seeking access to SORTA's advertising space must first obtain permission from SORTA, and that this permission is not granted as a matter of course. This does not, however, as explained below, conclusively establish that SORTA's methods of excluding speech are constitutionally permissible.

We must ask whether the exclusion of the Union's message was intended to remove from the forum speech that is incompatible with the forum's principal function. Like the Third Circuit, we believe "the goal of generating income by leasing ad space suggests that the forum may be open to those who pay [*354] the requisite fee." *Christ's Bride Ministries, 148 F.3d at 251.* However, in examining the nature of the property, we cannot ignore the larger context, i.e., the Metro buses, for the advertising space is not a discrete, self-contained forum separate from the buses upon which the advertisements appear. See *Air Line Pilots Ass'n, 45 F.3d at 1156;* cf.

*Cornelius, 473 U.S. at 805*[**30] (examining whether granting the plaintiffs access to the government's charitable campaign drive for federal employees would disrupt the larger forum, the workplace of federal employees).

SORTA offers three policy justifications for its exclusion of advertisements that are too controversial or not aesthetically pleasing: enhancing the environment for its riders, enhancing SORTA's standing in the community, and enabling SORTA to attract and maintain its ridership. The argument is that, unlike the Southeastern Pennsylvania Transportation Authority ("SEPTA") in Christ's Bride Ministries, which retained for itself the authority to reject an advertisement considered "in its sole discretion" to be objectionable without any reference to the purpose of the forum, *Christ's Bride Ministries, 148 F.3d at 251,* SORTA's policies expressly denote an intent to exclude expressive activity that would hinder the forum's larger purpose -- the provision of safe, efficient, and profitable Metro bus services.

However, we question whether in practice SORTA's determination of the acceptability of a proposed ad substantially differs from the practices of SEPTA considered by[**31] the Third Circuit in Christ's Bride Ministries. For reasons explained below, we believe the lack of definitive standards guiding the application of SORTA's advertising policy permits SORTA, like SEPTA, to reject a proposed advertisement deemed objectionable for any reason. Cf. *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225, 1230, 1232 (7th Cir. 1985)* (affirming district court's finding that transit authority's advertising system constitutes a public forum where no written standards guided application of the transit authority's policy of rejecting controversial speech, in practice the determination to reject an ad as controversial was subjective, and policy was not consistently enforced but a "laissez-faire policy").

Moreover, where the record indicates that SORTA has rejected few advertisements since the Policy's inception in 1995, we cannot readily surmise that SORTA's exercise of control over access to its advertising space operates so as to ensure that the speech is compatible with the forum's larger purpose. Cf. *Christ's Bride Ministries, 148 F.3d at 252* (concluding that SEPTA did not maintain "tight control" [**32] over the forum where SEPTA has exercised its control over only three ads and that "at least 99% of all ads are posted without objection by SEPTA"); *Planned Parenthood Ass'n/Chicago Area, 767 F.2d at 1232* (where transit authority's "laissez- faire policy" meant the defendant maintained no consistent system of control over acceptance of advertisements and virtually guaranteed access to those willing to pay, advertising system had become a public forum).

We also find SORTA's stated purpose for limiting advertising on buses only tenuously related, at best, to the greater forum's intended use. This is not a situation like that in Cornelius, where the government established a controlled solicitation process to prevent disruption in the workplace, or Arkansas Educational Television Commission, where a public broadcasting system logistically could not possibly accommodate all political candidates, or even Perry Education Association, where a high school had a direct interest in controlling access to its internal mail system. Here there is no established causal link between SORTA's goal of enhancing the environment for its riders, enhancing SORTA's[**33] standing in the community, and enabling SORTA to attract and maintain its ridership, and its broad-based discretion to exclude advertisements that are too controversial or not aesthetically pleasing. Although political and public-issue speech is often contentious, it does not follow that such speech necessarily will frustrate SORTA's commercial interests. Rather, it may be the case that only in rare circumstances will the controversial nature of such speech sufficiently interfere with the provision of Metro bus services so as to warrant excluding a political or public-issue advertisement. Cf. [*355] *Air Line Pilots Ass'n, 45 F.3d at 1157* (stating that "there is no indication that political or public interest messages would generally disrupt air travel services" if displayed in airport terminal's display cases).

This is not to say SORTA may not limit speech at all once it has opened the body of the bus to public discourse. Not all speech receives the same level of protection. SORTA may, for example, permissibly limit obscene or offensive material, if narrowly tailored to include only less protected speech, as indeed it has apparently attempted to do. [**34] n7 But once SORTA permits messages of all sorts to grace its buses, it may not then select among the submitted messages based on their content. Just as a governmental entity may not avoid First Amendment scrutiny simply by declaring that it is not creating a public forum, it may not demonstrate intent to keep the forum nonpublic simply by declaring a purpose that involves excluding protected speech based on its content. See *New York Magazine, 136 F.3d at 129-30.*

n7 The language in SORTA's policy forbidding obscene or indecent advertising is not before us, and we do not express any opinion regarding the constitutionality of that clause.

We agree with the UFCW that in accepting a wide array of political and public-issue speech, SORTA has demonstrated its intent to designate its advertising space a public forum. Acceptance of a wide array of advertisements, including political and public-issue advertisements, is indicative of the government's intent to create an open forum. [**35] Cf. *Christ's Bride Ministries, 148 F.3d at 252.* Acceptance of political and public-issue advertisements, which by their very nature generate conflict, signals a willingness on the part of the government to open the property to controversial speech, which the Court in Lehman recognized as inconsistent with operating the property solely as a commercial venture. See *Lehman, 418 U.S. at 303-04;* see also *New York Magazine, 136 F.3d at 130; Planned Parenthood Ass'n/Chicago Area, 767 F.2d at 1232* ("Since [Chicago Transit Authority] already permits its facilities to be used for public-issue and political advertising, it cannot argue that such use is incompatible with the primary use of the facilities."). Moreover, acceptance of political and public-issue speech suggests that the forum is suitable for the speech at issue in this case -- an advertisement conveying pro-union sentiment. Cf. *Christ's Bride Ministries, 148 F.3d at 252* (acceptance of virtually all advertisements implied that the created forum was suitable for the advertisement rejected by SEPTA, posters concerning abortion and health[**36] issues).

We therefore conclude that SORTA, through its policies and actions, demonstrated an intent to designate its advertising space a public forum. As a result, we subject SORTA's refusal to accept UFCW's advertisement to strict scrutiny. "Speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius, 473 U.S. at 800.* We think it self- evident that excluding the Union's advertisement based on aesthetics and the limited possibility of controversy fails this historically stringent test.

2. Reasonableness of SORTA's Actions

Even if we were to conclude that the exteriors of the Queen City Metro buses are a nonpublic forum, we would still hold that UFCW has demonstrated a strong likelihood that it will succeed on the merits of its First Amendment claim. Restrictions on access to a nonpublic forum must be reasonable and viewpoint neutral. See *Perry Educ. Ass'n, 460 U.S. at 46.* SORTA rests its rejection of the Red Bus ad on its claim that the ad was not aesthetically pleasing and that the photograph[**37] contained in the ad has an "in-your-face" or intimidating quality that would prove controversial, thereby undermining SORTA's purpose of enhancing the environment for its customers and maintaining its ridership. J.A. at 464, 480, 484-500 (Jablonski Test.). After reviewing the evidence, the district court determined that SORTA's rejection of the Red Bus ad was unreasonable. J.A. at 46-48 (Dist. Ct. Op. and Order at 16-18). We agree.

[*356] Where the proffered justification for restricting access to a nonpublic forum is facially legitimate, the government nevertheless violates the First Amendment when its stated purpose in reality conceals a bias against the viewpoint advanced by the excluded speakers. See *Cornelius, 473 U.S. at 811.* The district court concluded that the decision by SORTA's General Manager, Mr. Jablonski, to reject the Red Bus ad "was based, at least in part, on his displeasure over the use of the Blue Bus at the protest at the Hyatt." J.A. at 48 (Dist. Ct. Op. and Order at 18 n.1). Clearly any effort to suppress the Red Bus ad due to disagreement with its pro-union message offends the values underlying the First Amendment, for "above all else, [**38] the First Amendment means that government has no power to restrict expression because of its message [or] its ideas." *Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972);* see also *Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 828, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995)* (government cannot regulate "speech based on its substantive content or the message it conveys"); *Metro Display Adver., Inc. v. City of Victorville, 143 F.3d 1191 (9th Cir. 1998)* (city officials violated the First Amendment when they required lessor of bus shelter to remove pro-union advertisement because of the viewpoint expressed). Despite its conclusion that bias against UFCW may have motivated the decision to reject UFCW's Red Bus ad, however, the district court's opinion and order granting the preliminary injunction rests on alternative grounds that assume the absence of bias. We therefore assume for purposes of this appeal that SORTA's stated reasons for its rejection of the Red Bus ad -- the ad's controversial nature and poor aesthetic quality -- actually motivated the decision[**39] to reject the ad.

a. Reasonableness of SORTA's Advertising Policy

The state may limit access to a nonpublic forum based on subject matter or speaker identity so long as such restrictions are "reasonable." *Cornelius, 473 U.S. at 806.* "The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius, 473 U.S. at 809.*

The district court did not question whether SORTA's policy banning controversial advertising was reasonably related to its stated objective -- enhancing SORTA's

community image and the environment for SORTA's riders, and attracting and maintaining ridership. We note, however, that the Supreme Court has suggested that excluding speech because its controversial nature adversely impacts the forum's other purposes constitutes a reasonable restriction on access to a nonpublic forum. See *Cornelius, 473 U.S. at 811* ("Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the[**40] free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose. "); see also *Brody v. Spang, 957 F.2d 1108, 1122 (3d Cir. 1992)* ("'Reasonable' grounds for content based restrictions include the desire to avoid controversy."); Planned Parenthood *of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991)* (en banc) ("avoidance of controversy" constitutes a reasonable justification for refusing plaintiff's potentially controversial advertisement where publication of an ad in the defendant-school district's yearbook and newspaper could create the perception of sponsorship and endorsement by the schools, thereby compromising the school's interest in maintaining its position of neutrality). With respect to SORTA's aesthetic rationale, the district court expressed some reservation over whether this rationale justified excluding otherwise protected speech, but nevertheless assumed "that an aesthetic interest with regard to a specific ad is an appropriate basis for rejection." n8

n8 SORTA argues that the district court erred in subjecting its aesthetic rationale to heightened review by requiring that SORTA's aesthetic interest be "sufficiently substantial to justify its use for restricting protected expression." J.A. at 47 (Dist. Ct. Op. and Order at 17). After recognizing aesthetic harm as a legitimate state interest, the Supreme Court in *Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984),* required that the city's aesthetic interest must be sufficiently important or substantial to justify a prohibition against certain forms of speech in a public forum. See *id. at 816.* The Court has not addressed whether this heightened standard extends to challenges to restrictions on speech in a nonpublic forum or is limited to cases involving a public forum. The circuits appear to be in conflict on this matter. Compare *Multimedia Publishing Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154, 161* (4th Cir. 193) (applying "sufficiently substantial" standard to airport commission's aesthetic rationale), with *Jacobsen v. City of Rapid City, S.D., 128 F.3d 660, 662 (8th Cir. 1997)* (city's restrictive policy based in part on aesthetic considerations need only be "reasonable"). We need not resolve this matter because the district court never definitively determined whether SORTA satisfied the "sufficiently substantial" standard, but instead assumed that SORTA's aesthetic rationale was "appropriate." Thus, even assuming the district court improperly applied a heightened standard instead of the reasonableness standard, any error by the district court was harmless.

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J.A. at 48 (Dist. Ct. [*357] Op. and Order at 18). Therefore, for purposes of this appeal, we will assume that SORTA's advertising policy was reasonably related to maintaining the multipurpose environment of the Metro buses.

The assumption, as described above for this appeal, that as a general matter SORTA's advertising policy was reasonable does not end our inquiry, however, for the application of the policy must also be reasonable. We therefore must assess whether SORTA had a reasonable basis for concluding that the Red Bus ad violated its advertising policy.

b. Reasonableness of SORTA's Application of its Policy

Before considering the evidence offered in support of SORTA's decision to reject the Red Bus ad, we must first determine the level of deference to which SORTA's judgment is entitled. SORTA claims "the district court abused its discretion by substituting its judgment for that of SORTA in determining that SORTA's decision was not 'reasonable.'" Def.-Appellant's Br. at 24. SORTA argues that under the standards applicable to nonpublic fora, its judgment "was entitled to deference" and the district court improperly engaged in an independent[**42] assessment of whether the decision to reject the Red Bus ad was reasonable. Id. We disagree. SORTA fails to appreciate the distinction between policy determinations and application of state policy. The courts must remain free to engage in an independent determination of whether the government's rules and its application of its rules are reasonably related to the government's policy objectives. See *Planned Parenthood Ass'n/Chicago Area, 767 F.2d at 1231* (affirming district court's independent fact finding that transit authority's exclusion of plaintiff's advertisement on the grounds that it interfered with the government's proprietary interests was not reasonable but "entirely speculative"); cf. *Cox v. Louisiana, 379 U.S. 536, 545 n.8, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965)* (stating that in the area of First

Amendment freedoms, the Court has a duty to engage in an independent examination of the record and will not defer to the judgment of the state supreme court, "else federal law could be frustrated by distorted fact finding"). Under our constitutional scheme, any deference to a state agency's expertise "must be tempered by our duty[**43] to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification." *Quincy Cable TV, Inc. v. FCC, 248 U.S. App. D.C. 1, 768 F.2d 1434, 1459 (D.C. Cir. 1985)*, cert. denied, *476 U.S. 1169, 90 L. Ed. 2d 977, 106 S. Ct. 2889 (1986).* Absent special circumstances, the state must prove the links in its chain of reasoning, for example, that its rules and its application of the rules in fact serve a legitimate interest of the state. Cf. *768 F.2d at 1457-59.* A contrary rule deferring to the unproven subjective determinations of state officials absent a clear abuse of discretion would leave First Amendment rights with little protection. An official harboring bias against a particular viewpoint could readily exclude ads communicating that viewpoint simply by "determining" that the ad was controversial, aesthetically unpleasing, or otherwise offensive. We [*358] simply will not allow such speculative allegations to justify the exclusion of a speaker from government property.

The reasonableness of excluding a particular advertisement requires a determination of whether the[**44] proposed conduct would "actually interfere" with the forum's stated purposes, as set forth in the advertising policy. See *Air Line Pilots Ass'n, 45 F.3d at 1159;* see also *Planned Parenthood Ass'n/Chicago Area, 767 F.2d at 1231* (affirming district court's finding that transit authority's justification for rejecting plaintiff's advertisement could not be credited where it was "entirely speculative" as to whether acceptance of the advertisement would adversely affect transit authority's commercial interests). The district court concluded that the evidence did not support SORTA's decision to reject the Red Bus ad on the basis of its controversial nature. Of the approximately 49 individuals pictured in the photograph displayed in the Red Bus ad, Jablonski identified only eight individuals as intimidating. J.A. at 484 (Jablonski Test.). Numerous individuals pictured were smiling. J.A. at 650 (Pl.'s Ex. 2). Although some people in the photograph have signs beside them, the group is not arranged in a picket line. See id. UFCW's advertising expert testified that the photograph was not an intimidating ad but simply a collection of faces or a[**45] range of faces, mostly neutral in expression. J.A. at 555-556 (Galvin Test.). Our independent review of the Red Bus ad and the testimony presented below leads us to agree with the district court's conclusion that "the tone of the photograph is neither angry nor intimidating." J.A. at 46 (Dist. Ct. Op. and Order at 16).

Even assuming the photograph depicted a picket line, the district court properly found that the Red Bus advertisement was unlikely to affect adversely SORTA's proprietary interests. J.A. at 47 (Dist. Ct. Op. and Order at 17). The district court reasonably concluded that any controversy that would attach to the image of a picket line would be no greater than the controversy surrounding unions in general since unions are already associated with picketing. Noting that SORTA had previously run pro-union ads, including one reading "please don't cross our picket lines," without any detriment to SORTA's interests, the district court concluded that "SORTA's decision to reject the proposed Red Bus ad on the basis of its controversiality and potentially adverse effect was unreasonable." Id; cf. *Air Line Pilots Ass'n, 45 F.3d at 1156* (concluding that where the[**46] advertising space at issue "[has] contained 'political' or other public interest messages in the past, the City cannot now claim that those messages are incompatible with the purpose of the forum."). In sum, the evidence does not appear to substantiate SORTA's proffered reasons for rejecting the Red Bus ad. We therefore hold that the district court was not clearly erroneous when it concluded that SORTA's rejection of the proposed Red Bus ad was unreasonable.

With respect to SORTA's rejection of the Red Bus ad on aesthetic grounds, the testimony of Jablonski was the only evidence presented by SORTA in support of its decision. Jablonski testified that he did not find the Red Bus ad aesthetically pleasing. The district court stated that "this assertion, without more, is insufficient to permit the restriction of protected expression," noting that "Mr. Jablonski offered nothing in the way of aesthetic standards or guidelines but merely" his personal opinion. J.A. at 48 (Dist. Ct. Op. and Order at 18). The district court's refusal to rely on Jablonski's subjective opinion as to the aesthetic quality of the Red Bus ad, without any supporting objective evidence, was not clearly[**47] erroneous. Accordingly, we affirm the district court's conclusion that UFCW demonstrated that it was likely to succeed on the merits of its claim that SORTA's decision to reject the Red Bus ad plainly fails the reasonableness test.

B. Facial Challenge to SORTA's Advertising Policy

1. Vagueness Doctrine

In addition to challenging SORTA's application of its advertising policy to the proposed Red Bus ad, UFCW also raises a facial challenge to the Policy. Due process requires that we hold a state enactment void for vagueness if its prohibitive terms are not clearly defined such that a person of ordinary [*359]intelligence can

readily identify the applicable standard for inclusion and exclusion. See *Grayned v. City of Rockford, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).* Not only do "vague laws . . . trap the innocent by not providing fair warning," but laws that fail to provide explicit standards guiding their enforcement "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [**48] *Id. at 108-09;* see also *Leonardson v. City of East Lansing, 896 F.2d 190, 196 (6th Cir. 1990).* The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors. See *Leonardson, 896 F.2d at 198.* Quite simply, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975).* We will not presume that the public official responsible for administering a legislative policy will act in good faith and respect a speaker's First Amendment rights; rather, the vagueness "doctrine requires that the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988).* [**49]Thus, a statute or ordinance offends the First Amendment when it grants a public official "unbridled discretion" such that the official's decision to limit speech is not constrained by objective criteria, but may rest on "ambiguous and subjective reasons." *Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996),* cert. denied, *139 L. Ed. 2d 227, U.S. , 118 S. Ct. 294 (1997).*

SORTA's advertising policy prohibits "controversial" ads that affect adversely SORTA's ability to attract and maintain its ridership. We have no doubt that standing alone, the term "controversial" vests the decision-maker with an impermissible degree of discretion. Cf. *National Endowment for the Arts v. Finley, 141 L. Ed. 2d 500, 524 U.S. 569, 118 S. Ct. 2168, 2179 (1998)* (concluding that the terms of a provision directing the National Endowment for the Arts to take into consideration general standards of "decency and respect" for diverse beliefs and values of the American public "are undeniably opaque, and . . . could raise substantial vagueness concerns" if appearing as part of a regulatory scheme); [**50] *Aubrey v. City of Cincinnati, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993)* (holding that Cincinnati Reds' ban on ballpark banners that are not in "good taste" is unconstitutional because the policy "leaves too much discretion in the decision maker without any standards for that decision maker to base his or her determination"). However, SORTA's advertising policy does not broadly ban advertisements SORTA officials find "controversial," but limits the ban to cases where the advertisements adversely affect SORTA's image or ridership. The question then is whether in linking the term "controversial" to SORTA's commercial interests, the term becomes sufficiently precise so as to constrain the decision-maker's discretion and protect those seeking access to SORTA's advertising space from arbitrary or discriminatory treatment.

In Grayned, the Supreme Court addressed whether an otherwise standardless term became sufficiently definite when its application required the decision-maker to assess the impact of the speech-related activity on the state's interests. Specifically, the Grayned Court considered whether the meaning of the otherwise imprecise terms "noise" [**51] and "diversion" as used in an anti-noise ordinance were clear when the ordinance qualified that the noise or diversion is prohibited only where it disturbs or tends to disturb a primary or secondary school session. In holding that the ordinance was not impermissibly vague, the Court concluded that

> the vagueness of these terms, by themselves, is dispelled by the ordinance's requirements that (1) the "noise or diversion" be actually incompatible with normal school activity; [and] (2) there be a demonstrated [*360] causality between the disruption that occurs and the "noise or diversion."

*408 U.S. at 113.* The district court concluded that, like the ordinance at issue in Grayned, "where the prohibited disturbances are easily measured by their impact on the normal activities of the school," *id. at 112,* SORTA's advertising policy's ban against "controversial" advertisements clearly identifies the prohibited speech by measuring the proposed advertisements' impact on SORTA's commercial interests. The district court thus concluded that the policy was not unconstitutionally vague. J.A. at 44 (Dist. Ct. Op. and Order at 14). The [**52]district court, however, failed to assess whether there existed "a demonstrated causality" between the prohibited controversial advertisements and SORTA's legitimate interest in enhancing the environment for its riders, its ability to maintain its ridership, and its standing in the community. The Supreme Court concluded that the anti-noise ordinance at issue in Grayned, when read in light of state supreme court precedent, prohibited "only actual or imminent interference with the 'peace or good order' of the school." *Grayned, 408 U.S. at 111-12.* In contrast, SORTA's

advertising policy contains no such "demonstrated causality" requirement, but instead permits the rejection of controversial ads which merely "may" affect SORTA's ridership. J.A. at 783 (Def.'s Ex. 501). In the absence of requiring a demonstrable causality between an advertisement's controversial nature and SORTA's interests, the Policy invites "subjective or discriminatory enforcement" by permitting the decisionmaker to speculate as to the potential impact of the controversial advertisement on SORTA's interests. Cf. *Desert Outdoor Advertising, 103 F.3d at 819* (holding[**53] void for vagueness a city ordinance that permitted city officials to deny a permit for a structure or sign "without offering any evidence to support the conclusion that a particular structure or sign is detrimental to the community").

The advertising policy's "aesthetically pleasing" requirement similarly invites arbitrary or discriminatory enforcement. As illustrated by the testimony of Jablonski, who was unable to define the term "aesthetically pleasing," J.A. at 494 (Jablonski Test. ("I don't think we have a definition of "aesthetically pleasing. . . . It is ultimately my decision.")), aesthetics is a vague term that invites subjective judgments. See *Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981)* ("Esthetic judgments are necessarily subjective, defying objective evaluation."); cf. *Desert Outdoor Advertising, 103 F.3d at 818* (holding that public officials had "unbridled discretion" in deciding whether to grant a permit for erection of a sign or structure where officials could deny the permit when the structure or sign was "detrimental to the aesthetic quality of the community"). We [**54] have no doubt that the application of the term "aesthetically pleasing" will substantially vary from individual to individual, for "what is contemptuous to one . . . may be a work of art to another." *Smith v. Goguen, 415 U.S. 566, 573, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974)* (quotation omitted). Since it is not susceptible to objective definition, the "aesthetically pleasing" requirement grants SORTA officials the power to deny a proposed ad that offends the officials' subjective beliefs and values under the guise that the ad is aesthetically displeasing. It is precisely this danger of arbitrary and discriminatory application that violates the basic principles of due process. We therefore conclude that the district court erred in determining that UFCW is not substantially likely to succeed on the merits of its facial challenge to SORTA's advertising policy on vagueness grounds.

2. Overbreadth Doctrine

In addition to holding SORTA's advertising policy facially unconstitutional on vagueness grounds, we believe the policy, specifically the ban on controversial ads that adversely affect SORTA's ridership, is constitutionally invalid under the overbreadth doctrine. [**55] n9 A statute, ordinance, or resolution is [*361] unconstitutionally overbroad when there exists "'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.'" *Leonardson, 896 F.2d at 195* (quoting *City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984))*. Underlying the overbreadth doctrine is the concern that an overbroad statute will "chill" the exercise of free speech and expression by causing "'those who desire to engage in legally protected expression . . . [to] refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'" *Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574, 96 L. Ed. 2d 500, 107 S. Ct. 2568 (1987)* (quoting *Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985))*; see also *Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1182 (6th Cir. 1995)*. A statute may be invalidated on its face as overbroad, however, only where the[**56] overbreadth of the statute is "substantial." *Broadrick v. Oklahoma, 413 U.S. 601, 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)*; see also *Jews for Jesus, 482 U.S. at 574*.

n9 During the proceedings below, the parties debated whether SORTA's advertising guidelines were viewpoint neutral. J.A. at 373-75 (Hr'g Br. of Def. at 15-17); 397-98 (Post-Hr'g Br. of Def. at 6-7); 404-06 (Pl.'s Post-Hr'g Br. at 4-6). Although neither party utilized the term "overbroad," the substance of their arguments raised below essentially involved a facial challenge to SORTA's advertising policy on the ground that the policy's guidelines are unconstitutionally overbroad by permitting SORTA officials to reject a proposed advertisement on the basis of the viewpoint expressed. Though their arguments could have been presented more clearly to the district court, we nevertheless believe the parties' briefs placed before the district court the validity of the policy under the overbreadth doctrine. Cf. *International Union, UAW v. Yard-Man, Inc., 716 F.2d 1476, 1484 n.11* (6th Cir.) (reviewing defendant's defense of accord and satisfaction even though defendant failed to use the words "accord and satisfaction" before the district court where defendant essentially raised the defense in substance, albeit in a confused fashion), cert. denied, *465 U.S. 1007, 79 L. Ed. 2d 234, 104 S. Ct. 1002 (1984)*. The district court did not consider whether SORTA's advertising policy conceivably could lead to the rejection of a proposed ad based on the viewpoint expressed. Although we will generally decline to consider in the first instance issues not considered by the district court, we will

make an exception "where injustice might otherwise result, or where the issue presents only a question of law." *City Management Corp. v. U.S. Chem. Co., 43 F.3d 244, 255 (6th Cir. 1994)* (citations omitted). Because the parties raised below the overbreadth argument in substance and the issue involves purely legal questions, we shall consider the issue on appeal. See id. (considering on appeal party's implied assumption argument where the argument "was actually raised below, even though it was not pressed at trial, and the issue presents only a question of law"); cf. *Hadix v. Johnson, 144 F.3d 925, 935 (6th Cir. 1998)* (reviewing on appeal a facial challenge to law amended after district court proceedings where challenge involved purely legal issues and consideration of the matter by the appellate court furthered interest of judicial economy).

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As stated previously, SORTA's advertising policy prohibits controversial advertisements that may adversely affect its ability to attract and maintain its ridership. Expressive activity may stir-up controversy in two different ways. First, "independently of the message the speaker intends to convey, the form of his communication may be offensive." *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n, 447 U.S. 530, 547, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980)* (Stevens, J., concurring) (emphasis added). Second, "other speeches, even though elegantly phrased in dulcet tones, are offensive simply because the listener disagrees with the speaker's message." *Id. at 547-48.* Thus, SORTA's prohibition against controversial advertisements adversely affecting its ridership reaches not only ads controversial because of their form, but also ads controversial because of their message. We therefore must carefully examine whether the advertising policy's prohibition conceivably could lead SORTA's officials to reject a proposed advertisement because of the viewpoint expressed, a power they do not have under the First Amendment.

We believe[**58] any prohibition against "controversial" advertisements unquestionably allows for viewpoint discrimination. A controversy arises where there exists a "disputation concerning a matter of opinion." RANDOM HOUSE UNABRIDGED DICTIONARY 443 (2d ed. 1993). An opinion that conforms with prevailing community standards is unlikely to prove contentious. Cf. Finley, U.S. at , 118 S. Ct. at 2181 (Scalia, J., concurring) (where statute required the National Endowment for the Arts to take into consideration general standards of "decency and respect," "the applicant who displays 'decency,' that is, 'conformity [*362] to prevailing standards of propriety or modesty,' and the applicant who displays 'respect,' that is, 'deferential regard,' for the diverse beliefs and values of the American people, will always have an edge over an applicant who displays the opposite." (citations omitted)). A viewpoint challenging the beliefs of a significant segment of the public, however, frequently will generate discord. Thus, an ad's controversy often is inseparable from the viewpoint it conveys. Indeed, Jablonski, SORTA's general manager, testified that he would reject a political[**59] ad that "got into specific, . . . controversial viewpoints." J.A. at 477 (Jablonski Test. (emphasis added)).

In addition, Jablonksi made clear that he would not reject all ads whose content addressed union related matters, but only those expressing a more controversial perspective. J.A. at 476-77 (Jablonski Test.). Although Jablonski's testimony suggests a willingness to exclude controversial anti-union viewpoints as well as controversial pro-union positions, this does not mean that viewpoint discrimination may not occur. The nature of public discourse generally is "complex and multifaceted," not necessarily bipolar. *Rosenberger, 515 U.S. at 831.* Consequently, the "exclusion of several views on [an issue] is just as offensive to the First Amendment as exclusion of only one." Id. We therefore can conceive of numerous cases where under SORTA's advertising policy "it is the treatment of a subject, not the subject itself, that is disfavored." *Finley v. National Endowment for the Arts, 100 F.3d 671, 683 (9th Cir. 1996)* (emphasis added), rev'd on other grounds, *141 L. Ed. 2d 500, 524 U.S. 569, 118 S. Ct. 2168 (1998).*[**60] The danger is very real and substantial that SORTA's rejection of a proposed advertisement due to the controversy generated by its message will have "a speech-based restriction as its sole rationale and operative principle." *Rosenberger, 515 U.S. at 834;* see also *Lebron v. National R.R. Passenger Corp. (AMTRAK), 69 F.3d 650, 658 (2d Cir. 1995)* (suggesting that if Amtrak excluded controversial political ads from its advertising billboards, a nonpublic forum, its policy would be void for viewpoint bias); Majorie Heins, Viewpoint Discrimination, *24 HASTINGS CONST. L.Q. 99 (1996)* (arguing that government actions that discriminate against speech deemed "controversial" violate the principle of viewpoint neutrality); cf. *Air Line Pilots Ass'n, 45 F.3d at 1157* (stating that airport authority's exclusion of plaintiff's advertisement on the grounds that it undermined its commercial interests by offending the airport authority's largest airline customer was "troubling" because advertisement was objectionable only when considered in the context of the viewpoint the plaintiff wished to express).

Before we may invoke the overbreadth[**61] doctrine against SORTA's advertising policy, however, we must address whether a more limited or narrow construction of the policy would remove the threat to constitutionally protected speech. See *Broadrick, 413 U.S. at 613.* We will not, however, rewrite the guidelines to cure their substantial infirmities. See *United States v. National Treasury Employees Union, 513 U.S. 454, 479, 130 L. Ed. 2d 964, 115 S. Ct. 1003 and n.26 (1995)* (refusing to rewrite challenged statutory provision in order to correct for unconstitutional abridgement of speech under the First Amendment); *Chapman v. United States, 500 U.S. 453, 464, 114 L. Ed. 2d 524, 111 S. Ct. 1919 (1991)* ("The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction . . . is not a license for the judiciary to rewrite language enacted by the legislature." (quotation omitted)). During the proceedings below, SORTA asserted that its advertising guidelines "have nothing to do with the viewpoint being expressed, but only with its mode of presentation." J.A. at 374 (Hr'g Br. of Def. at 16). We simply do[**62] not see such a limitation in the express language of SORTA's advertising policy. Rather, the policy's prohibition applies to "advertising of controversial public issues," J.A. at 783 (Def.'s Ex. 501), which suggests to us that the prohibition is directly linked to the proposed advertisement's message. Moreover, the testimony of Jablonski demonstrates that SORTA itself does not in practice interpret its policy as suggested. J.A. at 477 (Jablonski Test. (testifying that under the policy, he would reject ads that conveyed "controversial viewpoints")). We [*363] therefore cannot discern a reasonable interpretation of the policy that will eliminate its overbreadth. Accordingly, we conclude that the policy's broad prohibition against controversial advertisements that may adversely affect SORTA's ridership threatens to chill protected expressive activity, thereby providing an additional rationale in support of the district court's issuance of a preliminary injunction in favor of the Union and against SORTA.

C. Conclusion Regarding Likelihood of Success

In sum, we conclude that UFCW has demonstrated a strong likelihood that it will succeed on the merits of its First [**63] Amendment claims. SORTA created a limited public forum and fails to show a compelling state interest for excluding the Union's advertisement. Furthermore, even if we did not conclude that a public forum was created, we also conclude that the district court correctly determined that SORTA's rejection of the proposed Red Bus ad was not reasonable in light of the forum's purpose. Finally, UFCW is likely to succeed on its facial challenge to SORTA's advertising policy on the grounds that the policy is both unconstitutionally vague and overbroad.

IV. IRREPARABLE HARM, HARDSHIP TO OTHERS, AND THE PUBLIC INTEREST

Relying on the plurality opinion in *Elrod v. Burns, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976),* the district court held that in light of its conclusion that the UFCW was likely to succeed on the merits of its First Amendment claims, UFCW will suffer irreparable harm without an injunction because "'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" J.A. at 49 (Dist. Ct. Op. and Order at 19 (quoting *Elrod, 427 U.S. at 373)).* This court previously has approved[**64] the granting of a preliminary injunction on the grounds that "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Newsom v. Norris, 888 F.2d 371, 378 (6th Cir. 1989);* see also *Foti v. City of Menlo Park, 146 F.3d 629, 643 (9th Cir. 1998)* (quoting Elrod); *New York Magazine, 136 F.3d 123, 127 (2d Cir. 1998)* (same); *Maceira v. Pagan, 649 F.2d 8, 18 (1st Cir. 1981)* ("It is well established that the loss of first amendment freedoms constitutes irreparable injury."). The irreparable injury stems from "'the intangible nature or the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future.'" *Newsom, 888 F.2d at 378* (quoting *Cate v. Oldham, 707 F.2d 1176, 1188-89 (11th Cir. 1983)).* Consequently, in demonstrating a likelihood of success on the merits of their First Amendment claim, UFCW has also demonstrated irreparable harm.

The harm to UFCW's First[**65] Amendment rights should the preliminary injunction not be issued must be weighed against the harm to others from the granting of the injunction. The district court concluded that requiring SORTA to run the Red Bus ad would not bring any substantial harm upon the defendant. J.A. at 50 (Dist. Ct. Op. and Order at 20). As explained previously, the district court reasonably concluded that running the Red Bus ad would not adversely affect SORTA's image or ridership. Accordingly, the district court correctly concluded that substantial harm will not befall SORTA from the issuance of the preliminary injunction.

Finally, the district court correctly concluded that "the public interest that would be served by the granting of a preliminary injunction outweighs any public interest that would be served by denying it." J.A. at 50 (Dist. Ct. Op. at 20). SORTA failed to show that the public's interest in safe and efficient transportation would be affected. In

contrast, failure to issue the injunction would harm the public's interest in protecting First Amendment rights in order to allow the free flow of ideas.

In sum, we hold that the district court correctly concluded that the balance of the four[**66] preliminary injunction factors [*364] weighs in favor of UFCW: UFCW has demonstrated a likelihood of success on the merits of its First Amendment claim; UFCW has shown it will suffer irreparable harm if SORTA continues to reject the Red Bus ad; n10 and the public interest will be served by the granting of the injunction. n11

n10 SORTA argues that the preliminary injunction issued by the district court is "broader than necessary to accomplish the end it sought to achieve." See Def.-appellant's Br. at 36. The Union has shown that it was likely to succeed on the merits of its claim that SORTA violated its First Amendment rights when SORTA denied the Union access to SORTA's advertising space, and that the Union will suffer irreparable harm if SORTA continues to deny the Union the access sought. We therefore do not believe a preliminary injunction that grants the Union the access it requests is "broader than necessary" to prevent irreparable injury to the Union's First Amendment rights.

n11 SORTA contends that the district court prematurely awarded UFCW substantially all of the relief sought. See Def.-Appellant's Br. at 21. SORTA "improperly equates 'likelihood of success' with 'success,' and . . . ignores the significant procedural differences between preliminary and permanent injunctions." *University of Texas v. Camenisch, 451 U.S. 390, 394, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981).* As the district court made clear in its order denying the defendant's motion for a stay pending an interlocutory appeal, the district court considered the merits of the Union's claims solely for the purpose of determining whether the Union demonstrated a likelihood of success on the merits of its First Amendment claims; the district court did not render binding conclusions of law or fact on the constitutional issues raised by UFCW. J.A. at 431 (Order Denying Def.'s Mot. for Stay pending Appeal at 3). Should UFCW fail to prevail after a full trial on the merits, the preliminary injunction will be vacated. Should the Union ultimately prevail on the merits, the district court must then consider UFCW's request for a permanent injunction, damages, and reasonable attorney fees.

[**67]

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's granting of the preliminary injunction. We lift our emergency stay of the preliminary injunction, and we remand this case to the district court for further proceedings consistent with this opinion.

CONCURBY: HARRY W. WELLFORD

CONCUR: HARRY W. WELLFORD, Circuit Judge, concurring. I concur in the result reached in this difficult case, but I express my disagreement with the majority's determination in part III A.1. that SORTA's advertisement policy created a "designated public forum." I think it clear, as determined by the district court, that SORTA did not make its exterior bus advertising space "generally available" to entities such as Local 1099 on an essentially unrestricted basis. See *Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 1641, 140 L. Ed. 2d 875 (1998).*

An analysis of the merits of a claim that the state has restricted First Amendment freedoms by denying access to public property, as the Union urges in this case, requires a court to place the public property at issue in one of three categories: traditional public fora, [**68] designated public fora, or nonpublic fora. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 802, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45-46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).* In the first two types, the state may enact content-neutral time, place, and manner restrictions on speech so long as those restrictions serve a significant government interest and "leave open alternative channels of communication." Local No. 1099 v. SORTA, No. 97-512 (S.D. Ohio Sept. 15, 1998) (district court order in this case which granted the preliminary injunction and which relied on Cornelius and Perry). The state may also enact content-based restrictions in these two fora if the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve it. Id. In the case of a nonpublic forum, however, the state may enforce not only content-neutral time, place, and manner restrictions, but may also "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is[**69] reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry, 460 U.S. at 46.* A threshold question on the analysis of likelihood of

success on the merits, therefore, is what sort of forum Metro buses are.

[*365] Transit system advertising space does not automatically constitute a public forum. See *Lehman v. City of Shaker Heights, 418 U.S. 298, 304, 41 L. Ed. 2d 770, 94 S. Ct. 2714 (1974)* (plurality opinion). Property that is not traditionally a public forum may, however, become a public forum if the state allows the property to be used as a place for expressive activity. See *Perry, 460 U.S. at 45.* In deciding whether the state has allowed its property to become a public forum, courts should look at "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius, 473 U.S. at 802.* Courts that have found that advertising space on transit systems has become a public forum have done so where the transit authority maintained no system of control over [**70]the ads its accepts. See *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225, 1232 (7th Cir. 1985)* (noting that access was "virtually guaranteed to anyone willing to pay the fee"); *Coalition for Abortion Rights and Against Sterilization Abuse v. Niagara Frontier Transp. Auth., 584 F. Supp. 985, 989 (W.D. N.Y. 1984)* (noting that no witness could recall an instance in which an ad had been rejected for content).

Unlike the situation in Planned Parenthood and Coalition for Abortion Rights, SORTA has vigorously enforced its advertising policy. Not only does the policy state that SORTA advertising space is not a public forum, it makes clear that all ads are subject to SORTA's approval. Furthermore, SORTA's practice is consistent with its written policy's intent to maintain the advertising space as a nonpublic forum. Although it accepts a wide range of ads, it has also rejected various ads that did not meet the criteria outlined in the policy. Thus, SORTA, in fact, has prevented its advertising space from becoming a public forum for First Amendment expression. I would hold that the district court properly concluded[**71] that SORTA's ad space constituted a nonpublic forum. As such, the restriction on speech, which forms the basis for this case, will stand if it "is reasonable in light of the purpose which the forum at issue serves." *Perry, 460 U.S. at 49.*

The majority concedes that "the Supreme Court has been reluctant to hold that the government intended to create a designated public forum when it followed a policy of selective access for individual speakers rather than allowing general access for an entire class of speakers," see Majority Opinion P 19, and that SORTA had an "apparently consistent policy of limiting access to its advertising space." Majority Opinion P 31. This should be dispositive of the issue, but the majority instead reaches the opposite conclusion, relying primarily on *Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242 (3d Cir. 1998),* which I do not find to be persuasive. The policies and practices of SEPTA differed materially from those of SORTA. Unlike the majority, I find SORTA's purposes for limiting advertising were related to the forum's intended use and that SORTA has not transformed the buses into a designated public forum.[**72] See Citizens for Hyland v. SORTA, No. 98-713 (S.D. Ohio Oct. 2, 1998) (order denying preliminary injunction in case with the same defendant and indistinguishable facts).

Despite the disagreement expressed above, I concur with the majority's alternative rationale in part III A.2. which affirms the decision of the district court with respect to the reasonableness of SORTA's actions. I find this issue to be very close, particularly in light of the facts and decision in Citizens for Hyland, supra. I would, accordingly, AFFIRM the district court despite my reservations about whether SORTA's actions in this case were unreasonable as claimed by the majority.

EXHIBIT D

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.

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

DECISION: State's minimum stream flow requirement held to be permissible condition of certification under *33 USCS 1341* to build hydroelectric project.

SUMMARY: The Clean Water Act *(33 USCS 1251* et seq.) requires (1) under 303 of the Act *(33 USCS 1313),* that each state, subject to federal approval, institute comprehensive water quality standards establishing water quality goals for all intrastate waters, (2) under 401 of the Act *(33 USCS 1341),* that states provide a water quality certification before a federal license or permit is issued for activities that might result in any discharge into intrastate navigable waters, and (3) under 401(d) of the Act *(33 USCS 1341*(d)), 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, which limitations will become a condition on any federal license. The state of Washington adopted comprehensive water quality standards intended to regulate all of the state's navigable waters under an administrative scheme that classified certain waters as extraordinary, which waters had characteristic uses including fish migration, rearing, and spawning. A city and a local utility district proposed to build on a river that had been classified as extraordinary a hydroelectric project that would divert water from a 1.2-mile bypass reach of the river, run the water through turbines to generate electricity, and then return the water to the river below the bypass reach. The state ecology department issued a 401 water quality certification imposing on the project conditions that included a minimum stream flow requirement of between 100 and 200 cubic feet per second, depending on the season. The state Pollution Control Hearings Board determined that the flow requirement, by being intended to enhance rather than maintain the fishery in the river, exceeded the ecology department's authority under state law, but the Thurston County Superior Court, holding that the Board had erred, reinstated the department's flow requirement. The Supreme Court of Washington, holding that the antidegradation provisions of the state water quality standards required the imposition of minimum stream flows, and that 401(d) authorized the flow requirement imposed by the ecology department, affirmed the Superior Court judgment *(121 Wash 2d 179, 849 P2d 646).*

On certiorari, the United States Supreme Court affirmed. In an opinion by O'Connor, J., joined by Rehnquist, Ch. J., and Blackmun, Stevens, Kennedy, Souter, and Ginsburg, JJ., it was held that the minimum flow requirement was a permissible condition of a 401 certification, because (1) pursuant to 401, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law; (2) the minimum flow requirement was such a limitation; and (3) the court was unwilling to read implied limitations into 401 based on a purported conflict with the authority of the Federal Energy Regulatory Commission (FERC), under the Federal Power Act (FPA) *(16 USCS 791a* et seq.), to license hydroelectric projects, since (a) 401's

certification requirement applied to statutes and regulatory schemes other than those concerning FERC's authority under the FPA, and (b) any conflict with such authority was hypothetical, where FERC had not yet acted on the license application from the city and the local utility district.

Stevens, J., concurring, expressed the view that the Clean Water Act (1) did not purport to place any constraint on a state's power to regulate the quality of its own waters more stringently than federal law might require, and (2) explicitly recognized states' ability to impose stricter standards.

Thomas, J., joined by Scalia, J., dissenting, expressed the view that (1) the majority opinion fundamentally altered the federal-state balance Congress had carefully crafted in the Federal Power Act *(16 USCS 791a* et seq.), and (2) such a result was neither mandated nor supported by the text of 401.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:
[***HN1]

hydroelectric power -- federal license -- state minimum flow requirement -- protection of fisheries --

Headnote:
A minimum stream flow requirement of between 100 and 200 cubic feet per second imposed, in order to protect a river's fisheries, by a state environmental agency under a water quality certification issued, with respect to a proposed hydroelectric project on the river, pursuant to 401 of the Clean Water Act *(33 USCS 1341)*--which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters--is a permissible condition of 401 certification, because the United States Supreme Court has determined that (1) pursuant to 401, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law; (2) the minimum flow requirement is such a limitation; and (3) the court is unwilling to read implied limitations into 401 based on a purported conflict with the authority of the Federal Energy Regulatory Commission (FERC), under the Federal Power Act (FPA) *(16 USCS 791a* et seq.), to license hydroelectric projects, since (a) 401's certification requirement applies to other statutes and regulatory schemes in addition to that concerning FERC's authority under the FPA, and (b) any conflict with such authority is hypothetical, where FERC has not yet acted on the license application for the project in question. (Thomas and Scalia, JJ., dissented from this holding.)

[***HN2]

Clean Water Act -- federal license -- state water quality certification --

Headnote:
Pursuant to 401 of the Clean Water Act *(33 USCS 1341),* which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law, rather than on only water quality standards specifically tied to a discharge, because (1) the text of 401(d) of the Act *(33 USCS 1341*(d)), providing 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, refers to the compliance of the applicant, not the discharge, (2) the conclusion of the Environmental Protection Agency (EPA)--whose regulations implementing 401 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--that activities, not merely discharges, must comply with state water quality standards is a reasonable interpretation of 401 and is entitled to deference, (3) consistent with the EPA's view of the Act, state water quality standards adopted pursuant to 303 of the Act *(33 USCS 1313),* which requires each state, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters, are among the "other limitations" with which a state may insure compliance through the 401 certification process, (4) limitations to assure compliance with state water quality standards are

permitted by 401(d)'s reference to any other appropriate requirement of state law, and (5) at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to 303 are "appropriate" requirements of state law. (Thomas and Scalia, JJ., dissented from this holding.)

[***HN3]

Clean Water Act -- federal license -- compliance with state standards --

Headnote:
Although 401(d) of the Clean Water Act *(33 USCS 1341*(d))--providing that any certification under 401 of the Act *(33 USCS 1341),* which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters, shall set forth any effluent limitations and other limitations necessary to assure that any applicant will comply with various provisions, including certain specified statutory provisions, of the Act, and with appropriate state law requirements--authorizes a state to place restrictions on the activity as a whole, that authority is not unbounded; however, insuring compliance with 303 of the Act *(33 USCS 1313),* which requires each state, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters, is a proper function of the 401 certification, because, although 303 is not one of the statutory provisions listed in 401(d), the statute allows states to impose limitations to insure compliance with 301 of the Act *(33 USCS 1311),* and 301 in turn incorporates 303 by reference.

[***HN4]

Clean Water Act -- federal license -- state minimum stream flow requirement -- protection of fish habitat --

Headnote:
With respect to the determination of the United States Supreme Court that pursuant to 401 of the Clean Water Act *(33 USCS 1341),* which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law, a minimum stream flow requirement of between 100 and 200 cubic feet per second imposed by a state environmental agency for certification for a proposed hydroelectric project on a river with a state-designated use as a fish habitat is such a necessary limitation, because (1) the designated use directly reflects the Act's goal (stated in *33 USCS 1251*(a)) of maintaining the chemical, physical, and biological integrity of the nation's waters, (2) 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, and a certification requirement that an applicant operate the project 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 of the Act *(33 USCS 1313),* which requires each state to institute standards establishing water quality goals for intrastate waters, and an appropriate requirement of state law, (3) Environmental Protection Agency (EPA) regulations implicitly recognize that in some circumstances, criteria alone are insufficient to protect a designated use, (4) the Act permits enforcement of broad, narrative criteria which cannot reasonably be expected to anticipate all the water quality issues arising from every activity which can affect the state's hundreds of individual water bodies, (5) the minimum flow requirement is a proper application of the state and federal antidegradation regulations, as the requirement insures that an existing instream water use will be maintained and protected, (6) there is recognition in the Act itself that reduced stream flow can constitute water pollution, where the Act's definition of water pollution (under *33 USCS 1362*(19)) encompasses the effects of reduced water quantity and 304 of the Act *(33 USCS 1314*(f)) expressly recognizes that water pollution may result from changes in the flow of navigable waters, which concern is also embodied in the EPA regulations, (7) 101(g) and 510(2) of the Act *(33 USCS 1251*(g), 1370(2)) preserve the authority of each state to allocate water quantity as between users, (8) the certification merely determines the nature of the use to which that proprietary right of the parties seeking to build the hydroelectric project may be put under the Act, and (9) this view is reinforced by the legislative history of the 1977 amendment to the Act adding 101(g), which history indicates that the purpose of the amendment is not to prohibit incidental effects of the requirements of the Act on individual water rights, but to insure that state allocation systems are not subverted and that any effects on individual rights are prompted by legitimate and necessary water quality standards. (Thomas and Scalia, JJ., dissented from this holding.)

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

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.

"(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."

[*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

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."

[***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.

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.

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.

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").

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.*

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)(1).

Subsections 401(a)(1) and (d) can easily be reconciled to avoid this problem. To ascertain the nature of the conditions permissible under § 401(d), § 401 must be read as a whole. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 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.*

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.

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 § 401 certification shall contain "[a] statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity." 40 CFR § 121.2(a)(4) (1993) (emphases added). In my view, § 121.2(a)(4) should, at the very least, give the Court pause before it resorts to Chevron deference in this case.

II

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

The Court states that, "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law" under § 401(d). Ante, at 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.

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.

[***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).

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

The problematic consequences of decoupling "uses" and "criteria" become clear once the Court's interpretation of § 303 is read in the context of § 401. In the Court's view, a State may condition the § 401 certification "upon any limitations necessary to ensure compliance" with the "uses of the water body." Ante, at 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.

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.

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.

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).*

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 include 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.

EXHIBIT E

Joseph M. Keating, petitioner v. Federal Energy RegulatoryCommission, respondent; State of California, Ex. Rel. California State WaterResources Control Board, intervenor
No. 90-1080

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIACIRCUIT

288 U.S. App. D.C. 344; 927 F.2d 616; 1991 U.S. App. LEXIS8997; 21 ELR 20692

May 10, 1991

SUBSEQUENT HISTORY: Reported at: *927 F.2d 616 at 625.*

PRIOR HISTORY:
[**1] Original Opinion of March 8, 1991, Reported at: *927 F.2d 616.* Reported at: *1991 U.S. App. LEXIS 3582.*

JUDGES: Mikva, Chief Judge, Edwards and Thomas, Circuit Judges.

OPINIONBY: PER CURIAM

OPINION: [*625] On Intervenor's Petition for Rehearing

Upon consideration of the petition for rehearing filed by intervenor, the State of California, it is hereby ordered that the petition is denied. We find no merit in this petition, and only one of the arguments raised warrants a response.

California now argues, for the first time, that section 401(a)(3) of the Clean Water Act, *33 U.S.C. § 1341*(a)(3) (1988) - the statutory provision found to be controlling in this case - has no application here because the so-called dredge-and-fill permit issued to Keating by the Army Corps of Engineers ("the Corps") is not a permit "with respect to the construction of a[] facility" within the meaning of the statute. This argument comes too late, for it presents an entirely new theory of this case which cannot be appropriately raised on a petition for rehearing.

As was noted in the panel opinion in this case, section 401(a)(3) "creates a presumption that a state certification issued for purposes of a federal construction permit will be valid for purposes of a second[**2] federal license related to the operation of the same facility." *Keating v. FERC, 288 U.S. App. D.C. 344, 927 F.2d 616, 623 (D.C. Cir. 1991)* (footnote omitted). Throughout this litigation, it has been Keating's contention that because he had earlier obtained state certification for a dredge-and-fill permit from the Corps - a permit that Keating needed in order to begin construction work at his proposed hydroelectric facility - section 401(a)(3) mandated that this certification would also be valid for purposes of obtaining a subsequent license from the Federal Energy Regulatory Commission ("FERC"). n1

n1 California does not dispute that the FERC license for which Keating applied is one "required for the operation of [Keating's proposed] . . . facility" within the meaning of section 401(a)(3). In fact, in its original brief before this court, California noted that "Keating [had] applied to [FERC] . . . for a license to operate the Tungstar hydropower project." Brief for Intervenor State of California at 3 (emphasis added).

[**3]

During the proceedings before the agency, in their original briefs and at oral argument before this court, neither FERC nor California ever disputed Keating's assertion that a Corps dredge-and-fill permit is one for which state certification is required under 401(a)(1), and that such a permit is a "construction" permit within the contemplation of section 401(a)(3). For purposes of this litigation, we accepted these assertions as given. Both FERC and California limited their arguments principally to a claim that state courts have exclusive jurisdiction to review all disputes over state certifications under section 401(a)(1). It was not until the instant petition for rehearing that California raised for the first time a claim that the Corps permit is not a permit "with respect to the construction of a[] facility" within the meaning of the statute. [*626] Because California failed to raise this argument until its petition for rehearing, the argument is waived and we decline to reopen the matter now.

We offer no view on whether, upon proper submission and review, it might be found that a Corps permit is not a "construction" permit within the contemplation of section 401(a)(3). Nothing in our[**4] decisions should be read to foreclose any party from raising this issue as may be appropriate in future litigation.

Joseph M. Keating, Petitioner v. Federal Energy RegulatoryCommission, Respondent, State of California, Ex. Rel. California State WaterResources Control Board, Intervenor
No. 90-1080

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIACIRCUIT

288 U.S. App. D.C. 344; 927 F.2d 616; 1991 U.S. App. LEXIS3582; 21 ELR 20692

January 31, 1991, Argued
March 8, 1991, Decided

SUBSEQUENT HISTORY: [**1] Review Denied May 10, 1991, Reported at: *927 F.2d at 625, 1991 U.S. App. LEXIS 8997.*

PRIOR HISTORY:
On Petition for Review of Orders of the Federal Energy Regulatory Commission.

CORE TERMS: certification, license, revocation, license application, Clean Water Act, nationwide, revoke, water quality, water, federal law, blanket, interstate, purported, notice, environmental, licensing, issuance, Federal Power Act, certification requirement, dredge-and-fill, certifying, originate, requisite, effluent, revoked, matter of federal law, state agency, project-specific, site-specific, satisfying

COUNSEL: Robin L. Rivett, with whom Ronald A. Zumbrun was on the brief, for Petitioner.

Joel M. Cockrell, Attorney, Federal Energy Regulatory Commission, with whom William S. Scherman, General Counsel, and Jerome M. Feit, Solicitor, Federal Energy Regulatory Commission, were on the brief, for Respondent.

Roderick E. Walston, Supervising Deputy Attorney General, was on the brief for Intervenor. Clifford T. Lee, also entered an appearance, for Intervenor.

JUDGES: Mikva, Chief Judge, Edwards and Thomas, Circuit Judges. Opinion for the Court filed by Circuit Judge Edwards.

OPINIONBY: EDWARDS

OPINION: [*618] EDWARDS, Circuit Judge.

The petitioner in this case, Joseph M. Keating, challenges a decision by the Federal Energy Regulatory Commission ("FERC") dismissing his application for a license to construct and operate a hydroelectric power plant. In rejecting the petitioner's license application, FERC ruled that Keating did not have the necessary state certification covering water quality standards for the project as required by the Clean Water Act. See *33 U.S.C. § 1341*(a)(1) (1988). n1

n1

(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 in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed

one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

*33 U.S.C. § 1341*(a)(1) (1988).

[**2]

Keating contends that he obtained the requisite certification from the State of California in the course of procuring an earlier permit with respect to the same project from the Army Corps of Engineers ("the Corps"); the state, however, claims to have revoked that earlier certification. Keating now argues that, under the express terms of *33 U.S.C. § 1341*(a)(3) (1988), n2 California's purported revocation is invalid as a matter of federal law and that FERC is bound by the Clean Water Act to recognize the continuing validity of the state's earlier certification. In reply, FERC insists that it is powerless to apply the standards of section 1341(a)(3) and that Keating's only recourse for contesting the validity of California's asserted revocation is in the California state courts.

n2

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

*33 U.S.C. § 1341*(a)(3) (1988).

[**3]

We can find no merit in FERC's position; we therefore grant the petition for review. We agree that section 1341(a)(3) of the Clean Water Act expressly controls the validity of California's attempted withdrawal of its prior certification. Because this provision requires an application of federal law, in connection with a matter that is within the clear compass of FERC's jurisdiction, we hold that FERC is obligated to apply the controlling federal law in considering [*619] Keating's present request for a license. Accordingly, we remand the case to the agency with instructions to reinstate Keating's application and to consider whether California's attempted revocation is valid.

## I. BACKGROUND

Joseph Keating desires to build a small hydroelectric power plant, called the Tungstar project, on the Morgan and Upper Pine Creeks in Inyo County, California. Under section 4(e) of the Federal Power Act, Keating is required to obtain a license from FERC authorizing construction and operation of the proposed facility. See *16 U.S.C. § 797*(e) (1988). Because construction of the plant would require the placement of dredged or fill material into the creeks, Keating was also required, by section 404 of the[**4] Clean Water Act, *33 U.S.C. § 1344* (1988), to obtain a dredge-and-fill permit from the Army Corps of Engineers.

The licensing authority of both FERC and the Corps, however, is contingent upon compliance with a provision of the Clean Water Act, section 401(a)(1), which requires prior state environmental approval of proposed water projects. See *33 U.S.C. § 1341*(a)(1) (1988), reprinted at note 1 supra.

Both a section 4(e) (FERC) license and a section 404 (Corps) permit fall within the terms of "a Federal license

or permit" subject to the state certification requirement under section 401. See *33 C.F.R. §§ 325.1(d)(4)*, 330.9(a), 336.1(a)(1), (b)(8) (1990) (Corps section 404 permit must be supported by section 401 state certification); *18 C.F.R. § 4.38(a)* & (c)(2) (1990) (applicant for FERC license under section 4(e) must produce proof of section 401 certification or waiver); *City of Fredericksburg, Va. v. FERC, 876 F.2d 1109, 1111 (4th Cir. 1989)* (section 4(e) license applicant must obtain state certification under section 401). Without such state certification, neither the FERC license nor the Corps permit may be issued. See *33 U.S.C. § 1341*(a)(1) (1988) ("No [federal] [**5] license or permit shall be granted until the certification required by this section has been obtained or has been waived . . . .").

On June 23, 1986, Keating filed a request for state certification of his proposed Tungstar project with the Lahontan Regional Water Quality Control Board ("the Regional Board"), a division of the California State Water Resources Control Board. Three months later, on September 30, 1986, he submitted an application to FERC for a section 4(e) license.

While his applications before FERC and the California Regional Board were pending, Keating also sought a dredge-and-fill permit from the Army Corps of Engineers under section 404. The Corps authorizes dredge-and-fill operations in one of two ways: either with a permit that extends only to a given project, based upon a site-specific review of the particular activities proposed there; or, for certain classes of activities that "will cause only minimal adverse environmental effects," with a general permit, customarily known as a "nationwide permit." See *33 U.S.C. § 1344*(e)(1) (1988); 33 C.F.R. Part 330 (1990). See generally *United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989).* A nationwide[**6] permit authorizes any party to engage in the sort of activity described in the permit without the need to seek prior project-specific authorization. See *id. at 98-99; Riverside Irr. Dist. v. Andrews, 758 F.2d 508, 511 (10th Cir. 1985); Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 909-10 (5th Cir. 1984);* see also *33 C.F.R. § 320.1(c)* (1990) ("If an activity is covered by a general permit, an application for a . . . [Corps] permit does not have to be made. In such cases, a person must only comply with the conditions contained in the general permit to satisfy requirements of law for a . . . [Corps] permit.").

Regardless of which route is followed, however, the Corps cannot issue a permit under section 404 without first obtaining state certification pursuant to section 401 from the state in which the activity is to take place. See *33 C.F.R. §§ 330.9(a)*, 336.1(b)(8) (1990); *Marathon Development, 867 F.2d at 100* ("The state certification requirement of section 401 applies to section 404(e) nationwide permits in the same way that it applies to any other section 404 permit."); *Friends of the Earth v. United States Navy, 841 F.2d 927, 929-30 (9th Cir. 1988).* At about[**7] the same time that Keating was seeking a site-specific state certification for his Tungstar project, the Corps sought state certification in connection with 26 nationwide permits covering a range of modest construction, navigational and similar activities. See *33 C.F.R. § 330.5* (1990) (listing nationwide permits). On October 31, 1986, the California State Water Resources Control Board ("the State Board") - the parent agency of the Regional Board then considering Keating's project - granted a blanket state certification [*620] authorizing the activities set out in all 26 Corps nationwide permits. See State Water Resources Control Board, 1986 Amended Decision (Oct. 31, 1986), reprinted in Appendix ("App.") Tab 3. The State Board's certification included a number of conditions concerning particular regions in the state, none of which were relevant to Keating's project, and claimed to reserve "discretionary authority to revoke certification, or set additional conditions of certification, for such permits on a case-by-case basis." Id. Based on this certification, the Corps issued final permits on January 12, 1987.

Keating's Tungstar project is covered by the last of the general[**8] permits issued by the Corps. On October 11, 1987, Keating wrote to the Los Angeles District of the Corps, seeking confirmation that his proposed Tungstar project fell within the scope of the nationwide permit. On November 18, 1987, the Corps replied, agreeing that Keating's project was authorized by the Corps' Nationwide Permit No. 26. See Letter from Clifford Rader, U.S. Army Corps of Engineers, to Joseph Keating (Nov. 18, 1987) (citing *33 C.F.R. § 330.5(a)(26)* (Nationwide Permit No. 26)), reprinted in App. Tab 7. "As long as you comply with the nationwide permit conditions," the Corps letter stated, "an individual permit is not required." Id. (citation omitted).

Although it is undisputed that Keating had a Corps section 404 permit for his project, and that this permit was granted with the requisite state certification, he nonetheless ran into difficulties in connection with his application for a section 4(e) license from FERC. Under section 401(a)(3) of the Clean Water Act, absent other valid objections, FERC was obliged to accept the certification underlying the Corps permit as satisfying the state certification requirement with respect to Keating's section 4(e) license[**9] application. See *33 U.S.C. § 1341*(a)(3) (1988). However, on April 30, 1987, the California Regional Board, which had continued to review Keating's application for certification specific to the Tungstar site, denied Keating's request without prejudice because Keating allegedly had failed to submit

all environmental documentation required by state law. See Letter from James L. Easton, Exec. Dir., State Water Resources Control Board, to Joseph M. Keating (Apr. 30, 1987), reprinted in App. Tab 4. Upon learning of this situation, officials at FERC apparently believed that they were faced with conflicting signals from the State of California concerning whether Keating had the requisite state certification to support his section 4(e) license application. On the one hand, the State Board had certified that projects satisfying the criteria spelled out in the Corps' Nationwide Permit No. 26 would conform with state water quality standards, and the Corps had subsequently confirmed that Keating's project fell within the scope of that permit. On the other hand, the Regional Board had later denied Keating's site-specific request for certification on grounds of inadequate environmental[**10] data.

In light of these arguably inconsistent pronouncements, FERC sought clarification from the State of California regarding certification of the Tungstar project. Specifically, FERC asked the State Board whether the Regional Board's project-specific denial of certification for the Tungstar project in April 1987 purported to revoke the State Board's October 1986 blanket certification of projects, like Keating's, satisfying the Corps' nationwide permit criteria. See *Joseph Martin Keating, 45 F.E.R.C. (CCH) P 61,112, at 61,351* (Oct. 27, 1988) (order on motion for expedited action on license application), reprinted in App. 10. The State Board responded on December 9, 1988, confirming that the Regional Board's action vitiated the state's earlier certification given in connection with the Corps nationwide permits. The State Board explained that it had never intended by its blanket Corps certification to certify any individual projects for purposes of a later federal power license and that if "certification of Nationwide Permits applies to applications for hydropower licenses under the Federal Power Act, that certification was revoked as applied to the Tungstar project." [**11] See California State Water Resources Control Board Response to Request for Advice Regarding the Status of State Water Quality Certification Under Section 401 of the Clean Water Act for the Tungstar Project 3 (Dec. 9, 1988), reprinted in App. Tab 11.

On the basis of the state's reply, FERC held itself powerless to act on Keating's application. "In light of the Board's December 12, 1988[,] filing," FERC wrote, "it has not been shown that the Tungstar Project has water quality certification." See *Joseph Martin Keating, 47 F.E.R.C. (CCH) P 61,170, at 61,554* (May 2, 1989) (order denying motion for expedited action on license application), reprinted in App. Tab 1. Accordingly, the agency suspended [*621]consideration of Keating's license application until Keating could produce an unclouded state certification. Id.

In his petition for rehearing, Keating objected vigorously to FERC's acceptance of California's decision to revoke the certification Keating claimed to hold under the state's 1986 blanket approval of the Corps' nationwide permits. Keating argued that section 401(a)(3) of the Clean Water Act, *33 U.S.C. § 1341*(a)(3) (1988), limits the power of a state to revoke a[**12] prior certification once a federal license or permit - such as a Corps section 404 permit - has been issued on the basis of that certification. California's attempted revocation, Keating continued, was invalid by the terms of that federal law and FERC was therefore obligated to treat California's original certification of his project as valid for purposes of his subsequent section 4(e) license application.

In reply, FERC refused Keating's demand that it review the validity of California's purported revocation. The agency contended that "[a] review of the case law on section 401 of [the Clean Water Act] . . . indicates that the issue of whether a state certifying agency has legally revoked validly issued project-specific or blanket water quality certification is reviewable in the state courts, not by this Commission." See *Joseph Martin Keating, 49 F.E.R.C. (CCH) P 61,343, at 62,229* (Dec. 18, 1989) (order denying rehearing) ("Rehearing Order"), reprinted in App. Tab 2. The Commission acknowledged Keating's argument that federal law governed the validity of California's action, but held nonetheless that Keating's only recourse was a challenge in the state courts. As [**13] the Commission later explained in response to Keating's arguments concerning the controlling effect of section 401(a)(3) of the Clean Water Act, "whatever may be the validity of these contentions, the Commission's position here is that they must be raised and decided by the state agency and thereafter, if necessary, reviewed in state court." See Brief for Respondent Federal Energy Regulatory Commission at 21, *Keating v. FERC, 288 U.S. App. D.C. 344, 927 F.2d 616 (D.C. Cir. 1991).*

Because Keating refused to pursue any such state remedies, FERC dismissed his license application. See *Rehearing Order, 49 F.E.R.C. at 62,231.* Keating then filed this petition for judicial review.

## II. ANALYSIS

### A. This Court's Authority and the Issue on Appeal

In section 4(e) of the Federal Power Act, Congress delegated to the Federal Power Commission, now the Federal Energy Regulatory Commission, the authority to

issue licenses for the construction and operation of hydroelectric facilities. *16 U.S.C. § 797*(e) (1988). We have jurisdiction to review FERC's final order dismissing Keating's application under section 313(b) of the Federal Power Act. *16 U.S.C. § 825l*(b) (1988).

The dispute between Keating and [**14] the Commission is relatively narrow: whether the blanket certification issued by California in October 1986 continues in effect for Keating's Tungstar project or whether California's claimed revocation of that approval in April 1987 effectively blocks the issuance of the FERC license. It is clear on these facts that the resolution of this dispute is controlled by a provision of federal law, section 401(a)(3) of the Clean Water Act. The only question remaining is who must apply that provision -- FERC or the state courts.

At first blush, the record in this case suggested that state and federal authorities had overlapping, and seemingly conflicting, authority in connection with Keating's section 4(e) license application. Thus, it appeared that this case might pose an impossible dilemma with respect to the jurisdiction of federal and state agencies to enforce the Clean Water Act. Upon careful consideration, however, the facts at hand are relatively straightforward and the applicable legal standards are not unclear.

At bottom, this case strictly concerns an application of section 401(a)(3) of the Clean Water Act. See note 2 supra. The Army Corps of Engineers first received state [**15] certification under section 401 for its section 404(e) nationwide permits. The Corps then issued permits, one of which covered Keating's project. The Corps deemed the state certification underlying its permits to be final and unqualified, at least insofar as Keating's project was concerned. See note 4 infra. Thus, the state certification underlying the Corps permit should have been sufficient under section 401(a)(3) to support Keating's application for a section 4(e) license from FERC. Under section 401(a)(3), the only way that FERC could reject the prior certification as [*622] insufficient to support the section 4(e) license application was upon a finding that the State of California, within 60 days after proper notice, gave notice to FERC that there was "no longer reasonable assurance that [Keating would comply with the applicable water quality standards] . . . because of changes since the [issuance of California's 1986 blanket certification] . . . in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other [**16]requirements." *33 U.S.C. § 1341*(a)(3) (1988). In other words, a state may revoke a prior certification that might otherwise support a subsequent license application, but only pursuant to the terms of, and for the reasons indicated in, section 401(a)(3).

Thus, this case boils down to an analysis of whether FERC was justified in refusing to recognize the state certification underlying the Corps permit as valid and sufficient for purposes of Keating's subsequent application for a section 4(e) license. Stated alternatively, the question before us focuses on FERC's authority to decide whether the state's purported revocation of its prior certification satisfied the terms of section 401(a)(3). We have no doubt that the question posed is a matter of federal law, and that it is one for FERC to decide in the first instance.

B. The Statutory Framework

In designing the Clean Water Act, Congress plainly intended an integration of both state and federal authority. Although federal licenses are required for most activities that will affect water quality, an applicant for such a license must first obtain state approval of the proposed project. See *33 U.S.C. § 1341*(a)(1) (1988). The states[**17] remain, under the Clean Water Act, the "prime bulwark in the effort to abate water pollution," see *United States v. Puerto Rico, 721 F.2d 832, 838 (1st Cir. 1983),* and Congress expressly empowered them to impose and enforce water quality standards that are more stringent than those required by federal law, see *33 U.S.C. § 1370* (1988). At the very outset of the statute, Congress made clear that

it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

*33 U.S.C. § 1251*(b) (1988).

One of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act. Section (a)(1) of that provision says that no federal license or permit may be granted in the absence of the requisite state certification indicating that no state water quality standards will be violated by the proposed project. See *33 U.S.C. § 1341*(a)(1) (1988). [**18] Through this requirement, Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval. See *Marathon Development, 867 F.2d at 99-100;* 2 W. RODGERS, JR., ENVIRONMENTAL

LAW: AIR AND WATER § 4.2, at 26 (1986) ("Section 401 offers a veto power to states with water quality related concerns about licensing activities of the various federal agencies, including the Environmental Protection Agency, Federal Energy Regulatory Commission, Corps of Engineers, and the Nuclear Regulatory Commission.").

There is no doubting that FERC is bound by federal law to refuse a section 4(e) license application that is unsupported by a valid state certification under section 401. See *33 U.S.C. § 1341*(a)(1) (1988); *City of Fredericksburg, 876 F.2d at 1111.* Nor do we doubt the propriety of a federal agency's refusal to review the validity of a state's decision to grant or deny a request for certification in the first instance, before any federal license or permit has yet been issued. Such a decision presumably turns on questions of substantive state environmental law - an area that Congress expressly intended[**19] to reserve to the states and concerning which federal agencies have little competence. It is for these reasons that a number of courts have held that disputes over such matters, at least so long as they precede the issuance of any federal license or permit, are properly left to the states themselves. See *Marathon Development, 867 F.2d at 102; Proffitt v. Rohm & Haas, 850 F.2d 1007, 1009 (3d Cir. 1988)* (dictum); *Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982); Lake Erie Alliance for the Protection of the Coastal Corridor v. United States Army Corps of Eng'rs, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981),* aff'd mem., *707 F.2d 1392* (3d Cir.), cert. denied, *464 U.S. 915, 78 L. Ed. 2d 257, 104 S. Ct. 277 [*623] (1983); Mobil Oil Corp. v. Kelley, 426 F. Supp. 230, 234-36 (S.D. Ala. 1976).*

The certification power of the states under section 401 is not, however, unbounded. Whatever freedom the states may have to impose their own substantive policies in reaching initial certification decisions, the picture changes dramatically once that decision has been made and a federal agency has acted upon it. Thus, under section (a)(3) of section 401, Congress created a presumption[**20] that a state certification issued for purposes of a federal construction permit will be valid for purposes of a second federal license related to the operation of the same facility. n3 A state may overcome that presumption and revoke certification for purposes of the second federal license, but only under limited circumstances expressly defined in the statute. See note 2 supra.

n3 The applicable portion of section 401(a)(3) provides:

> The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, [specified changed circumstances are present] . . . .

*33 U.S.C. § 1341*(a)(3) (1988).

C. Keating's Case

As indicated above, it is obvious that section 401(a)(3) controls the disposition of this case. The Commission did not doubt that[**21] a valid state certification had been granted by California for activities covered by the Corps' nationwide permits. Nor can it be doubted, given that section 401 certification is a predicate to the issuance of any section 404 permit, and that a Corps dredge-and-fill permit is a federal permit "with respect to the construction of a[] facility" within the meaning of section 401(a)(3). It is also significant that the Commission made an express finding that a "Corps section 404 permit for the Tungstar Project [had] . . . issued and [was] . . . final," see *Rehearing Order, 49 F.E.R.C. at 62,230,* a conclusion that has been reinforced by the Corps itself. n4 From these facts, it is clear that section 401(a)(3) governs the validity of California's attempt, after a valid Corps section 404 permit had issued, to revoke its prior certification for purposes of Keating's second federal license application.

n4 Corps officials have indicated that the nationwide permit issued under section 404 remains valid for purposes of Keating's project despite California's attempted revocation of the certification underlying it. See Letter from B.N. Goode, Chief, Regulatory Branch, U.S. Army Corps of Engineers, to John H. Tait (Mar. 10, 1989) ("If a state 'decertifies' a general or individual permit after the Corps has issued the permit in good faith reliance on the original certification, the Corps does not recognize an obligation to revoke the Corps permit but may elect to modify or revoke the permit at its own discretion . . . ."), reprinted in App. Tab 13.

[**22]

The arguably equivocal language used in California's section 401 certification to the Corps does not require a contrary result. We recognize the authority of states to

impose express conditions upon the issuance of a particular certification. When states make compliance with specified conditions a prerequisite to the effectiveness of a certification, the federal Government has been prepared to enforce those conditions. See *Roosevelt Campobello, 684 F.2d at 1055-57; 33 U.S.C. § 1341*(d) (1988); *33 C.F.R. §§ 325.4(a)(1)*, 330.9(a) (1990) (Corps section 404 permits will incorporate conditions specified by states in underlying section 401 certifications). In this case, however, we are confronted not by any such conditions precedent, but rather by the state's claim of a general reservation of discretionary authority to revoke prior blanket certification as to particular projects at any time and apparently for any reason. Such a broad reservation of authority cannot be squared with Congress' purpose in section 401(a)(3). The statute allows a state to revoke a prior certification only within a specified time limit and only pursuant to certain defined circumstances; if a state could revoke[**23] a prior certification at any time and for any (or no) reason, however, section 401(a)(3) would be rendered meaningless. Obviously, such a result would make no sense.

It is the applicability of section 401(a)(3) that separates this case from those relied upon by FERC in asserting that the validity of a state's action in connection with certification is a question exclusively for the state courts. It is true that some of those cases suggested broadly that "certification under Section 401 is set up as an exclusive prerogative of the state and is not to be reviewed by . . . any agency of the federal government." See *Mobil Oil, 426 F. Supp. at 234*. But, to our knowledge, none of those cases involved a situation in which a state sought to revoke certification after a federal agency had already issued a [*624] permit based upon the state's earlier approval - i.e., the scenario contemplated by section 401(a)(3). In Mobil Oil, for instance, upon which FERC relies heavily, a state agency granted section 401(a)(1) certification to a project for purposes of a Corps of Engineers drilling permit and then revoked that certification before the Corps had acted upon the application. Because[**24] no federal permit had yet been issued, section 401(a)(3) had no application and the court found no federal law purporting to control the state's action. The court's decision in that context to abstain from intervening in the state's certification decision in no way suggests, however, that this court should follow suit, given that a Corps permit has already issued in Keating's case and that section 401(a)(3) clearly applies.

D. Applying Section 401(a)(3)

As we have suggested, section 401(a)(3) permits state revocation of prior certification only if certain conditions are met. The first is timeliness: the state must notify the relevant federal licensing agency of its intention to revoke within 60 days of the time it is itself notified that a new license application is pending. The second is that the revocation be driven by some change in circumstances "since the construction license or permit certification was issued." See *33 U.S.C. § 1341*(a)(3) (1988). If either of these conditions is not met -- if the state's decision comes too late or if it is not pursuant to changed circumstances -- then the attempted revocation is invalid as a matter of federal law and no further inquiry[**25] is needed.

There can be no serious claim that FERC is without any authority to consider the validity of a state's purported revocation of a prior certification under section 401(a)(3). At a minimum, FERC must find that the purported revocation is timely and that the state's action was assertedly taken in response to changed circumstances pursuant to section 401(a)(3). In this case, there is no claim that the state's objection to FERC was untimely, n5 but neither is there any suggestion that the state's purported revocation came "because of changes since the [Corps] . . . permit certification was issued." *33 U.S.C. § 1341*(a)(3) (1988) (emphasis added). This is a matter that FERC must consider on remand.

n5 In fact, it is unclear whether the state was ever given the official federal notice that is contemplated under section 401(a)(3). The 60-day time limit for state objection set out in that section is not triggered until the state receives notice from the second federal licensing authority that there is a pending license application premised upon the state's earlier certification. Thus, in assessing the timeliness of California's asserted revocation on remand, FERC must first determine whether and when it notified the state of Keating's section 4(e) license application.

[**26]

If FERC finds that the state's revocation was both timely and assertedly because of changed circumstances, then the question will arise whether the motivating change in circumstance falls within one of the four categories specified in section 401(a)(3). n6 FERC has suggested, without any good explanation, that Keating's sole recourse for resolution of this question is before a state agency or a state court. We recognize that, in certain cases, the resolution of a disputed claim over "changed circumstances" under section 401(a)(3) may involve a question of state law or an application of state water quality standards, neither of which is within the expertise or normal jurisdiction of FERC. In such a situation, we could hardly doubt the wisdom of FERC's

declination of jurisdiction to resolve the section 401(a)(3) question. However, other cases might arise regarding claims of "changed circumstances" under section 401(a)(3) that easily can be resolved by FERC, without resort to consideration of state law or the applicable water quality standards.

n6 The motivating change in circumstances must be related to:

(A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or
(D) applicable effluent limitations or other requirements.
*33 U.S.C. § 1341*(a)(3) (1988).

[**27]

FERC has been too quick to assume that it has no role to play in the application of section 401(a)(3). It is true that the state, alone, decides whether to certify under section 401(a)(1). The issue under section 401(a)(3), however, involves a different question, i.e., one going to the authority of a federal agency to issue a federal permit or license once the state has already issued a certification. A state can affect federal authority under section 401(a)(3) only to the extent therein indicated. Thus, the application of section 401(a)(3) involves a federal question that, absent satisfactory explanation, presumably must be resolved by the applicable federal licensing authority and the federal courts. Cf. New Orleans Pub. [*625] *Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 109 S. Ct. 2506, 2512-13, 105 L. Ed. 2d 298 (1989)* ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. . . . The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.") [**28] (inner quotation marks and citations omitted).

In any event, FERC has given no adequate explanation in this case for its refusal to apply section 401(a)(3). We offer no final judgment on this question, save to say that FERC must at least decide whether the state's assertion of revocation satisfies section 401(a)(3)'s predicate requirements - i.e., whether it is timely and motivated by some change in circumstances after the certification was issued. Beyond that, assuming the predicate requirements are met, we do not decide whether FERC must go on to determine whether the asserted changed circumstance falls within one of section 401(a)(3)'s enumerated categories. FERC must, however, either decide the question itself or articulate a satisfactory explanation for why Congress would have intended to leave the application of some or all of section 401(a)(3)'s categorical provisions to the state courts alone.

## III. CONCLUSION

For the foregoing reasons, the petition for review is granted and the case is remanded to the Commission for further proceedings.

So ordered.

EXHIBIT F

UNITED STATES OF AMERICA, Plaintiff, Respondent, v.COMMONWEALTH OF PUERTO RICO and ENVIRONMENTAL QUALITY BOARD, Defendants,Petitioners
No. 83-1046

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

721 F.2d 832; 1983 U.S. App. LEXIS 16139; 20 ERC (BNA) 1189;14 ELR 20003

October 11, 1983, Decided

PRIOR HISTORY: [**1]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan R. Torruella, U.S. District Judge].

DISPOSITION: Affirmed

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff U.S. Navy sought to set aside a decision of defendant Commonwealth of Puerto Rico's Environmental Quality Board (EQB), which denied the Navy a water quality certificate. The United States District Court for the District of Puerto Rico denied the commonwealth's motion to dismiss for want of subject matter jurisdiction. The commonwealth petitioned for interlocutory appellate review.

OVERVIEW: The commonwealth argued that *33 U.S.C.S. § 1323*(a) required federal facilities to be treated no differently than non-federal facilities and that, just as a private-sector proprietor could not contest an adverse EQB decision in the federal district court, the Navy could not do so. The court held that the district judge correctly denied the commonwealth's motion to dismiss. Federal facilities were required to achieve certification, pursuant to *33 U.S.C.S. § 1341*(a)(1), in order to obtain National Pollution Discharge Elimination System (NPDES) permits, which required the Navy to obtain its certificate from the EQB before dumping pollutants into waters off Vieques Island. When the EQB denied the request, the Navy properly filed suit in federal district court, pursuant to *33 U.S.C.S. § 1345,* because the later *33 U.S.C.S. § 1323*(a) did not impliedly repeal *33 U.S.C.S. § 1345*'s jurisdictional dictates, and the state policies at issue did not serve a sufficiently important countervailing interest to justify abstention by the federal courts in matters pertaining to NPDES permits. Because abstention was interdicted at the enforcement stage, it was illogical to apply it at an earlier stage.

OUTCOME: The denial of the commonwealth's motion to dismiss was affirmed, and the case was remanded to the district court for further proceedings.

CORE TERMS: certification, water, removal, pollution control, state law, federal government, pollution, certificate, repeal, non-federal, instrumentality, legislative history, issue presented, anent, irreconcilable conflict, federal jurisdiction, federal judiciary, implied repeal, water quality, state water, administratively, abstention, pollutant, manifest, amici, P.R. Laws, air pollution, abatement, Clean Air Act, substantial evidence

CORE CONCEPTS -

Environmental Law: Litigation & Administrative Proceedings: Jurisdiction & Procedure
Environmental Law: Water Quality
The linchpin of the Federal Water Pollution Control Act (FWPCA), P.L. 92-500, 86 Stat. 816, is the National Pollution Discharge Elimination System (NPDES) permit process. Such a permit is required for the discharge of any pollutant into any body of water covered by the FWPCA. *33 U.S.C.S. § 1342*(a)(1). To secure a NPDES permit, an applicant must obtain a certificate from the appropriate state agency validating compliance with both federal and state water pollution control standards. *33 U.S.C.S. § 1341*(a)(1). Failure to procure such certification prevents the applicant from receiving its permit; and a state decision denying certification, or one imposing conditions or restrictions, is not reviewable administratively by the Environmental Protection Agency. In the case of applications by non-federal agencies, such a decision is likewise exempt from review in federal court.

Environmental Law: Litigation & Administrative Proceedings: Judicial Review
Environmental Law: Water Quality
The Environmental Quality Board is the Puerto Rican agency charged with the responsibility of issuing certificates for the purpose obtaining a National Pollution Discharge Elimination System permit, and its decisions are, in the normal course, appealable to the commonwealth's superior court. 12 P.R. Laws Ann. § 1134(d)(2).

Environmental Law: Water Quality
Governments: State & Territorial Governments: Relations With Governments
A state has the authority to promulgate water pollution control standards which are stricter than those mandated by the federal government. Puerto Rico is considered as a "state" for purposes of the Federal Water Pollution Control Act, P.L. 92-500, 86 Stat. 816, *33 U.S.C.S. § 1362*(3), and thereby enjoys the power to fix such standards.

Environmental Law: Water Quality
Civil Procedure: Jurisdiction: Jurisdictional Sources
See *33 U.S.C.S. 1323*(a).

Environmental Law: Litigation & Administrative Proceedings: Judicial Review
Environmental Law: Water Quality

*33 U.S.C.S. § 1323* cedes to the President of the United States authority to grant exemptions from the Federal Water Pollution Control Act (FWPCA), P.L. 92-500, 86 Stat. 816, for military operations. Despite the carving-out of this national security escape hatch, no such exemption has ever been sought with reference to the Navy's training exercises at Vieques Island, and none has been conferred. In the absence of executive action, national security considerations can play no role in a court's assessment of an appeal of a judgment under the FWPCA.

Constitutional Law: The Judiciary: Jurisdiction
Governments: Federal Government: Claims By & Against
Except as otherwise provided by an act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by an act of Congress. *28 U.S.C.S. § 1345.*

Governments: Legislation: Construction & Interpretation
Governments: Legislation: Suspension, Expiration & Repeal
Implied repeals are not lightly to be indulged. Statutes should be read consistently when possible. There are two recognized categories of repeals by implication: (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest.

Civil Procedure: Preclusion & Effect of Judgments: Full Faith & Credit
See *28 U.S.C.S. § 1738.*

Environmental Law: Air Quality
Federal compliance under the Clean Air Act, *42 U.S.C.S. §§ 7401*-642, is dictated by *42 U.S.C.S. § 7418*(a).

Environmental Law: Air Quality
Civil Procedure: Jurisdiction: Jurisdictional Sources
See *42 U.S.C.S. § 7418*(a).

Civil Procedure: State & Federal Interrelationships: Amendment 11
Environmental Law: Water Quality
The goal of *33 U.S.C.S. § 1323*(a) is to insure that federal facilities comply fully with apposite state laws and regulations, recognizing that the states are the prime bulwark in the effort to abate water pollution. *33 U.S.C.S. § 1251*(b). But state court adjudication of the denial of National Pollution Discharge Elimination System certificates pursuant to *33 U.S.C.S. § 1341*(a)(1) is not so critical to the teleology of federal compliance that the dictates of *28 U.S.C.S.§ 1345* must be overridden. Laying *28 U.S.C.S. § 1345* and *33 U.S.C.S. § 1323*(a) side by side fails to reveal any inherent contradictions.

Environmental Law: Water Quality
Governments. Legislation: Construction & Interpretation
The court's concern is consistent application of a system of statutes conferring original federal court jurisdiction. Consentient with established principles of statutory construction and with prior case law, there is no legally sufficient basis to presume that *33 U.S.C.S. § 1323*(a) is designed to preempt the provisions of the judiciary code or to supplant *28 U.S.C.S. § 1345* as to water pollution control matters. State court adjudication is not needed to promote federal compliance under the Clean Water Act of 1977, *33 U.S.C.S. §§ 1251*-1376. Accordingly, there is no irreconcilable conflict between *33 U.S.C.S. § 1323*(a) and *28 U.S.C.S. § 1345.*

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JUDGES: Coffin and Breyer, Circuit Judges, and Selya, * District Judge.

* Of the District of Rhode Island, sitting by designation.

OPINIONBY: SELYA

OPINION: [*833] SELYA, District Judge.

The United States, on behalf of the Navy, instituted this action in the district court against the Commonwealth of Puerto Rico and its Environmental Quality Board ("EQB"), seeking to set aside a decision of the EQB denying a water quality certification

request. The defendants (hereinafter collectively "Puerto Rico" or "the Commonwealth") moved to dismiss the case for want of subject matter jurisdiction, asseverating that the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended at *33 U.S.C. §§ 1251*-1376) ("CWA") requires the issues raised in the complaint to be adjudicated in the courts of the Commonwealth. In a[**3] reported opinion, *United States v. Puerto Rico, 551 F. Supp. 864 (D.P.R. 1982),* the court below denied the motion, but suggested certification of the issue presented as one justifying interlocutory appellate review. The parties concurred in this suggestion, and an appropriate order was entered below. We granted leave to appeal pursuant to *28 U.S.C. § 1292*(b), and now affirm.

I.

The underlying facts giving rise to this action have been set forth in detail in our opinion in a predecessor case, *Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981),* rev'd in part sub nom. *Weinberger v. Romero-Barcelo, 456 U.S. 305, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982),* and it would be pleonastic to repeat them here. A decurtate recital of certain crucial facts is, however, useful in setting the stage upon which the instant confrontation was played out in the district court.

Vieques Island lies off the southeast coast of Puerto Rico; over three-fourths of the island is owned by the United States Navy. The Navy uses both the island and its surrounding coastal waters to stage training exercises, some of which involve[**4] live ammunition weapons fire. Puerto Rico originally brought suit to enjoin the conduct of such activities. In so doing, the Commonwealth argued, inter alia, that the dropping of ordnance into coastal waters without a National Pollution Discharge Elimination System ("NPDES") permit violated the CWA. In Romero-Barcelo, the Supreme Court affirmed our ruling that the CWA was applicable to the ongoing naval operations and that a NPDES permit should have been sought *(643 F.2d at 861-62),* though the Court reversed our decision pertaining to the need for interim injunctive relief pending the obtaining of such a permit. *Weinberger v. Romero-Barcelo, 456 U.S. at 320.*

While Romero-Barcelo was pending, the Navy commenced efforts to comply administratively with the strictures of the CWA, and in the course thereof filed for a NPDES permit. After receipt of the application, the United States Environmental Protection Agency ("EPA") requested the EQB, pursuant to *33 U.S.C. § 1341,* to issue a water quality certificate (such a certificate being a condition precedent to the EPA's issuance of a NPDES permit). *33 U.S.C. § 1341* [**5](a)(1). The EQB refused to act on this request since no environmental impact statement ("EIS") had been filed with respect to the off-shore bombing. A draft EIS was subsequently prepared and circulated by the Navy, and a final EIS was thereafter issued. EPA then renewed its bid for a water quality certificate. The EQB entertained this request, held the requisite public hearing, and eventually denied [*834] certification, citing divers grounds. n1 The Navy's petition for reconsideration was summarily denied by the EQB, and the instant action thereupon ensued.

n1 In substance, the EQB concluded that the discharges violated both the Puerto Rico Public Policy Environmental Act, P.R. Laws Ann. Tit. 12, § 1121 et seq. and the CWA; that no effective monitoring system could be devised to verify compliance with any restrictions set by the EQB; and that the evidence adduced was insufficient to establish a reasonable likelihood of compliance with Puerto Rico's Water Quality Standards. See Resolution and Notification of EQB (Dec. 2, 1981), at 16-17.

[**6]

II.

Putting the novel issue presented for our consideration in proper perspective necessitates, at the outset, both an explication of the relevant statutory mosaic and perlustration of the proceedings below within that statutory frame of reference.

In order to protect and enhance the quality of the nation's water resources, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816 (1972) ("FWPCA"). The FWPCA, erected on the foundation of the Federal Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965), was a bold and sweeping legislative initiative. Experience with the FWPCA during its embryonic years led to substantial amendment, evidenced most notably by the enactment in 1977 of the CWA. n2 The linchpin of the Act is the NPDES permit process. Such a permit is required for the discharge of any pollutant into any body of water covered by the Act. *33 U.S.C. § 1342*(a) (1). To secure a NPDES permit, an applicant must obtain a certificate from the appropriate state agency validating compliance with both federal and state water pollution control standards. n3 *33 U.S.C. § 1341*[**7] (a)(1). Failure to procure such certification prevents the applicant from receiving its permit; and a state decision denying certification, or one imposing conditions or restrictions, is not reviewable administratively by the EPA. *Roosevelt Campobello International Park Commission v. United States Environmental Protection Agency, 684 F.2d 1041, 1056 (1st Cir. 1982)* ("RCIPC I"). At least in the case of applications by non-federal agencies, such a decision is likewise exempt from review in federal court. Id. See also *Shell Oil Co. v. Train, 585 F.2d 408, 414 (9th Cir. 1978).* The EQB is the Puerto Rican agency charged with certification responsibilities, and its decisions are, in the normal course, appealable to the Commonwealth's superior court. P.R. Laws Ann. Tit. 12, § 1134(d)(2).

n2 The FWPCA, as augmented and amended by the CWA, is sometimes referred to herein as "the Act ".

n3 A state has the authority to promulgate water pollution control standards which are stricter than those mandated by the federal government. *Commonwealth Edison v. Train, 649 F.2d 481, 486 (7th Cir. 1980);* see *33 U.S.C. § 1370.* Puerto Rico is

considered as a "state" for purposes of the Act. *33 U.S.C. § 1362*(3), and thereby enjoys the power to fix such standards.

[**8]

Some four years after passage of the FWPCA, the Supreme Court, in *EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (1976),* ruled that federal facilities need not comply with state standards or pollution control requirements. *Id. at 227-28;* cf. *Hancock v. Train, 426 U.S. 167, 198-99, 48 L. Ed. 2d 555, 96 S. Ct. 2006 (1976)* (rationale of EPA v. California applied to the Clean Air Act). Congress, plainly disenchanted with this pronouncement, the following year enacted *33 U.S.C. § 1323*(a) as a part of the CWA. This provision provides in pertinent part:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, [**9] [*835] and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such [**10]proceeding may be removed in accordance with section 1441 et seq. of Title 28. n4 (Emphasis added).

The net effect of this statute was to reverse legislatively the Court's ruling in *EPA v. California, supra,* and to require that federal facilities achieve certification pursuant to *33 U.S.C. § 1341*(a)(1) in order to obtain NPDES permits.

n4 *33 U.S.C. § 1323* also ceded to the President authority to grant exemptions for, inter alia, military operations. Despite the carving-out of this national security escape hatch, no such exemption has, for aught that appears of record here, ever been sought with reference to the Navy's training exercises at Vieques Island, and none has been conferred. In the absence of executive action, national security considerations,

heretofore sometimes relied on by us in matters related to the much-litigated terrain of Vieques Island, see e.g., *United States v. Zenon, 711 F.2d 476,* slip op. at 835 (1st Cir. 1983), can play no role in our assessment of this appeal.

[**11]

Faced with an unmistakable declaration of congressional intent that federal facilities must comply with state water pollution control requirements, the government sought NPDES certification in the instant case. When the EQB balked at granting such a certificate, the United States, in lieu of appealing that denial to the Commonwealth courts, filed this action in the district court. In doing so, appellee relied on *28 U.S.C. § 1345,* which provides in material part as follows:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

The Commonwealth moved to dismiss on the ground that the enactment of *33 U.S.C. § 1323*(a) satisfied the exception in *28 U.S.C. § 1345,* and thus mandated adjudication of the EQB denial in the Puerto Rico superior court. The district court, as previously noted, denied the motion. On appeal, the Commonwealth raises the same basic contention. In support of its position, [**12] Puerto Rico argues in substance that *33 U.S.C. § 1323*(a) requires federal facilities to be treated no differently than non-federal facilities; and that, just as a private-sector proprietor cannot contest such an EQB decision in the district court, *RCIPC I, 684 F.2d at 1056,* so, too, the United States. In effect, the Commonwealth urges that what is sauce for the non-federal goose is likewise sauce for Uncle Sam's gander.

III.

In order to sharpen the focus of the competing contentions raised by the parties, in a context where no provision of the Act explicitly provides for deflection of *28 U.S.C. § 1345* in CWA cases, it is useful to examine the circumstances under which § 1345 may be deemed to have been abridged by Congress. More particularly, since the heart of the Commonwealth's exhortation is that *33 U.S.C. § 1323*(a) impliedly repeals *28 U.S.C. § 1345* by virtue of its command that all federal facilities must [*836] adhere to state procedural requirements (including, in appellants' view, state forum designations anent the appeal of EQB decisions), the parameters[**13] of the doctrine of implied repeal must be ascertained.

The Supreme Court has recently had occasion to reexamine this doctrine in *Kremer v. Chemical Construction Corp., 456 U.S. 461, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982).* There, the plaintiff alleged that his dismissal from employment violated Title VII of the Civil Rights Act of 1964, as amended, *42 U.S.C. § 2000e,* et seq. ("Title VII"). After unsuccessful pursuit of state employment discrimination claims, both administratively

and in the state courts, the employee brought a Title VII action in the district court. Since the factual predicate of the suit was virtually identical to that upon which the state proceedings had been based, the claim was dismissed on the ground that the federal courts were constrained to give preclusive effect to state court adjudications pursuant to *28 U.S.C. § 1738.* n5 On appeal, the employee expostulated that in enacting Title VII, Congress had, by implication, repealed *28 U.S.C. § 1738* as regards employment discrimination cases. In rejecting this argument, the Supreme Court first reiterated the long-settled[**14] notion that implied repeals are not lightly to be indulged. *Id. at 468;* accord *Radzanower v. Touche Ross & Co., 426 U.S. 148, 154, 48 L. Ed. 2d 540, 96 S. Ct. 1989 (1976); United States v. Brien, 617 F.2d 299, 310* (1st Cir.), cert. denied, *446 U.S. 919, 100 S. Ct. 1854, 64 L. Ed. 2d 273 (1980).* The Court further held that statutes should be read consistently when possible, *Kremer v. Chemical Construction Corp., 456 U.S. at 468;* accord *United States v. Brien, 617 F.2d at 310,* and proceeded to catalogue the two recognized categories of repeals by implication:
(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . . . *Radzanower v. Touche Ross & Co., supra, at 154,* quoting *Posadas v. National City Bank, 296 U.S. 497, 503, [80 L. Ed. 351, 56 S. Ct. 349]*[**15] (1936).

*Kremer v. Chemical Construction Corp., 456 U.S. at 468.* Such an analysis is, of course, wholly appropriate in assaying any claim that the original jurisdiction of the district courts under *28 U.S.C. § 1345* has been truncated by illation, as the Court has acknowledged that such jurisdiction "should not be disturbed by a mere implication flowing from subsequent legislation." *Colorado River Water Conservation District v. United States, 424 U.S. 800, 808, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976).*

n5 *28 U.S.C. § 1738* provides in pertinent part:
Such Acts, records and judicial proceeding or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Applying these guidelines to the case at bar, our task is plain: [**16] we must analyze whether Congress intended *33 U.S.C. § 1323*(a) to act as a substitute for the jurisdictional provisions of the Judiciary Code (especially *28 U.S.C. § 1345);* or in the alternative, whether an schism exists between *33 U.S.C. § 1323*(a) and *28 U.S.C. § 1345.*

IV.

The legislative history of the CWA, in and of itself, provides precious little insight into whether Congress intended the federal compliance provision to be a surrogate for *28 U.S.C. § 1345.* The Senate Report, more concerned with the federal government's failure to serve as an exemplar for pollution control, simply stated:

Section 313 [of the FWPCA] is amended to specify that, as in the case of air pollution, a Federal facility is subject to any Federal, State, and local requirement [*837] respecting the control or abatement of water pollution, both substantive and procedural, to the same extent as any person is subject to these requirements. This includes, but is not limited to, requirements to obtain operating and construction permits, reporting and monitoring requirements, [**17] any provisions for injunctive relief and such sanctions imposed by a court to enforce such relief, and the payment of reasonable service charges.
S. Rep. No. 95-370, 95th Cong., 1st Sess. 67, reprinted in 1977 U.S. Code Cong. & Ad. News 4326, 4392. ("Senate Report").

The Senate-House conference committee added the provision explicitly sanctioning the use of the general removal statutes, *28 U.S.C. §§ 1441*-51, when a federal actor is sued in state court. In making this addition, the conference committee gave no articulated indication of its underlying rationale for so doing, remarking only that:

The conference substitute is essentially the same as the Senate amendment revised to conform with a comparable provision in the Clean Air Act and with the additional requirement that any action or other judicial proceeding to which this provision applies may be removed by the Federal department, agency, instrumentality, officer, agent, or employee to the appropriate district court of the United States.

H. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 93, reprinted in 1977 U.S. Code Cong. & Ad. News 4424, 4468.

It is in the dim light of this[**18] murky backdrop that we must proceed in our effort to divine the congressional will. n6

n6 In fact, given congressional concern over pollution by federal facilities, see Senate Report at 67-68, one could argue persuasively that Congress never considered the possibility that the United States might be a plaintiff in litigation under the state certification procedures. But, even this avails the Commonwealth scant solace, as implied repeal requires the party urging that proposition to demonstrate a "clear and manifest" legislative intention to effect the repeal. *Kremer, 456 U.S. at 468.*

Although the legislative history of the CWA is cryptic at best, that history (see, e.g., id.), as well as our recent decision in *Roosevelt Campobello International Park Commission v. EPA, 711 F.2d 431 (1st Cir. 1983)* ("RCIPC II"), suggests that we examine the comparable provision in the Clean Air Act Amendments of 1977, P.L. No.

95-95, 91 Stat. 685 (1977) (codified as amended at [**19] *42 U.S.C. §§ 7401*-642) ("CAA") and its antecedents.

Federal compliance under the CAA is dictated by *42 U.S.C. § 7418*(a), which provides:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. [**20] This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

This provision is substantially identical to *33 U.S.C. § 1323*(a), with one glaring exception: the removal language is missing. While the legislative history of the CAA, like that of the CWA, does not address [*838] whether the provision requiring federal compliance is intended as a substitute for any provision of the Judiciary Code (much less *28 U.S.C. § 1345),* the House report on the CAA does point out that the same federal compliance provision also amends the citizen suit provision of the CAA (now codified at *42 U.S.C. 7604*(e)) explicitly to bar removal of cases by the federal government. H.R. Rep. No. 294, 95th Cong., 1st Sess. 201, reprinted in 1977 U.S. Code Cong. & Ad. News 1077, 1279-80.

The amendment to the CAA's citizen suit provision is accorded further explication in the Senate-House conference[**21] report. H. Conf. Rep. No. 95-564, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Ad. News 1502. The House bill provided that federal facilities must comply with substantive and procedural aspects of both federal and state law. Id. at 137, 1977 U.S. Code Cong. & Ad. News at 1517. The Senate version was markedly similar but contained language which authorized the use of the removal provisions of the Judiciary Code. Id. at 137, 1977 U.S. Code Cong. & Ad. News at 1518. The conferees, in deleting the Senate's removal provision from the CAA, noted that they intended "by adopting the House amendment, to require compliance with all procedural and substantive requirements, to authorize States to sue Federal facilities in State courts, and to subject such facilities to State sanctions." Id. Again, no reference is made anent the federal government's putative role as a plaintiff.

The records of the Congress are, to a point, instructive. While an unequivocal intention appears to detour around a federal forum in CAA certification cases (at least where the

government is on the defense), and while this intent was definitively memorialized in shaping the CAA, no such road-map is[**22] to be found referable to the CWA. To the contrary, by the insertion of removal language into the CWA -- language which is wholly alien to the CAA as enacted -- Congress seems knowingly to have chosen a different route. And, at a bar minimum, it can be said with considerable assurance that no clear or manifest legislative intent to work a substitution of *33 U.S.C. § 1323*(a) for *28 U.S.C. § 1345* appears in the archives of Congress or in the interstices of the CWA.

V.

In the absence of any such positive manifestation, we must, in adherence to the Kremer test, examine whether an irreconcilable conflict exists between *28 U.S.C. § 1345* and *33 U.S.C. § 1323*(a). If so, the latter, having been enacted later in time, would perforce control.

The goal of *33 U.S.C. § 1323*(a) is to insure that federal facilities comply fully with apposite state laws and regulations, Senate Report at 67, recognizing that the states are the prime bulwark in the effort to abate water pollution. *33 U.S.C. § 1251*(b). But, is state court adjudication of the denial[**23] of NPDES certificates pursuant to *33 U.S.C. § 1341*(a)(1) so critical to the teleology of federal compliance that the dictates of *28 U.S.C. § 1345* must necessarily be overridden? To this question, we must respond in the negative.

We observe, first, that laying the two statutes side by side fails to reveal any inherent contradictions. Compliance with state and local standards -- "requirements, administrative authority, and process and sanctions", in the parlance of *33 U.S.C. § 1323*(a) -- can, it would seem, be enforced as well by the federal courts as by non-federal tribunals. And, sub-part (C) of § 1323(a) specifically contemplates, at least to some entropic extent, enforcement by the federal judiciary.

Moreover, since *33 U.S.C. § 1323*(a) unequivocally grants to the United States the right to remove compliance proceedings brought against it to the district courts, Congress must not have believed that the perficient enforcement of state standards required, ipso facto, a non-federal forum. It would be anomalous indeed, given this scenario, were we to hold that a different rule should [**24]prevail for proceedings of a kindred nature initiated by the government. The result would be a patchwork: precertification compliance on the part of federal facilities being in thrall to the exclusive jurisdiction of the state courts, and postcertification enforcement relative to the same facilities remaining within the reach of federal jurisdiction. n7 Divvying up jurisdiction in such a mindless fashion, while admittedly reminiscent of the precedent proposed by Solomon to resolve conflicting claims of parentage, see 2 Kings, 3:16-28, should not gladly be suffered by the courts in the absence of a firm congressional directive to do so. Cf. *Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 51 U.S.L.W. 4945, 77 L. Ed. 2d 420, 103 S. Ct. 2841 ([*839] 1983)* (federal jurisdiction under ERISA limited to those situations in which it is necessary to effectuate the statute's purposes); *Levy v. Lewis, 635 F.2d 960, 966-67 (2d Cir. 1980)* (special circumstances exist for federal courts to abstain

from deciding breach of ERISA-qualified plans despite the grant of concurrent jurisdiction in federal and state courts for the adjudication[**25] of such claims). Here, the absence of expressed congressional resolve forms a matched pair with the lack of any compelling reason sufficient to justify the extraordinary result urged upon us by the Commonwealth.

n7 Taking appellants' thesis, of course, this crazy-quilt pattern is susceptible to even more bizarre twists, because even certain pre- certification actions, e.g., suits to enforce the Act in the absence of, or for neglect to obtain, certification would, if prosecuted against the United States, be amenable to removal to the district court under *33 U.S.C. § 1323*(a).

In passing the CAA, Congress apparently acted upon the belief that state court adjudication of state law issues was of paramount importance in air pollution control matters; elsewise, Congress would not have consciously foreclosed, at least part-way, the availability of a federal forum. n8 By adopting a removal provision for the CWA, however, Congress signalled precisely the opposite intent. It must have assumed that[**26] the maintenance of litigation anent state water pollution laws in federal courts would not adversely affect federal compliance with such laws. n9 Implicit in this assumption is the recognition that, since state law governs controversies involving NPDES permits, see, e.g., *District of Columbia v. Schramm, 203 U.S. App. D.C. 272, 631 F.2d 854, 863 (D.C. Cir. 1980),* the federal judicial system has the capacity to apply state law in enforcement proceedings. Certainly, assessment of whether or not the determination of an administrative agency is supported by substantial evidence (the criterion established for review of the instant EQB certification denial under P.R. Laws Ann. Tit. 12, § 1134(g)) is not foreign to the wonted responsibilities of the district courts. See, e.g., *5 U.S.C. § 706*(2)(E). And, if the federal courts are capable of interpreting state law so as to effect compliance therewith when the United States is a defendant, we find no reason to doubt that the same ability inheres when the government is a plaintiff. Indeed, the Congress has historically seen fit to entrust state law questions to the tender ministrations of the[**27] federal judiciary in much broader contexts. See *Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).* It is true that we recently noted that the CWA and CAA are ordinarily to be read in pari passu, RCIPC II, slip op. at 14; but this parallelism cannot be taken beyond the frontiers of logic. The case at bar furnishes an excellent example of such an outer limit, given the unique removal language embodied in the CWA and omitted from the CAA.

n8 Carrying the appellee's argument to its logical extreme, the government apparently maintains that, even as to the CAA, the absence of removal language such as graces the CWA does not suffice to oust the district courts from jurisdiction under *28 U.S.C. § 1442.* While this proposition seems at first blush to teeter on shaky ground in the cold light of the legislative history and the commands of *42 U.S.C. § 7604*(e), it is not squarely before us; and we leave it open for a later day.

n9 It is not for us to gauge the wisdom of Congress' judgment on these issues; that is, after all, the prerogative of the electorate. *Munn v. Illinois , 94 U.S. 113, 134, 24 L. Ed. 77 (1876).* See, e.g., *Harris v. McRae, 448 U.S. 297, 326, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980); Maher v. Roe, 432 U.S. 464, 479, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977); Williamson v. Lee Optical Co., 348 U.S. 483, 488, 99 L. Ed. 563, 75 S. Ct. 461 (1955).*

[**28]

VI.

In light of the above, there can be but a single meaningful solution to this jurisdictional tangram. As was true of the Supreme Court in *Franchise Tax Board v. Construction Laborers Vacation Trust, supra,* "Our concern in this case is consistent application of a system of statutes conferring original federal court jurisdiction". *463 U.S. 1, at 27, 103 S. Ct. 2841, , 77 L. Ed. 2d 420, 51 U.S.L.W. at 4952.* Consentient with established principles of statutory construction and with prior case law, there is no legally sufficient basis to presume that *33 U.S.C. § 1323* (a) was designed to preempt the provisions of the Judiciary Code or to supplant *28 U.S.C. § 1345* as to [*840] water pollution control matters. Further, Congress has made and adequately evinced its judgment that state court adjudication is not needed to promote federal compliance under the CWA; n10 accordingly, we can find no irreconcilable conflict between *33 U.S.C. § 1323*(a) and *28 U.S.C. § 1345.* Thus, we give effect to both by permitting the appellee to maintain the instant action[**29] in the district court. The district judge correctly denied the Commonwealth's motion to dismiss.

n10 Appellants raise implicitly (and the amici raise explicitly) the issue of abstention. The amici argue that, even if jurisdiction inheres in the district court in this instance, the federal judiciary should eschew such jurisdiction in order to allow the Puerto Rican courts the opportunity to rule on a thorny issue of state law. Cf. *Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28-29, 3 L. Ed. 2d 1058, 79 S. Ct. 1070 (1959).* The amici also contend that the hand of the district court should be stayed so as not to disrupt the Commonwealth's endeavors to establish a coherent policy anent water pollution control. Cf. *Alabama Pub. Serv. Comm. v. Southern R. Co., 341 U.S. 341, 349-50, 95 L. Ed. 1002, 71 S. Ct. 762 (1951).*

To be sure, the issue presented in this case is of vital significance to the Commonwealth. But, the state policies at issue do not serve a sufficiently important countervailing interest to justify abstention by the federal courts. See *Colorado River Water Conservation Dist. v. United States, 424 U.S. at 813-16.* At bottom, this case does not involve far-reaching and presently unresolved principles of Puerto Rican law;

rather, it calls for a routine determination as to whether or not an administrative body's finding is supported by substantial evidence. The novel and compelling issue presented is one of federal law and federal jurisdiction. This juxtaposition is a far cry from the conundrum limned in *Thibodaux, supra,* regarding the extent of a city's power to condemn the property of a utility; nor does the case at bar implicate matters of strictly local concern. Unlike the availability of intrastate rail service at issue in *Alabama Pub. Serv. Comm., supra,* the goals and methods for controlling water pollution are, in large part, dictated by the federal government. See, e.g., *33 U.S.C. §§ 1251,* 1342, 1370.

It would be anomalous indeed to require the federal courts to abstain from any role in the initial certification process, and yet remain duty-bound to rule on enforcement actions citing the federal government's putative non-compliance with Puerto Rican water pollution control standards. The policies and interests of the Commonwealth are implicated equally at either stage; and, if abstention is interdicted by congressional directive at the latter stage, we find no logic to support a judge-made inhibition at the earlier stage.

[**30]

The case is remanded to the court below for further proceedings consistent with this opinion.

Affirmed.

EXHIBIT G

OHIO FORESTRY ASSOCIATION, INC., PETITIONER v. SIERRA CLUB,ET AL.
No. 97-16

SUPREME COURT OF THE UNITED STATES

523 U.S. 726; 118 S. Ct. 1665; 140 L. Ed. 2d 921; 1998 U.S.LEXIS 3101; 66 U.S.L.W. 4376; 46 ERC (BNA) 1577; 98 Cal. Daily Op. Service 3733;98 Daily Journal DAR 5150; 28 ELR 21119; 1998 Colo. J. C.A.R. 2473; 11 Fla. L.Weekly Fed. S 525

February 25, 1998, Argued
May 18, 1998, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

DISPOSITION: *105 F.3d 248,* vacated and remanded.

CORE TERMS: logging, forest, clearcutting, timber, ripe, tree, site-specific, justiciable, regulations, judicial review, hardship, modify, ripeness, revise, environmental, harvesting, below-cost, lawfulness, acres, site, National Environmental Policy Act, et seq, implemented, withholding, wilderness, recreation, interfere, premature, imminent, concrete

DECISION: Federal suit by environmental organizations who challenged logging provisions of United States Forest Service's land and resource management plan for national forest held not justiciable.

SUMMARY: Pursuant to the National Forest Management Act of 1976 *(16 USCS 1601*-1614) (NFMA), the United States Forest Service was required to develop land and resource management plans for units of the National Forest System. However, in order to authorize any specific logging project, the Forest Service was required, under certain NFMA provisions and regulations, to (1) propose a specific area and the harvesting method to be used, (2) insure that the project was consistent with the land and resource management plan, (3) provide those affected with notice and an opportunity to be heard, (4) conduct an environmental analysis to evaluate the project and to contemplate alternatives, and (5) make a final decision which could be challenged in an administrative appeal and in court. In 1988, the Forest Service adopted a 10-year plan for a 178,000-acre national forest in Ohio. The plan (1) designated 126,000 acres of the forest as areas from which timber could be cut; and (2) projected, based on a ceiling for the total amount of wood that could be cut, that (a) there would be logging on about 8,000 acres, and (b) there would be clearcutting or other forms of "even-aged" tree harvesting on 5,000 of the 8,000 acres. In 1992, after the Forest Service rejected attempts by two environmental advocacy organizations to modify the plan on administrative review, the organizations filed an action in the United States District Court for the Southern District of Ohio against the Forest Service. The organizations alleged that the plan's provisions for logging and clearcutting violated the NFMA and other laws. The District Court, determining that the Forest Service had acted lawfully, granted the Forest Service's motion for summary judgment *(845 F Supp 485, 1994 US Dist LEXIS 2799).* On appeal, the United States Court of Appeals for the Sixth Circuit, reversing and remanding, ruled that (1) the action was justiciable, and (2) the plan improperly favored clearcutting and therefore violated the *NFMA (105 F3d 248, 1997 US App LEXIS 819).*

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Breyer, J., expressing the unanimous view of the court, it was held that the organizations' action was not justiciable, as the dispute between the organizations and the Forest Service was not ripe for court review, because (1) delayed judicial review would not cause significant hardship to the parties, (2) immediate judicial intervention could hinder the Forest Service's efforts to refine its policies through both revision of the plan and application of the plan in practice, (3) the courts would benefit from further factual development of the issues presented, and (4) Congress had not provided for preimplementation judicial review of forest plans.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

; Public Lands 17 ripeness for judicial review -- land management plan -- logging provisions --

Headnote:
An action brought in Federal District Court against the United States Forest Service by environmental advocacy organizations--who alleged that provisions for logging and clearcutting in a land and resource management plan for a national forest, which plan had been adopted by the Forest Service under the National Forest Management Act of 1976 *(16 USCS 1601*-1614) (NFMA), violated the NFMA and other laws--is not justiciable, as the dispute between the organizations and the Forest Service is not ripe for court review, because (1) delayed judicial review will not cause significant hardship to the parties, where (a) the provisions of the plan that the organizations challenge do not create adverse effects of a strictly legal kind, (b) the plan does not inflict significant practical harm on the interests advanced by the organizations, since the organizations will have ample opportunity to bring a legal challenge later--once the Forest Service has met requirements, under the NMFA and regulations for permitting logging, that it (i) focus upon a particular site, (ii) propose a specific harvesting method, (iii) prepare an environmental review, (iv) permit the public an opportunity to be heard, and (v) justify the proposal in court if challenged--when harm is more imminent and more certain, and (c) the organizations do not point to any other way in which the plan can now force them to modify their behavior in order to avoid future adverse consequences; (2) immediate judicial intervention could hinder the Forest Service's efforts to refine its policies through both (a) revision of the plan, such as in response to an appropriate site-specific action that is inconsistent with the plan, and (b) application of the plan in practice, such as in the form of site-specific proposals which are subject to review by a court applying purely legal criteria; (3) the courts would benefit from further factual development of the issues presented, since judicial review of the organizations' claims (a) would have to take place without benefit of the focus that a particular logging proposal could provide, and (b) threatens the kind of abstract disagreements over administrative policies that the ripeness doctrine seeks to avoid; and (4) Congress has not provided for preimplementation judicial review of forest plans, which are unlike agency rules that Congress has specifically instructed courts to review prior to enforcement.

[***HN2]

judicial review -- ripeness --

Headnote:
The ripeness requirement for judicial review of an administrative decision is designed (1) to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and (2) to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

[***HN3]

judicial review -- NEPA violation --

Headnote:
Since the requirement, under the National Environmental Policy Act of 1969 *(42 USCS 4332* et seq.) (NEPA), of preparing an environmental impact statement where a major agency action would significantly affect the environment guarantees a particular procedure, not a particular result, a person with standing who is injured by an agency's failure to comply with the NEPA procedure may complain in a court of that failure at the time the failure takes place, for the claim can never get riper.

[***HN4]

Supreme Court -- failure to raise claim below --

Headnote:
The United States Supreme Court, on certiorari to review a Federal Court of Appeals decision, will not consider claims by environmental advocacy organizations that a land and resource management plan for a national forest--which plan had been adopted by the United States Forest Service under the National Forest Management Act of 1976 *(16 USCS*

*1601*-1614) (NFMA)--would permit certain intrusive activities and preclude certain affirmative measures to promote recreation in the forest, where such claims were raised for the first time in the organizations' brief on the merits in the Supreme Court.

SYLLABUS: Pursuant to the National Forest Management Act of 1976 (NFMA), the United States Forest Service developed a Land and Resource Management Plan (Plan) for Ohio's Wayne National Forest. Although the Plan makes logging in the forest more likely -- it sets logging goals, selects the areas suited to timber production, and determines which probable methods of timber harvest are appropriate -- it does not itself authorize the cutting of any trees. Before the Service can permit logging, the NFMA and applicable regulations require it to: (a) propose a particular site and specific harvesting method, (b) ensure that the project is consistent with the Plan, (c) provide affected parties with notice and an opportunity to be heard, (d) conduct an environmental analysis of the project, and (e) make a final decision to permit logging, which affected persons may challenge in administrative and court appeals. Furthermore, the Service must revise the Plan as appropriate. When the Plan was first proposed, the Sierra Club and another environmental organization (collectively Sierra Club) pursued various administrative remedies to bring about the Plan's modification, and then brought this suit challenging the Plan's lawfulness on the ground that it permits too much logging and too much clearcutting. The District Court granted the Forest Service summary judgment, but the Sixth Circuit reversed. The latter court found the dispute justiciable because, inter alia, it was "ripe for review" and held that the Plan violated the NFMA.

Held: This dispute is not justiciable, because it is not ripe for court review. Pp. 5-12.

(a) In deciding whether an agency decision is ripe, this Court has examined the fitness of the particular issues for judicial decision and the hardship to the parties of withholding review. *Abbott Laboratories v. Gardner, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507.* Such an examination in this case reveals that the relevant factors, taken together, foreclose court review. First, withholding review will not cause the plaintiffs significant "hardship." Ibid. The challenged Plan provisions do not create adverse effects of a strictly legal kind; for example, they do not establish a legal right to cut trees or abolish any legal authority to object to trees being cut. Cf. *United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 309-310, 71 L. Ed. 651, 47 S. Ct. 413.* Nor would delaying review cause the Sierra Club significant practical harm. Given the procedural requirements the Service must observe before it can permit logging, the Sierra Club need not bring its challenge now, but may await a later time when harm is more imminent and certain. Cf. *Abbott Laboratories, 387 U.S. at 152-154.* Nor has the Club pointed to any other way in which the Plan could now force it to modify its behavior to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions. Cf., e.g., *id., at 152-153.* Second, court review now could interfere with the system that Congress specified for the Forest Service to reach logging decisions. From that agency's perspective, immediate review could hinder its efforts to refine its policies through revision of the Plan or application of the Plan in practice. Cf., e.g., *id., at 149.* Here, the possibility that further consideration will actually occur before the Plan is implemented is real, not theoretical. Third, the courts would benefit from further factual development of the issues. See *Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 82, 57 L. Ed. 2d 595, 98 S. Ct. 2620.* Review now would require time-consuming consideration of the details of an elaborate, technically based Plan, which predicts consequences that may affect many different parcels of land in a variety of ways, and which effects themselves may change over time. That review would have to take place without benefit of the focus that particular logging proposals could provide. And, depending upon the agency's future actions to revise the Plan or modify the expected implementation methods, review now may turn out to have been unnecessary. See *FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 242, 66 L. Ed. 2d 416, 101 S. Ct. 488.* Finally, Congress has not specifically provided for preimplementation judicial review of such plans, unlike certain agency rules, cf., e.g., *Lujan v. National Wildlife Federation, 497 U.S. 871, 891, 111 L. Ed. 2d 695, 110 S. Ct. 3177,* and forest plans are unlike environmental impact statements prepared pursuant to the National Environmental Policy Act of 1969 because claims involving such statements can never get any riper. Pp. 5-11.

(b) The Court cannot consider the Sierra Club's argument that the Plan will hurt it immediately in many ways not yet mentioned. That argument makes its first appearance in this Court in the briefs on the merits and is, therefore, not fairly presented. Pp. 11-12.

*105 F.3d 248,* vacated and remanded.

COUNSEL: Malcolm Stewart argued the cause for federal respondents supporting petitioner.

Steven P. Quarles argued the cause for petitioner.

Frederick M. Gittes argued the cause for private respondent.

JUDGES: BREYER, J., delivered the opinion for a unanimous Court.

OPINIONBY: BREYER

OPINION: [***925] [**1668] [*728] JUSTICE BREYER delivered the opinion of the Court.

[***HR1A] The Sierra Club challenges the lawfulness of a federal land and resource management plan adopted by the United States Forest Service for Ohio's Wayne National Forest on[***926] the ground that the plan permits too much logging and too much clearcutting. We conclude that the controversy is not yet ripe for judicial review.

I

The National Forest Management Act of 1976 (NFMA) requires the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 90 Stat. 2949, as renumbered and amended, *16 U.S.C. § 1604*(a). The System itself is vast. It includes 155 national forests, 20 national grasslands, 8 land utilization projects, and other lands that together occupy nearly 300,000 square miles of land located in 44 States, Puerto Rico, and the Virgin Islands. § 1609(a); 36 CFR § 200.1(c)(2) (1997); Office of the [*729] Federal Register, United States Government Manual 135 (1997/1998). The National Forest Service, which manages the System, develops land and resource management plans pursuant to NFMA, and uses these forest plans to "guide all natural resource management activities," 36 CFR § 219.1(b) (1997), including use of the land for "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." *16 U.S.C. § 1604*(e)(1). In developing the plans, the Service must take both environmental and commercial goals into account. See, e.g., § 1604(g); 36 CFR § 219.1(a) (1997).

This case focuses upon a plan that the Forest Service has developed for the Wayne National Forest located in southern Ohio. When the Service wrote the plan, the forest consisted of 178,000 federally owned acres (278 sq. mi.) in three forest units that are interspersed among privately owned lands, some of which the Forest Service plans to acquire over time. See Land and Resource Management Plan, Wayne National Forest, United States Department of Agriculture, Forest Service, Eastern Region (1987) 1-3, 3-1, A-13 to A-17 (hereinafter Plan). The Plan permits logging to take place on 126,000 (197 sq. mi.) of the federally owned acres. Id., at 4-7, 4-180. At the same time, it sets a ceiling on the total amount of wood that can be cut -- a ceiling that amounts to about 75 million board feet over 10 years, and which, the Plan projects, would lead to logging on about 8,000 acres (12.5 sq. mi.) during that decade. Id., at 4-180. According to the Plan, logging on about 5,000 (7.8 sq. mi.) of those 8,000 acres would involve clearcutting, or other forms of what the Forest Service calls "even-aged" tree harvesting. Id., at 3-5, 4-180.

Although the Plan sets logging goals, selects the areas of the forest that are suited to timber production, *16 U.S.C. § 1604*(k), and determines which "probable methods of timber harvest," are appropriate, § 1604(f)(2), it does not itself authorize the cutting of any trees. Before the Forest Service can permit the logging, it must: (a) propose a specific area in [*730] which logging will take place and the harvesting methods to be used, Plan 4-20 to 4-25; *53 Fed. Reg. 26835-26836 (1988);* (b) ensure that the project is consistent with the Plan, *16 U.S.C. § 1604*(i); 36 CFR § 219.10(e) (1997); (c) provide those affected by proposed logging notice and an opportunity to be heard, 106 Stat. 1419 (note following *16 U.S.C. § 1612);* 36 CFR pt. 215, § 217.1(b) (1997); Plan 5-2; (d) [***927]conduct an environmental analysis pursuant to the National [**1669]Environmental Policy Act of 1969 (NEPA), *42 U.S.C. § 4332* et seq.; Plan 4-14, to evaluate the effects of the specific project and to contemplate alternatives, 40 CFR §§ 1502.14, 1508.9(b) (1997), Plan 1-2; and (e) subsequently take a final decision to permit logging, which decision affected persons may challenge in an administrative appeals process and in court, see 106 Stat. 1419-1420 (note following *16 U.S.C. § 1612); 5 U.S.C. § 701* et seq. See also *53 Fed. Reg. 26834-26835 (1988); 58 Fed. Reg. 19370-19371 (1993).* Furthermore, the statute requires the Forest Service to "revise" the Plan "as appropriate" *16 U.S.C. § 1604*(a). Despite the considerable legal distance between the adoption of the Plan and the moment when a tree is cut, the Plan's promulgation nonetheless makes logging more likely in that it is a logging precondition; in its absence logging could not take place. See ibid. (requiring promulgation of forest plans); § 1604(i) (requiring all later forest uses to conform to forest plans).

When the Forest Service first proposed its Plan, the Sierra Club and the Citizens Council on Conservation and Environmental Control each objected. In an effort to bring about the Plan's modification, they (collectively Sierra Club), pursued various administrative remedies. See Administrative Decision of the Chief of the Forest Service (Nov. 14, 1990), Pet. for Cert. 66a; Appeal Decision, Wayne National Forest Land and Resource

Management Plan (Jan. 14, 1992), id., at 78a. The Sierra Club then brought this lawsuit in federal court, initially against the Chief of the Forest Service, the Secretary of Agriculture, the Regional Forester, and the [*731] Forest Supervisor. The Ohio Forestry Association, some of whose members harvest timber from the Wayne National Forest or process wood products obtained from the forest, later intervened as a defendant.

The Sierra Club's Second Amended Complaint sets forth its legal claims. That Complaint initially states facts that describe the Plan in detail and allege that erroneous analysis leads the Plan wrongly to favor logging and clearcutting. Second Amended Complaint PP13-47 (hereinafter Complaint), App. 16-23. The Complaint then sets forth three claims for relief:

The first claim for relief says that the "defendants in approving the plan for the Wayne [National Forest] and in directing or permitting below-cost timber sales accomplished by means of clearcutting" violated various laws including the National Forestry Management Act, the National Environmental Policy Act, and the Administrative Procedure Act. Complaint P49, id., at 24.

The second claim says that the "defendants' actions in directing or permitting below-cost timber sales in the Wayne [National Forest] under the plan violate [their] duties as public trustees." Complaint P52, ibid.

The third claim says that, in selecting the amount of the forest suitable for timber production, the defendants followed regulations that failed properly to identify "economically unsuitable lands." Complaint PP54-58, id., at 25-26. It adds that, because the Forest Service's regulations thereby permitted the Service to place "economically unsuitable lands" in the category of land where logging could take place, the regulations violated[***928] their authorizing statute, NFMA, *16 U.S.C. § 1600* et seq., and were "arbitrary, capricious, an abuse of discretion, and not in accordance with law," pursuant to the Administrative Procedure Act, *5 U.S.C. § 701* et seq. Complaint P60, App. 26.

The Complaint finally requests as relief: (a) a declaration that the plan "is unlawful as are the below-cost timber sales and timbering, including clearcutting, authorized by the [*732] plan," (b) an "injunction prohibiting the defendants from permitting or directing further timber harvest and/or below-cost timber sales" pending plan revision, (c) costs and attorneys fees, and (d) "such other further relief as may be appropriate." Complaint PP(a)-(d), id., at 26-27.

The District Court reviewed the Plan, decided that the Forest Service had acted lawfully in making the various determinations that the Sierra Club had challenged, and granted summary judgment for the Forest Service. *Sierra Club v. Robertson, 845 F. Supp. 485, 503 (SD Ohio 1994).* The Sierra Club appealed. The Court of Appeals for [**1670] the Sixth Circuit held that the dispute was justiciable, finding both that the Sierra Club had standing to bring suit, and that since the suit was "ripe for review," there was no need to wait "until a site-specific action occurs." *Sierra Club v. Thomas, 105 F.3d 248, 250 (1997).* The Court of Appeals disagreed with the District Court about the merits. It held that the Plan improperly favored clearcutting and therefore violated NFMA. *Id., at 251-252.* We granted certiorari to determine whether the dispute about the Plan presents a controversy that is justiciable now, and if so, whether the Plan conforms to the statutory and regulatory requirements for a forest plan.

II

[***HR1B] Petitioner alleges that this suit is nonjusticiable both because the Sierra Club lacks standing to bring this case and because the issues before us -- over the Plan's specifications for logging and clearcutting -- are not yet ripe for adjudication. We find that the dispute is not justiciable, because it is not ripe for court review. Cf. Steel Co. v. *Citizens for a Better Environment, 523 U.S. 83,* , n. 3, *118 S. Ct. 1003, 140 L. Ed. 2d 210, 1998 U.S. LEXIS 1601,* *31 (1998).

[***HR1C] [***HR2] As this Court has previously pointed out, the ripeness requirement is designed

"to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract [*733] disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967).*

In deciding whether an agency's decision is, or is not, ripe for judicial review, the Court has examined both the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Id., at 149.* To do so in this case, we must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts[***929] would benefit from further factual development of the issues presented. These considerations, taken together, foreclose review in the present case.

[***HR1D] First, to "withhold court consideration" at present will not cause the parties significant "hardship" as this Court has come to use that term. Ibid. For one thing, the provisions of the Plan that the Sierra Club challenges do not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm. To paraphrase this Court's language in *United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 309-310, 71 L. Ed. 651, 47 S. Ct. 413 (1927)* (Brandeis, J.), they do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations. Thus, for example, the Plan does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees' being cut.

Nor have we found that the Plan now inflicts significant practical harm upon the interests that the Sierra Club advances -- an important consideration in light of this Court's [*734] modern ripeness cases. See, e.g., Abbott Laboratories, supra, at 152-154. As we have pointed out, before the Forest Service can permit logging, it must focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court. Supra, at 2-3. The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain. Any such later challenge might also include a challenge to the lawfulness of the present Plan if (but only if) the present Plan then matters, i.e., if the Plan plays a causal role with respect to the future, then-imminent, harm from logging. Hence we do not find a strong reason why the Sierra Club must bring its challenge now [**1671] in order to get relief. Cf. Abbott Laboratories, supra, at 152.

Nor has the Sierra Club pointed to any other way in which the Plan could now force it to modify its behavior in order to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions. Cf. Abbott *Laboratories, supra, at 152-153* (finding challenge ripe where plaintiffs must comply with Federal Drug Administration labeling rule at once and incur substantial economic costs or risk later serious criminal and civil penalties for unlawful drug distribution); *Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 417-419, 86 L. Ed. 1563, 62 S. Ct. 1194 (1942)* (finding challenge ripe where plaintiffs must comply with burdensome Federal Communications Commission rule at once or risk later loss of license and consequent serious harm).

The Sierra Club does say that it will be easier, and certainly cheaper, to mount one legal challenge against the Plan now, than to pursue many challenges to each site-specific logging decision to which the Plan might eventually lead. It does not explain, however, why one initial site-specific[***930] victory (if based on the Plan's unlawfulness) could not, through [*735] preclusion principles, effectively carry the day. See *Lujan v. National Wildlife Federation , 497 U.S. 871, 894, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990).* And, in any event, the Court has not considered this kind of litigation cost-saving sufficient by itself to justify review in a case that would otherwise be unripe. The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of -- even repetitive -- post-implementation litigation. See, e.g., ibid. ("The case-by-case approach . . . is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's . . . forests . . . . But this is the traditional, and remains the normal, mode of operation of the courts"); *FTC v. Standard Oil Co., 449 U.S. 232, 244, 66 L. Ed. 2d 416, 101 S. Ct. 488 (1980); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24, 39 L. Ed. 2d 123, 94 S. Ct. 1028 (1974); Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209, 222, 82 L. Ed. 1294, 58 S. Ct. 834 (1938).*

Second, from the agency's perspective, immediate judicial review directed at the lawfulness of logging and clearcutting could hinder agency efforts to refine its policies: (a) through revision of the Plan, e.g., in response to an appropriate proposed site-specific action that is inconsistent with the Plan, see *53 Fed. Reg. 23807, 26836 (1988),* or (b) through application of the Plan in practice, e.g., in the form of site-specific proposals, which proposals are subject to review by a court applying purely legal criteria. Cf. *Abbott Laboratories, 387 U.S. at 149;* Pacific Gas & Electric Co. v. *State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 201, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983).* Cf. *Standard Oil Co., 449 U.S. at 242* (premature review "denies the agency an opportunity to correct its own mistakes and to apply its expertise"). And, here, the possibility that further consideration will actually occur before the Plan is implemented is not theoretical, but real. See, e.g., *60 Fed. Reg. 18886, 18901 (1995)* (forest plans often not fully implemented), *id., at 18905-18907* (discussing process for amending forest plans); *58 Fed. Reg. 19369, 19370-19371 [*736] (1993)* (citing administrative appeals indicating that plans are merely programmatic in nature and that plan cannot foresee all effects on forest); Appeal Nos. 92-09-11-0008, 92-09-11-0009 (Lodging II) (successful Sierra Club administrative appeals against

Wayne timber harvesting site-specific projects). Hearing the Sierra Club's challenge now could thus interfere with the system that Congress specified for the agency to reach forest logging decisions.

Third, from the courts' perspective, review of the Sierra Club's claims regarding logging and clearcutting now would require time-consuming judicial consideration of the details of an elaborate, technically based plan, which predicts consequences that may affect many different parcels of land in a [**1672]variety of ways, and which effects themselves may change over time. That review would have to take place without benefit of the focus that a particular logging proposal could provide. Thus, for example, the court below in evaluating the Sierra Club's claims had to focus upon whether the Plan as a whole was "improperly skewed," rather[***931] than focus upon whether the decision to allow clearcutting on a particular site was improper, say, because the site was better suited to another use or logging there would cumulatively result in too many trees' being cut. See *105 F.3d at 250-251.* And, of course, depending upon the agency's future actions to revise the Plan or modify the expected methods of implementation, review now may turn out to have been unnecessary. See *Standard Oil Co., 449 U.S. at 242.*

This type of review threatens the kind of "abstract disagreements over administrative policies," *Abbott Laboratories, 387 U.S. at 148,* that the ripeness doctrine seeks to avoid. In this case, for example, the Court of Appeals panel disagreed about whether or not the Forest Service suffered from a kind of general "bias" in favor of timber production and clear-cutting. Review where the consequences had been "reduced to more manageable proportions," and where the [*737] "factual components [were] fleshed out, by some concrete action" might have led the panel majority either to demonstrate that bias and its consequences through record citation (which it did not do) or to abandon the claim. *National Wildlife Federation, 497 U.S. at 891.* All this is to say that further factual development would "significantly advance our ability to deal with the legal issues presented" and would "aid us in their resolution." *Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 82, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978).*

[***HR1E] [***HR3] Finally, Congress has not provided for pre-implementation judicial review of forest plans. Those plans are tools for agency planning and management. The Plan is consequently unlike agency rules that Congress has specifically instructed the courts to review "pre-enforcement." Cf. National Wildlife Federation, supra, at 891; *15 U.S.C. § 2618* (Toxic Substances Control Act) (providing pre-enforcement review of agency action); *30 U.S.C. § 1276*(a) (Surface Mining Control and Reclamation Act of 1977) (same); *42 U.S. C § 6976* (Resource Conservation and Recovery Act of 1976) (same); § 7607(b) (Clean Air Act) (same); *43 U.S.C. § 1349*(c)(3) (Outer Continental Shelf Lands Act); *Harrison v. PPG Industries, Inc., 446 U.S. 578, 592-593, 64 L. Ed. 2d 525, 100 S. Ct. 1889 (1980).* Nor does the Plan, which through standards guides future use of forests, resemble an environmental impact statement prepared pursuant to NEPA. That is because in this respect NEPA, unlike the NFMA, simply guarantees a particular procedure, not a particular result. Compare, *16 U.S.C. § 1604*(e) (requiring that forest plans provide for multiple coordinated use of forests, including timber and wilderness) with *42 U.S.C. § 4332* (requiring that agencies prepare environmental impact statements where major agency action would significantly affect the environment). Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper. [*738]

III

[***HR4] The Sierra Club makes one further important contrary argument. It [***932]says that the Plan will hurt it in many ways that we have not yet mentioned. Specifically, the Sierra Club says that the Plan will permit "many intrusive activities, such as opening trails to motorcycles or using heavy machinery," which activities "will go forward without any additional consideration of their impact on wilderness recreation." Brief for Respondents 34. At the same time, in areas designated for logging, "affirmative measures to promote undisturbed backcountry recreation, such as closing roads and building additional hiking trails" will not take place. Ibid. These are harms, says the Sierra Club, that will not take place at a distant future time. Rather, they will take place now.

This argument suffers from the legally fatal problem that it makes its first appearance [**1673] here in this Court in the briefs on the merits. The Complaint, fairly read, does not include such claims. Instead, it focuses on the amount and method of timber harvesting. The Sierra Club has not referred us to any other court documents in which it protests the Plan's approval of motorcycles or machinery, the Plan's failure to close roads or to provide for the building of trails, or other disruptions that the Plan might cause those who use the forest for hiking. As far as we can tell, prior to the argument on the merits here, the harm to which the Sierra Club objected consisted of too much, and the wrong kind of, logging.

The matter is significant because the Government concedes that if the Sierra Club had previously raised these other kinds of harm, the ripeness analysis in this

case with respect to those provisions of the Plan that produce the harm would be significantly different. The Government's brief in the Court of Appeals said

"If, for example, a plan incorporated a final decision to close a specific area to off-road vehicles, the plan itself [*739] could result in imminent concrete injury to a party with an interest in the use of off-road vehicles in that area." Brief for Federal Appellees in No. 94-3407 (CA6), p. 20.

And, at oral argument, the Solicitor General agreed that if the Sierra Club's claim was "that [the] plan was allowing motorcycles into a bird-watching area or something that like, that would be immediately justiciable." Tr. of Oral Arg. 5. Thus, we believe these other claims that the Sierra Club now raises are not fairly presented here, and we cannot consider them.

IV

For these reasons, we find the respondents' suit not ripe for review. We vacate the decision of the Court of Appeals, and we remand this case with instructions to dismiss.

It is so ordered.

EXHIBIT H

# AGENDA

## PORT OF SEATTLE/THIRD RUNWAY FLOW AUGMENTATION/WATER RIGHTS

October 31, 2000

I. Purpose: To define remaining water right issues relative to flow augmentation in Des Moines Creek, and to develop an action plan and schedule for resolving those issues.

II. Attendees:

Port of Seattle
Department of Ecology
Attorney General's Office
Seattle Public Utilities

III. Potential Sources of Stream Flow Augmentation Water

A. SPU Highline Well Field primary
B. Highline Water District Well. No. 1 – Tyee Golf course (1st)
C. Detained Storm Water Hydro diversion } place holders – use for mitigation?
D. Reclaimed Water KC? biggest issue = availability

IV. SPU Highline Well Field

A. Is a water right change of any kind necessary to use municipal water for flow augmentation? Current Eco pol. – yes – not broad enough. – in case for commercial Rel. current policy.

B. If so, what kind?

1) change in purpose of use? yes – maybe
2) change in place of use? no

C. When is Ecology approval of changes needed?

1) Can the 401 certification be issued before necessary changes are approved? yes – NI cond – but it has to be approved

2) Can the change application be processed before other competing applications are filed, i.e., can the application be expedited under WAC 173-152-050(3)?

D. What information is required to process the change application(s)?

1) information showing historic and current water usage;
2) information showing no abandonment due to nonuse;
3) information showing that the proposed change will not cause impairment of existing rights;
4) information showing that the proposed change is in the public interest;

V. Other Issues

A. Applicability of "Arrowleaf" amendment to RCW 90.03.380

1) Does it apply?
2) If so, how does it apply and what information does Ecology require?

B. Details of Highline Well Field water right permit

C. Should changed water right be converted to a trust water right?

VI. Development of Action Plan and Schedule

AR 006912

EXHIBIT I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AIRPORT COMMUNITIES COALITION, et al.,

Plaintiffs,

v.

FEDERAL AVIATION ADMINISTRATION, and PORT OF SEATTLE,

Defendants.

Cause Number C00-915R

ORDER OF DISMISSAL BY STIPULATION

The court having been notified that the remaining parties have agreed to dismiss this litigation,

IT IS NOW, THEREFORE, ORDERED that this matter be DISMISSED without prejudice and without costs to either side.

IT IS SO ORDERED this 6TH day of August 2001.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

ORDER OF DISMISSAL

EXHIBIT J

## Kenny, Ann

**From:** Yee, Chung K.
**Sent:** Monday, September 11, 2000 3:32 PM
**To:** Fitzpatrick, Kevin
**Subject:** RE: Clean Fill Criteria Language for the 401 Water Quality Certification on the Sea Tac Third Runway

I just talked to Pete. His is concerned with the Arsenic limit. Because TCP did not do arsenic in the new stds, he think 20 is too high and it should be set at background. Background in Western Washington is 7 to 8. He think they should do ground water monitoring now, ongoing.

We also talked about the sampling frequency.

Paul Agid called and he wants to talk about clean fill requirements. I left him a voicemail. Do you want to do a conference call?

----Original Message----
**From:** Fitzpatrick, Kevin
**Sent:** Monday, September 11, 2000 2:36 PM
**To:** Yee, Chung K.; Marchioro, Joan (ATG); Luster, Tom
**Subject:** FW: Clean Fill Criteria Language for the 401 Water Quality Certification on the Sea Tac Third Runway

To all: Pete Kmet has provided some very sound recommendations for the final language on clean fill criteria in the 401 Certification (when and if we issue a 401 Certification for the project). His recommended changes appear in the attached document below.
Kevin

-----Original Message-----
**From: Kmet, Peter**
**Sent:** Monday, September 11, 2000 11:51 AM
**To:** Fitzpatrick, Kevin
**Subject:** RE: Clean Fill Criteria Language for the 401 Water Quality Certification on the Sea Tac Third Runway

Here are my comments. Make sure you open the attachment.

<< File: Clean Fill Criteria for 401 Certification.doc >>

----Original Message----
**From:** Fitzpatrick, Kevin
**Sent:** Friday, September 08, 2000 12:52 PM
**To:** Kmet, Peter
**Subject:** Clean Fill Criteria Language for the 401 Water Quality Certification on the Sea Tac Third Runway

**DELIBERATIVE DOCUMENT CURRENTLY EXEMPT FROM PUBLIC DISCLOSURE**

Pete: The following are additions that have been made to the 401 Certification language which are not reflected in the attached Word document below.

E6. It sounds like we are allowing the Port to use problem fill as long as the Port notify Ecology. I think the second sentence should exclude the use of inappropriate fill that may result in any potential impacts to waters of the state.

E7c.2.(b) Should include appropriate EPA databases and the first list should read as "Confirmed & Suspected Contaminated Sites Report"

E7c.2.(e) "The fill material shall be analyzed for the potential contaminant(s) identified in the environmental site assessment. At a minimum, fill material from all sites shall be analyzed for TPH and Priority Pollutants metals for compliance with MTCA method A soil cleanup levels in

WAC 173-340-740. In the absence of MTCA method A soil cleanup levels, the potential contaminants shall comply with MTCA method B ~~"100 X Groundwater"~~ soil cleanup levels." [There is more to Method B than the 100 X standard. Also, we are in the process of changing that to another model and so this is no longer valid.] The sampling frequency . .

[NOTE: there are two method A cleanup tables, unrestricted and industrial soils. I'm assuming you mean unrestricted soil cleanup levels, which is why I added the reference. However, there is a problem with this language in that Method A does not have standards for all contaminants AND they are in the process of being changed. I wonder if you should instead cite natural background as the standard.]

[The reference to Method B makes no sense because Method B does not specify specific substances to analyze for. If I had to say anything here, I would say "contaminants with the potential to be in the fill material based on historical site use, available records and previous test data. For these contaminants the standard would have to be based on Method B soil cleanup levels in WAC 173-340-740. Again, there is a bit of a problem because the standards are changing.]

See if you want to add E7c.2.(f) after the sampling requirement table. This is a repeat of a sort since the term "environmental professional" is already used in couple of places.

(f) All work shall be performed by an environmental professional, with appropriate training, experience and expertise in environmental site assessment.

E7c.3. I don't think they know where the placement location yet. The location should be included in the as-builts to be submitted quarterly.

<< File: Clean Fill Criteria for 401 Certification.doc >>

Kevin C. Fitzpatrick
Supervisor, Industrial Permit Unit
Water Quality Program, NWRO
Voice: 425-649-7037
Fax: 425-649-7098
KFIT461@ecy.wa.gov

EXHIBIT K

Environmental Law
Spring, 1995

# *255 THE SLEEPING GIANT AWAKENS: PUD NO. 1 OF JEFFERSON COUNTY v. WASHINGTON DEPARTMENT OF ECOLOGY

Katherine P. Ransel [FNa]



In May 1994 the United States Supreme Court Established That the Water Quality Certification Provision of the Clean Water Act Allows States to Impose Conditions on Federally Licensed Hydroelectric Projects Based on State Water Quality Standards, Including Minimum Instream Flow Requirements. This Article Analyzes the Historical Underpinnings, the Court's Decision, and Its Implications for Other Federal Permits, Nonpoint Source Pollution, and Water Law and Policy in General.

## I. Introduction

The Dosewallips River is a sparkling gem in one of the crown jewels of our National Parks. It originates in the glacial peaks of the Olympic National Park, a World Heritage Site and International Biosphere Reserve. In an era when hydroelectric projects blanket the rivers of the Pacific Northwest, the Dosewallips is one of the few that runs free, from its source to the Puget Sound's Hood Canal. The " DOE-see" [FN1] might have remained an obscure little treasure, known only to those who haunt the Olympic Peninsula's temperate rainforest, had it not become the center of a decades-old struggle between the states and the federal government. Instead, it has caused a dramatic shift in the balance of power struck during ***256** the Progressive era in favor of centralized federal authority over the uses of the Nation's navigable waters. In PUD No. 1 of Jefferson County v. Washington Department of Ecology, [FN2] the Supreme Court rejected the long-standing notion that the Federal Energy Regulatory Commission (FERC), by virtue of the Federal Power Act (FPA), has exclusive authority over the regulation of hydroelectric projects. [FN3] The Court held that states may impose conditions on FERC- licensed hydroelectric projects based on state water quality standards -- including instream flow requirements -- through the water quality certification provision of the Clean Water Act. [FN4] By this decision, the Court laid waste to its previous opinion in California v. FERC. [FN5] Just four short years ago, Justice O'Connor, in the mirror image of her Jefferson County opinion, wrote for a unanimous Court that FERC, not the states, was charged with setting instream flows in FPA hydroelectric licensing proceedings. [FN6]

The first part of this article lays the foundation for understanding the Court's decision. Part II provides background for the Court's decision. Part III explains the Court's rulings. Part IV describes several possible consequences of the Court's rulings, such as the next logical steps in the application of the Court's decision to FERC proceedings, what other activities may be affected, causes of action that might be spawned, and broader implications for water law and policy generally.

## II. Background

### A. The Elkhorn Project

In 1982, Jefferson County Public Utility District Number One and the city of Tacoma, Washington proposed to

construct a new hydroelectric power project on the Dosewallips River. The Elkhorn Project, named after a nearby Forest Service campground, was toinclude a diversion dam, a penstock, and a powerhouse. [FN7] The dam would divert water from the river via a diversion portal and a penstock, run it through a turbine to generate electricity in two generators located in the powerhouse, and discharge the water back to the river from the powerhouse tailrace, some 1.2 miles downriver. The stretch of original river between the diversion portal and the powerhouse is called the "bypass reach." Tacoma proposed to divert approximately seventy-five percent of the river's water from the bypass reach for power generation. [FN8] Depending on ***257** the season, this would have been between 65 and 155 cubic feet per second (cfs). [FN9]

### B. The Federal Power Act

The Federal Power Act (FPA) [FN10] requires nonfederal entities, such as Tacoma, that operate hydroelectric projects on navigable waters of the United States to obtain a license from the Federal Energy Regulatory Commission (FERC) (formerly the Federal Power Commission). [FN11] FERC determines whether a proposed project is in the public interest and, since the amendment of the FPA by the 1986 Electric Consumers Protection Act (ECPA), [FN12] must give equal consideration to fish and wildlife resources, recreational values, and energy conservation opportunities in determining whether to grant a license. [FN13] Section 10(j) of the ECPA amendments requires licenses issued by FERC to include conditions designed to protect, enhance, and mitigate damage to fish and wildlife and their habitat. [FN14] These conditions must be based on the recommendations of federal and state resource agencies, and FERC must make specific findings if it rejects those recommendations. [FN15] Typically the resource agencies recommend minimum instream flows, ramping rates, [FN16] habitat improvements, [FN17] and other protective or mitigative conditions.

Tacoma argued before both the Washington and U.S. Supreme Courts that the ECPA amendments, and especially section 10(j), constituted a limit on the ability of states to set instream flows under their water quality certification authority. [FN18]

### ***258** C. History Is Indeed Prologue -- Relevant Prior Case Law on the "Exclusivity" of FERC's Jurisdiction

Four years ago in California v. FERC (Rock Creek), [FN19] the Supreme Court addressed whether section 27 of the FPA reserved to the states the right to regulate minimum flows at FERC-licensed dams. Section 27 saves from pre- emption state laws 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." [FN20] The issue arose under section 27 because an almost identical provision of the 1902 Reclamation Act -- after which section 27 was modeled -- had been interpreted by the Supreme Court in 1978 to preserve states' control over water resources impounded by federal reclamation projects. [FN21] Thus, the western states had become accustomed to protecting the instream uses of their waters from federal encroachment through the state water rights permitting process.

In Rock Creek, however, the Court was faced with the extreme situation where FERC had issued a license for the Rock Creek project with certain instream flow requirements based on its determination of project economics and fish needs, and several years later, the state, through its state water rights permitting law, attempted to require a stream flow approximately twice as great. [FN22] The Court found that section 27 of the FPA did not save California's stream flow condition because it was not a proprietary right like the other water uses specifically saved by section 27. [FN23] The Court felt bound, it said, by its 1946 decision in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, [FN24] interpreting section 27 as saving from pre-emption only proprietary water rights. [FN25]

The Supreme Court also said, however, that "[j]ust as courts may not find state measures pre-empted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role ***259** in our federal scheme." [FN26] This nod to the states must have seemed terribly weak at the time.

During the time between First Iowa and California v. FERC, however, another line of cases was chipping away at FERC's "exclusive" jurisdiction, weakening the foundation of FERC's position.

The first important case was Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, [FN27] which challenged the authority of the federal land management agencies under section 4(e) of the FPA. Section 4(e) states that FERC licenses "shall be subject to and contain such conditions as the Secretary of [the federal land management agencies] shall deem necessary for the adequate protection and utilization of such reservations." [FN28] FERC and members of the industry challenged license conditions similar to those in Jefferson County which allowed certain Indian Tribes to use a specified quantity of the water that otherwise would have been used by the licensees.

The industry and FERC, advancing arguments identical to those in Jefferson County, [FN29] claimed that section 4(e) could not possibly mean what it says because it would frustrate Congress' intent to centralize dam licensing authority in FERC. [FN30] The Supreme Court did not agree:

It is thus clear enough that while Congress intended that the Commission would have exclusive authority to issue all licenses, it wanted the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions. [FN31]

In another case, Monongahela Power Company v. Marsh, [FN32] the power company and FERC argued that FERC's licensing authority could not possibly contemplate the permitting obligations of section 404 of the Clean Water Act. [FN33] Again, the industry and FERC contended that such a requirement would frustrate the purposes of the FPA, and again, the federal court did not agree. [FN34] Finding nothing in the Clean Water Act to suggest that FERC licenses were exempt from the permitting requirements of section 404, and finding that the Clean Water Act represented a "radical change in legislative policy" and a "strong bipartisan movement in Congress 'to restore and maintain the chemical, physical and biological integrity ***260** of the Nation's waters,'"[FN35] the D.C. Circuit held that the applicant had to obtain a section 404 permit to construct its FERC-licensed hydroproject. [FN36]

The Monongahela court noted that the Second Circuit had also held that section 404 fully applied to licenses granted by FERC's predecessor agency, the Federal Power Commission. [FN37] The Court in Monongahela Power reasoned that if Congress had not approved of that result, then Congress could have taken the opportunity to register its dissatisfaction in the Clean Water Act, which amended the Federal Water Pollution Control Act in 1977. [FN38]

The same reasoning applies to Jefferson County. Congress had the opportunity, when it substantially amended the Clean Water Act in 1987, to limit state authority under section 401 to impose conditions on FERC-licensed hydroprojects, if ECPA, which had amended the FPA a year before, constituted a new limit on the states' authority under section 401. [FN39]

## D. The Clean Water Act

### 1. Water Quality Certification

Under section 401 of the Clean Water Act, Tacoma was obliged to obtain water quality certification (a "401 certificate") from the State of Washington. Indeed, any federally permitted or licensed activities that might result in a discharge into the navigable waters of the United States must obtain a 401 certificate. [FN40] If certification is granted (it may be waived or denied), the state must condition water quality certification to ensure that the project will comply with state water quality standards, [FN41] among the other requirements of the Clean Water Act. [FN42] Thus, the states' conditions become part of the federal license or permit by operation of law. The Washington Department of Ecology, relying on the expertise of the region's fisheries agencies and tribes, determined from instream flow studies that the existing fishery in the Dosewallips river would be harmed if Tacoma withdrew the amount of water it proposed for electrical generation. [FN43] It required, as a condition of certification, a minimum instream flow in the bypass reach of the proposed project of between 100 and 200 cfs, depending on the season. [FN44]

The issue was joined. Tacoma pursued a challenge to the State's authority to condition the certification on a minimum instream flow under the Clean Water Act and state law through the state administrative and judicial system, the forum which many federal courts -- indeed, all that have ruled on the issue -- have held is the proper one for such claims. [FN45]

***262** 2. Water Quality Standards

The Clean Water Act requires all states to promulgate comprehensive water quality standards for all intrastate waters. [FN46] Water quality standards consist of three parts: designations of uses of a waterway (designated uses), specific criteria designed to protect those uses (criteria), and a prohibition against degradation of the existing uses of the water (antidegradation). [FN47] When Congress shifted the emphasis of pollution control to technology-based effluent limitations, it preserved the pre-1972 water quality standards system. As a consequence, the states retained primary responsibility for setting water quality standards, subject to overarching federal regulations and approval by the Environmental Protection Agency (EPA). [FN48]

Water quality standards must be specific to particular bodies of water and consist of two basic elements: designated uses and criteria to protect those uses. [FN49] Designated uses must include, at a minimum, propagation of fish, shellfish, and wildlife, as well as recreation in and on the waters. [FN50] If a state chooses not to designate these minimum uses or wishes to remove a designated use, it must justify nondesignation through an elaborate process set out in the regulations. [FN51] The hope is that by requiring the states to designate these minimum uses and to adopt criteria to protect them, they will actually attain those uses in all water bodies and segments, if they have not already done so. However, in no event may a beneficial existing use be removed from a water body or segment. [FN52]

Criteria, whether pollutant-specific numerical, biological, hydrological, or other descriptive (narrative) measures of water quality, are designed to protect the designated and existing uses. [FN53] In addition, EPA requires all states to adopt an antidegradation policy, which, among other things, requires the maintenance of existing uses and the level of water quality necessary to protect them. [FN54]

Pursuant to these federal requirements, the State of Washington designated the segment of the Dosewallips River affected by the Elkhorn project as Class AA waters, the highest classification possible. [FN55] The ***263** designated uses for this segment of the river include "[s]almonid migration, rearing, spawning and harvesting." [FN56] Moreover, these uses also actually exist in the river reach for which the project is proposed; that is, they are not simply "designated" uses. The State's water quality standards mandate that these "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to [[such] . . . uses will be allowed." [FN57]

E. The Washington Supreme Court

After a somewhat tortuous administrative and lower court history, the Washington Supreme Court tackled two principle federal issues: whether section 401 of the Clean Water Act authorized states to include a minimum flow condition as part of its water quality certificate; and, if so, whether such a condition is precluded because it is irreconcilable with FERC's authority under the FPA. [FN58] The Washington Court concluded that the instream flow requirement was a proper exercise of state authority under section 401, both because the antidegradation provision of Washington water quality standards required the result, [FN59] and, alternatively, because the Washington "base flow" statute was one of the "other appropriate requirements of state law" contemplated by section 401(d). [FN60] Concerning the FPA "conflict" issue, and ***264** despite the Supreme Court's decision in California v. FERC, the Washington Supreme Court found that one federal law cannot pre-empt another, and, essentially, if the condition is proper under the Clean Water Act, it becomes part of the FPA permit. [FN61] Tacoma promptly filed in the U.S. Supreme Court a petition for writ of certiorari to the Washington Court. [FN62]

III. The United States Supreme Court

The Supreme Court granted certiorari to resolve the conflict among the state courts concerning the proper scope of section 401, [FN63] affirming the Washington Supreme Court in a seven-to-two opinion (Justices Thomas and Scalia dissenting). In so affirming, the Court soundly rejected Tacoma and industry arguments designed to defeat the instream flow requirement. [FN64] This section describes each of the Court's significant holdings.

### A. The Components of Water Quality Standards -- Designated Uses and Criteria To Protect the Uses -- Are Separately Enforceable

First, Tacoma argued that section 401 conditions could be based only on specific chemical or other numeric criteria. [FN65] The Court rejected that view, holding that states may impose any conditions which are reasonably necessary to enforce not only specific chemical or numeric criteria in water quality standards, but also narrative criteria, which the Court described as "open-ended" and "broad," pointing out that Washington's standards even specify that "[a]esthetic values shall not be impaired." [FN66] But perhaps most important, the Court also held that the use designations of water bodies -- the basic component of water quality standards ***265** that the criteria are designed to protect -- could also form the basis of section 401 conditions. [FN67] The Court found there may well be occasions when the criteria alone would not protect the designated uses. [FN68]

Washington's water quality standards designate the Dosewallips River for, among other things, the migration, rearing, and spawning of salmon. [FN69] Finding that water quality standards are "other limitations" with which section 401(d) directs the state to assure compliance, and also "other appropriate" state law requirements for purposes of that section, the Court held the state may impose conditions reasonably related to the achievement of water quality standards, including either specific chemical, numeric, or narrative criteria, as well as the use designations. [FN70]

### B. The Antidegradation Standard Is Another Valid Ground for the Instream Flow Requirement

The Court found that the antidegradation provision of state water quality standards, required by federal regulation, also justified the state's instream flow condition. [FN71] Federal, state, and tribal biologists had determined that without these minimum flows, the salmon fishery -- an existing use of the river, to which the antidegradation standard applies -- could not be maintained at current conditions or numbers. Summarizing the antidegradation provision's history, its interpretation by EPA, and its affirmation by the Congress in the 1987 amendments to the Clean Water Act, the Court held the minimum flow requirement was a proper application of the federal antidegradation provision, which had been incorporated into the state's water quality standards. [FN72]

### C. The State May Place Conditions on the Federally Permitted Activity, Not Just Specific "Discharges"

In a closely related issue, Tacoma argued that each condition imposed by the state under the authority of section 401 had to be directly associated with a point source discharge of pollutants, promoting a very cramped interpretation of the term "discharge" under section 401(a)(1). [FN73] The Court again disagreed, however, holding that once a discharge is shown to be associated with the activity for which the federal license is sought, a state may impose conditions respecting the activity as a whole and not just concerning the "discharge" itself. [FN74] The Court relied on the language of section 401(d) that the certification must "assure that any applicant . . . will comply" with limitations ***266** under section 301 and with other appropriate state law requirements. [FN75] Congress, the Court noted, has said that section 301 always includes section 303 by reference. [FN76] The Court also relied on EPA's section 401 implementing regulations requiring that "the activity will be conducted in a manner which will not violate applicable water quality standards." [FN77] EPA's interpretation "that activities -- not merely discharges -- must comply with state water quality standards" was reasonable and entitled to deference. [FN78]

The dissent found the majority's reliance on section 401(d) in direct conflict with section 401(a) language that "any such discharge will comply," which in the dissent's view articulates the substantive obligations of section 401. [FN79] Because Justices Scalia and Thomas avoided any discussion of the development of section 401 over its more than twenty-year history, it is easy to understand how they came to this conclusion. Indeed, were there nothing to guide the Court save for the current language of section 401, the apparent conflict between the two sections might be more bothersome.

But the first version of the water quality certification requirement directed that the activity must comply with water quality standards; while that language was changed in 1972 to "discharge," it seems that Congress had no intention of altering the effect of the original provision. [FN80] Indeed, when Congress amended the provision in 1977 to make "minor adjustments" unrelated to this issue, the Conference report paraphrased section 401 as requiring that "federally licensed or permitted activity . . . must be certified to comply with State water quality standards." [FN81]

It appears, then, that the majority came to the correct conclusion, if not with a total understanding of why it was correct. In any event, the result makes sense, just as the cramped industry argument does not. How could states possibly assure compliance with water quality standards if they were precluded from imposing conditions on activities causing nonpoint source pollution; water withdrawals or drainage; or other alterations to the physical, biological and chemical integrity of the waters not caused by the discharge of a pollutant from a point source?

The Court did not determine whether the discharge triggering the application of section 401 must be a point source discharge or whether it also includes nonpoint source discharges. Instead, it simply noted that ***267** there were at least two discharges associated with the proposed dam: the discharge of dredged and fill material necessary to build the dam and the discharge of water at the tailrace of the powerhouse during operations. [FN82]

### D. Water Quantity is a Critical Element of Water Quality

In what might be the most far-reaching of the Court's rulings, the Court rejected as an "artificial distinction" Tacoma's argument that the Clean Water Act may not concern itself with water quantity. [FN83] The Court held that water quantity is an integral part of water quality, observing that without sufficient volume, few, if any, of the designated uses of a water body could be attained or protected. [FN84] The Court found support in the Act's definition of "pollution," which encompasses not just point source discharges of pollutants, but also "the man-induced alteration of the chemical, physical, biological, and radiological integrity of water." [FN85] This definition, the Court held, clearly includes the alteration of the amount of water in a water body. [FN86]

### E. Applicants Have the Burden To Challenge Conditions as Unrelated to Water Quality

On the issue of potential conflicts between conditions required by the states under section 401 and those required by FERC under the Federal Power Act, the Court was not as clear as it might have been, no doubt because the United States was less than lucid on this critical issue. [FN87] Still, Justice O'Connor did provide guidance on this point. First, she stated that because section 401 applies to all federal permits and licenses without qualification, the Court would not read any special limitations on ***268** the provision in the context of the FERC licensing process. [FN88] Second, and most important, she said that "[i]f FERC issues a license containing a stream flow condition with which [license applicants] disagree, they may pursue judicial remedies at that time." [FN89]

It seems clear enough, then, that FERC does not have the discretion to impose conditions different from those which the water quality certification requires, [FN90] and that the burden is on license applicants to challenge those conditions as not reasonably related to the maintenance or attainment of water quality.

This issue may resolve itself soon enough, as FERC has taken it upon itself to determine whether a condition in a section 401 certification is water- quality related, [FN91] leaving the states with the burden of challenging FERC's

refusal to include the state's conditions.

### F. Other State Laws May Be Irrelevant

Finally, although the Court found that water quality standards fit under both the "other appropriate requirement of State law" and the "other limitations" prongs of section 401(d), it refused to "speculate what additional state laws, if any, might be incorporated by this language." [FN92] One wonders, however, given the breadth of the opinion, whether it matters. When a state may include in a section 401 certification any condition reasonably related to a designated or existing use, a narrative or numeric criterion, or the antidegradation provision, it is hard to imagine why it would have to rely on any other provision of state law.

## IV. Implications for the Future

The breadth of the Court's decision in Jefferson County invites speculation about its future consequences to the implementation of federal and state water quality laws.

### A. Does Section 401 Cover Nonpoint Source Discharges?

First, and perhaps most important, the section 401 certification process applies to "any" application for a federal license or permit which "may" result in "any" discharge to navigable waters. [FN93] Because the Court made it clear that the states can act to protect the physical and biological integrity of their waters, as well as impose conditions based on specific ***269** numeric and chemical criteria, [FN94] the states' authority would seem to apply equally to nonpoint as well as to point source discharges from such activities as grazing and timber practices, as long as a federal permit or license can be said to be involved. This also follows from the fact that the Court relied on EPA's interpretation of the provision that all pollution, not just pollutants, is subject to the certification requirement. [FN95] But even stronger support lies in the history of the provision itself. First, the water quality certification provision was enacted prior to the 1972 Clean Water Act's new point source reduction program. [FN96] The use of the words "any discharge" could simply not have been a reference to a program and terms of art which did not exist at the time. Second, the certification requirement explicitly applied only to water quality standards then existing. [FN97] Because water quality standards can be violated as much, if not more, by nonpoint source pollution and changes in the physical and biological integrity of the waters as by point source discharges of pollutants, it would not only have been legally impossible, but absurd as well for Congress to limit the states' authority to point source discharges.

While neither the majority nor the dissent offered an opinion of the meaning of the term discharge in section 401(a)(1), at the very least logic dictates that any discharge is just that -- any discharge. Because the term "discharge" in the water quality certification requirement predated the term of art "discharge of a pollutant," this would seem to be conclusive. But that is not all.

"Discharge of a pollutant," which means the addition of a pollutant from any point source, [FN98] was defined in 1972 by Congress separately from the term "discharge," which "when used without qualification, includes a discharge of a pollutant, and a discharge of pollutants." [FN99] Because it includes point source discharges but is not limited to them, it must encompass a broader range of discharges.

Where Congress took the trouble separately to define these terms, the argument that "any discharge" in section 401 is no broader than the definition of "discharge of a pollutant" had to have been only wishful thinking on Tacoma's part.

### ***270** B. What Permits Are Covered?

No one has ever argued that section 401 does not apply to the literally hundreds of thousands of Clean Water Act section 404 [FN100] permits granted by the Corps of Engineers each year. But now the application of section 401 not only to point source discharges of pollutants, but also to any alteration of the biological and physical integrity of the waters should provide states with much more ammunition to prevent water quality degradation from the multitude of activities that require section 404 approval. This is true as well, of course, for other permits and licenses to which section 401 application is undisputed, such as FERC licenses, EPA section 402 permits, and other Corps of Engineers permits required for construction in navigable waters. [FN101] What other federally permitted activities may be covered? Put simply and practically, any activity which arguably may have an impact on water quality appears to be subject to the section 401 certification requirement. In the first case attempting to prove that assumption, several Oregon groups are suing the Forest Service for failing to require section 401 certification before issuing a grazing permit on an allotment in the Malheur National Forest. [FN102]

Section 401 states that "[n]o [federal] license or permit shall be granted until the certification required by this section has been obtained or has been waived." [FN103] Yet, according to the plaintiffs in the Malheur case, the Forest Service issued a permit on July 8, 1993 to an applicant who provided no record of state certification (nor, I assume, a waiver) despite both the Clean Water Act's mandatory language and clear evidence of water quality problems directly attributable to grazing in a creek running through the allotment. [FN104] The Forest Service responded to the plaintiffs' sixty-day notice [FN105] by denying that section 401 applies to nonpoint discharges of pollution. [FN106] The issue is thus joined. [FN107]

***271** Once the question of whether nonpoint source pollution requires section 401 certification is definitively answered, the next logical challenge would be to Forest Service timber sales that have not been certified under section 401.

### C. Does Jefferson County Apply to Dam Relicensing?

The Jefferson County decision seems to apply to relicensing of dams as well as to initial licensing. FERC will consider hundreds of dams for "new" licenses over the next decade. [FN108] The Supreme Court found that states could act through the section 401 process not only to protect existing uses, but also to protect designated uses, which may include, among other things, recreation, drinking water, and even aesthetic enjoyment. [FN109] After Jefferson County, it appears that the states may act to attain water quality goals reflected in designated uses, even though a federally licensed project may have eliminated the use. For example, the Hell's Canyon Dam Complex in Idaho has blocked migration of salmon to upstream reaches. Thus, where a designated use has been lost through hydropower development, the state should be able to use the section 401 process in a relicensing application to require conditions that will recover the pre-existing use. [FN110]

That result follows naturally from the policies behind and purposes for the relicensing requirement. The Ninth Circuit held in Confederated Tribes & Bands of the Yakima Indian Nation v. FERC [FN111] that under the Federal Power Act, FERC must make the same inquiries into natural resource and environmental protection as are required when it initially licenses a project. [FN112] The Ninth Circuit found that relicensing is "more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo." [FN113]

Where designated uses are not attained in a waterbody, the states may act to achieve them under the Clean Water Act. Thus, if a state's dissolved oxygen, temperature, or other criteria are not being met because of the operation of a FERC licensed dam, it will be for the state under section 401 to ensure that the designated uses can be achieved upon relicensing. This applies as well to hydrologic modifications occasioned by hydroelectric projects and other dams or diversions, unless it is not feasible to attain the designated use. [FN114]

***272** Congress limited the duration of FERC licenses [FN115] because it correctly foresaw that the country might have new agendas and policies after two generations. [FN116] Since the FPA was enacted, federal water pollution control law was born and has matured to the point where the law's goal "to restore and maintain and restore the chemical, physical, and biological integrity of the Nation's waters" [FN117] is beginning to be implemented.

Congress clearly meant toleave states the ability to protect their aquatic resources through the water quality standards program. The balance so hotly contested in Jefferson County had already been struck; Congress had already determined that hydropower projects which do not allow for the maintenance of state water quality standards should not be built or operated. [FN118] Further, most projects built generations ago, which now must comply with state water quality standards through section 401, are in an excellent position to do so, their capital costs having been amortized over the prior license term.

### D. How Should Conflicts Between the States and FERC Be Resolved?

#### 1. The Cooperative Approach

Many are asking whether FERC could require higher streamflows than those authorized by a water quality agency. If, for instance, a state agency certifies low flows or none at all because of inattention or neglect, and the federal agencies under section 10(j) [FN119] of the Federal Power Act recommend a much higher flow in a bypass reach, may FERC require that higher flow? Apparently, if the state water quality agency has no objection, it certainly may. This situation might arise in a number of contexts. Suppose, for instance, that park and recreation agencies recommend reservoir releases in the spring and fall for whitewater rafting, requesting a higher flow than recommended by the water quality certification agency for the fishery. If FERC believes these releases are appropriate under the Federal Power Act, and the state water quality agency determines that the higher flow will not present a water quality problem, releases could become part of the license. But if salmon nests might be adversely affected by fall releases, there may indeed be a water quality conflict.

***273** Where the demands of the various uses of a waterbody conflict, Jefferson County says that the state water quality agency -- not FERC -- has the authority to determine the conditions necessary to comply with state water quality standards, including the many potentially conflicting use designations attributed to the same river or stream segment. This emphasizes the necessity for all of the agencies involved, both federal and state, to act with full knowledge of and in concert with the others. Such coordination must involve careful timing so that the certifying agency does not act precipitously, before all agencies have had an opportunity to determine the needs of a particular designated use or activity.

#### 2. The Current Reality

FERC recently refused to include in a license three conditions it determined were not water quality related. [FN120] Somehow, FERC gleaned from Jefferson County that it had the discretion to make such a determination. [FN121] But section 401(d) is clearly mandatory; the certification, with its conditions, "shall become a condition on [the] Federal license or permit." [FN122] Further, Escondido also seems plain enough. There, FERC argued:Requiring the Commission to include the Secretary's conditions in the license over its objection . . . is inconsistent with granting the Commission the power to determine that no interference or inconsistency will result from issuance of the license because it will allow the Secretary to "veto" the decision reached by the Commission. [FN123]

The Court, however, disagreed, stating the question instead to be whether "the Commission is empowered to decide when the Secretary's conditions exceed the permissible limits." [FN124] The Court then answered that question in the negative, because the plain command of FPA section 4(e) is that licenses issued by the Commission "shallbe subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary." [FN125]

With section 401, as in the case of all other federally mandated conditions, such as section 4(e), and the Commerce and Interior Secretaries' fishways authority, [FN126] all terms and conditions that FERC must take into consideration are known in advance of its license decision. Thus, with section 401 conditions, just as the Supreme Court held in Escondido, FERC has the exclusive authority to determine whether to issue the license. [FN127] But,

just as Congress intended federal land managers to determine what *274 conditions would protect resources on their lands, so also did Congress intend the states to determine what conditions are necessary to maintain and restore water quality. And with section 401, just as with section 4(e) of the FPA, if the state concludes that the conditions are necessary to protect a waterbody, "the Commission is required to adopt them as its own, and the court is obligated to sustain them if they are reasonably related to that goal." [FN128]

Moreover, FERC's tinkering with state conditions may violate the Eleventh Amendment to the United States Constitution, [FN129] an issue not reached in Escondido because the conditions at issue were those of the Secretary of the Interior. That Tunbridge Mill did not challenge the conditions in the state court system apparently gave the Commission no pause, even though every court entertaining the question has held that 401 challenges are for the state courts. [FN130] And while those courts may not have explicitly based their consistent deference to the state court forum on the Eleventh Amendment, it is clearly at the heart of those comity rulings. The Supreme Court, ending the then common practice of pendant state claims against state officials in federal court, said ten years ago: "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." [FN131]

FERC's collateral attack in its Tunbridge Mill decision on the validity of section 401 conditions arguably violates the Constitution. It clearly violates well-recognized principles of comity and the plain language of the Clean Water Act. [FN132]

## E. Implications for Western Water Law and Policy

The Jefferson County holding on the relationship between water quality and water quantity holds great promise for the reform of Western water law and policy, grounded as it is in an anachronistic doctrine (prior *275 appropriation) [FN133] having more in common with religion than with sound water management policy. The Court's holding that water quality and quantity are inseparable would seem to give ample coverage to EPA for requiring the states to adopt flow standards to attain the designated uses of their waters. The Court found the relationship between water quality and quantity elemental, describing Tacoma's argument that the Clean Water Act does not allow the regulation of water quantity as an "artificial distinction" between the two. [FN134] The Carter Administration flirted with the idea of using the Clean Water Act to regulate minimum stream flows in prior appropriation states, but the mere suggestion caused violent maelstroms in the West, and the Administration backed off. [FN135] That climate is not unlike the present one between the federal government and the Western states.

But aside from whether EPA can -- or more important, ever will -- require states to adopt flow criteria, how else might the Court's holding on water quantity and quality be implemented practically? Could the states require a reallocation of existing water rights to meet minimum flow criteria, or other water quality violations that are susceptible to remedy by increased flows, and withstand takings claims? It would be hard to imagine a more appropriate expression of the public trust than water quality standards:

Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation. [FN136]

Moreover, the Mono Lake decision [FN137] tells us nothing if not that appropriative water rights may indeed be modified to prevent the destruction of an existing use of the waters. [FN138]

*276 The public trust precedes all appropriative rights to water -- except those by Native Americans -- seemingly ridding the states of the concern for takings claims if they choose to enforce either flow criteria in water quality standards or, following Jefferson County, their use designations. This remedy seems particularly appropriate where use designations are impaired by water withdrawals, pollution, or, as is the case in much of the irrigated arid West, an often deadly combination of both low flows exacerbating the effect of pesticides and other agricultural pollutants. [FN139]

In any event, according to Jefferson County, the Clean Water Act is not a bar. The Court stated:

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. . . . The certification merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act . . . . [FN140]

The legislative history of section 101(g), the Court noted, recognizes the possibility that the Act's requirements might affect individual water rights and that such effects were proper if "prompted by legitimate and necessary water quality considerations," which now include the amount of water in water bodies. [FN141]

### F. Can Citizens Enforce Water Quality (Quantity) Standards After Jefferson County Under Section 505 of the Clean Water Act?

A more promising avenue for implementing the Jefferson County ruling may lie with citizen enforcement of the Clean Water Act. Citizen enforcement under section 505 [FN142] became an important device for *277 implementing the NPDES permit system in the 1980s, [FN143] and its exercise is not dependent on the vagaries of politics, as is state enforcement. [FN144] The argument that there is such a cause of action begins with the question that if water quality standards are a "limitation" for purposes of section 401(d), why are they not also a "limitation" for purposes of section 505? [FN145] An affirmative answer is important, because it would allow citizens to enforce against the largest sources of water pollution confronting the nation.

#### 1. The Enormity of -- and Lack of Control Over -- Nonpoint Sources of Pollution

In 1989, the Natural Resources Defense Council published Poison Runoff: A Guide to State and Local Control of Nonpoint Source Water Pollution. [FN146] The authors described how serious nonpoint source pollution is and how little has been done to tackle it:[A]ccording to the most recent national survey, nonpoint sources accounted for approximately 65% of the stream miles for which States reported impairments of water quality; 76% of impaired lake acres were attributed by the States to nonpoint sources. . . . In estuarine waters, too, pollution from nonpoint sources is the largest single cause of the impairments cited by the States . . . . Finally, ground water contamination from agricultural activities was reported to be a problem by 79% of the States reporting on water quality. [FN147]

Despite the recognition that nonpoint source water pollution is our largest water quality problem, and that agricultural practices "are the single largest source of several important water pollutants," [FN148] agricultural return flows were exempted from the NPDES permit program. [FN149] Thus, agricultural pollution is treated as nonpoint source pollution for the most part, although battles rage around the edges of this exemption. [FN150] And like *278 other sources of nonpoint source pollution, it resists comprehensive controls or solutions.

#### 2. The Supreme Court Interpreted the Clean Water Act in a Way That Suggests Allowing Enforcement of Water Quality Standards by Citizens Under Section 505

The Court's interpretation of "other limitations" in section 401(d) suggests that citizens can sue under the Clean Water Act section 505 citizen suit provision to compel compliance with water quality standards. Should the courts agree, the expansive reading given by the Supreme Court to state enforcement of water quality standards would apply to citizens as well. This would provide the public with a powerful tool against water pollution, because citizens could both enforce water quality standards and cause violators to be fined up to $25,000 per day and pay the citizens' costs and attorney's fees. [FN151]

a. The Citizen Suit Provision

Section 505(a) authorizes any citizen to file suit against any person, including the United States and any other governmental agency alleged to be in violation of an effluent standard or limitation under the Act or an order issued by EPA or a state with respect to a standard or limitation. [FN152] Section 505(f) defines what an effluent standard or limitation is for the purposes of section 505(a). [FN153] It states that the term "effluent standard or limitation" means, among other things, an effluent limitation or other limitation under sections 301 or 302 of the Act. [FN154] Although the Court was not interpreting section 505(f) in Jefferson County, it held that this exact language in section 401(d) includes water quality standards:

We agree with the State that ensuring compliance with s 303 is a proper function of the s 401 certification. Although s 303 is not one of the statutory provisions listed in s 401(d), the statute allows states to impose limitations to ensure compliance with s 301 of the Act. Section 301 in turn incorporates s 303 by reference. As a consequence, state water quality standards adopted pursuant to s 303 are among the "other limitations" with which a State may ensure compliance through the s 401 certification process. [FN155]

If water quality standards are "other limitations, under section 301" [FN156] of the Act in section 401(d), how could they not also be an "other limitation ***279** under section 301" [FN157] of the Act for purposes of section 505? Certainly any different interpretation would make no semantic sense.

The obvious response by an unwilling court would be that Congress chose to deal with nonpoint source pollution through sections 208, 303, and 319 of the Act. With respect to agricultural pollution, the argument is that Congress exempted agricultural return flows from the NPDES program in order to prevent just such a result.

But nonpoint source programs are not working. And the states, more than twenty years after having been directed by section 303(d) [FN158] of the Clean Water Act to identify water quality-limited waters and establish load allocations (TMDLs) among polluters (including nonpoint and thermal loads), have simply failed to implement the program. [FN159] Given this state of affairs, a sympathetic court presented with grave water quality violations that can be readily traced to one or a very few clear sources may well be induced to adopt this theory.

b. The Courts Before Jefferson County

In what appears to be the most recent Court of Appeals decision directly on point, the majority of a three-judge panel of the Ninth Circuit in Northwest Environmental Advocates v. City of Portland ( NWEA) [FN160] affirmed a district court ruling that " 'water quality standards do not equal 'effluent standards or limitations under this chapter.'" [FN161] The panel reasoned, first, that because Congress shifted emphasis in 1972 from ambient water quality standards to end-of-the-pipe controls on the discharge of pollutants, any enforcement of water quality standards was off limits to citizens. [FN162] That result is absurd, as Judge Pregerson points out in his dissent. [FN163] Simply because Congress shifted the emphasis of the act to the control of pollution at its source does not mean it eliminated water quality controls. Moreover, such an interpretation violates the tenant of statutory interpretation that remedial legislation is to be construed broadly to effectuate its purpose. Second, the panel assumed that because it is easier to prove violations of NPDES permit limits than water quality standards, citizens were prohibited from enforcing water quality standards unless they had been translated into effluent discharge limitations. [FN164] But this takes Congress' conviction that enforcement would be easier and thus more probable under the NPDES system to an illogical ***280** conclusion. [FN165] Simply because certain kinds of enforcement actions might be easier does not mean that other kinds are prohibited. The panel noted the following in explanation:

[A]n alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore an objective evidentiary standard will have to be met by any citizen who brings an action under this section. [FN166]

Even if one were to concede that administrative findings or some sort of administrative procedure, as the panel put

it, must precede citizen enforcement actions, the state list of water quality-impaired waters required under section 303(d) is a perfect analog to the NPDES permit violation.

Under section 303(d), the states must identify waters which do not meet water quality standards. [FN167] Under section 305(b), the states must submit a biennial report to EPA describing the water quality of all its navigable waters for the preceding year. [FN168] EPA rules require states to include all waters identified in their most recent section 305(b) reports as "partially meeting" or "not meeting" designated uses, or as "threatened." [FN169] The states must also include waters identified as impaired or threatened in the nonpoint assessment required under section 319. [FN170]

Here, then, are the administrative findings of violations that a citizen would only have to prove are ongoing, just as is required for NPDES permit ***281** violations. [FN171] Indeed, it may be easier for a citizen to establish an ongoing violation of a water quality standard than for an NPDES permit violation, because the stream itself is often more accessible to the public for testing than a discharge point on a permittee's property.

The NWEA panel's repeated insistence that "Congress . . . emphasized the primacy of discharge limits" [FN172] begs the question. And it is surely inapt today, when nonpoint source pollution is the prime enemy of healthy aquatic ecosystems (the "chemical, physical, and biological integrity of the Nation's waters" [FN173]) and years of enforcing end-of-the-pipe limits has brought us back full circle to a re-alliance with water quality standards as the proper focus of the effectiveness of the Clean Water Act. [FN174]

The NWEA panel cited a handful of cases which it said "generally reject citizen suit standing to enforce water quality standards," although it admitted the cases are either distinguishable or the conclusions dicta. [FN175] The panel also noted the plaintiffs' failure to cite any authority in their favor. [FN176] But that is no reason to read legislative history out of context, jump to illogical conclusions, or refuse to construe remedial statutes to effectuate their purposes. As for the policy reasons underlying the panel's decision, its primary reliance on a prior Ninth Circuit case further underscores the weakness of its reasoning.

Six years earlier, in Oregon Natural Resources Council v. U.S. Forest Service ( ONRC), the Ninth Circuit found that citizens could not sue to enforce water quality standards under the Clean Water Act citizen suit provision for the same reason -- water quality standards were not "limitations" for purposes of section 505(a)(1). [FN177] In the same breath, however, it held that exactly the same claim -- that road building and timber harvesting caused nonpoint source pollution resulting in violation of Oregon's water quality standards -- could be brought by plaintiff Oregon Natural Resources Council against the Forest Service under the Administrative Procedures Act. [FN178] Indeed, it cited other Ninth Circuit cases to the same effect. [FN179]

If, as the NWEA panel professed, prior administrative findings, objective standards, and certainty for nonpoint source dischargers are the policies to be served, then allowing plaintiffs to bring the same claim under a different statute does not further them. The only explanation for the ***282** ONRC panel's decision is that it was avoiding what it perceived to be a statutory prohibition against a claim with which it was sympathetic. The NWEA panel was also aware that the APA claim does not require sixty days notice, a procedural requirement of Clean Water Act citizen suits that the plaintiffs overlooked. [FN180]

The Supreme Court in Jefferson County made this sort of tap dance unnecessary when it held that effluent standards and "other limitations" include water quality standards [FN181] and that section 303 "is always included by reference where section 301 is listed." [FN182] Judge Pregerson was right:

Water quality standards "often cannot be translated into effluent limitations . . . ." For example, certain water quality standards cannot be expressed quantitatively, such as those that apply in this case to bacterial pollution, aesthetic conditions, and objectionable matter (scum, oily sleek, foul odors, and floating solids). Even after the 1972 amendments, states may adopt similar standards and express water quality criteria "as constituent concentrations, levels, or narrative statements . . . ."

. . . .

By interpreting s 1365(a)(1) to exclude citizen suit enforcement of water quality standards that are not translated into quantitative limitations, the majority opinion immunizes the entire body of qualitative regulations from an

important enforcement tool. [FN183]

Close your eyes and listen; you will think someone is reading Justice O'Connor's majority opinion in Jefferson County. [FN184]

## G. Indian Tribes Are States for Purposes of Section 401

Finally, Indian tribes as well as states benefit from the Court's decision, because they may be treated as states for purposes of section 401 (as well as many other provisions of the Clean Water Act). [FN185] Currently, three tribes have received delegated authority under section 401, [FN186] and two ***283** others are close to being authorized. [FN187] Indian tribes with delegated authority have the same duties and rights as the states when a federal license or permit is being sought (in the absence of delegation, EPA certifies when the discharge originates on the reservation). [FN188] But because the Court held, in effect, that any discharge is sufficient to allow regulation of the effects of an entire project on water quality, what happens for projects, such as the Cushman project in the State of Washington, where the existing hydroelectric project for which a utility is seeking relicensing causes discharges which originate both on and off the tribal reservation? Does EPA (the tribe has not been delegated section 401 authority) or the state or do both have conditioning authority? What if their conditions conflict?

## V. Conclusion

The Court may have been cognizant of the need for all levels of government to come to terms with the almost wholesale destruction of the nation's aquatic resources. Water bodies that cannot sustain fisheries and other aquatic organisms, whether because of toxic pollutants, thermal pollution, or because their natural flow has been diverted or altered to the degree that they cannot support critical aquatic life stages, do not meet water quality standards. EPA has, since its inception, directed the states to adopt water quality standards that protectaquatic habitat and the designated and existing uses of their waterways, and to condition section 401 certifications on attainment or maintenance of those uses.

The knowledge of these consistent program developments over the decades of implementation of federal water pollution control law and a recognition of our evolving understanding as a people of the ecological processes necessary to fulfill its goals are essential to appreciate the result in Jefferson County.

If the states and the tribes are to maintain broad authority to deny or condition federally-licensed activities with the potential of affecting water quality, they have a corollary obligation to have a rational substantive and procedural basis for doing so. With authority comes responsibility; states must allocate more resources to water quality certification and develop programs for guiding their determinations. For its part, EPA could provide more guidance at the federal level on many of the lingering questions (e.g., which permits are covered). These points have been made before, [FN189] but they have taken on significantly more urgency since the Jefferson County decision.

[FNa]. Co-Director of the Northwest Regional Office of American Rivers in Seattle, Washington. J.D. 1976, University of Kentucky. Ms. Ransel is the principal author of State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant, 7 Va. J. Nat. Resource L. 339 (1988) (co- authored with Erik Meyers). She represented 18 conservation and fishing organizations in the Washington and U.S. Supreme Courts in PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900 (1994). Special thanks to Matthew M. Werner for his valuable research and writing assistance.

[FN1]. The river's local diminutive.

[FN2]. 114 S. Ct. 1900 (1994).

[FN3]. Id. at 1914.

[FN4]. Federal Water Pollution Control Act, 33 U.S.C. ss 1251-1387 (1988 & Supp. V 1993).

[FN5]. 495 U.S. 490 (1990) [hereinafter sometimes referred to as Rock Creek, after the name of the proposed project].

[FN6]. Id. at 498.

[FN7]. Washington Dep't of Ecology v. PUD No. 1 of Jefferson County, 849 P.2d 646, 648 (Wash. 1993), aff'd, 114 S. Ct. 1900 (1994).

[FN8]. Jefferson County, 114 S. Ct. at 1907-08.

[FN9]. Id. at 1908.

[FN10]. 16 U.S.C. ss 791-828c (1988 & Supp. V 1993).

[FN11]. 16 U.S.C s 797(f) (1988).

[FN12]. Pub. L. No. 99-495, 100 Stat. 1243 (1986) (codified at 16 U.S.C. ss 791a note, 797, 797 notes, 797b, 800, 802, 803, 803 note, 807, 808, 817, 823a, 823a note, 823b, 824a-3, 824a-3 note, 824j, 825h (1988)).

[FN13]. 16 U.S.C. s 797(e) (1988).

[FN14]. 16 U.S.C. s 803(j) (1988).

[FN15]. Id.

[FN16]. Ramping rate, the speed at which the river level rises and falls, has a great influence on shoreline erosion and fish stranding.

[FN17]. For instance, dams prevent the "recruitment" of gravel, which normally is distributed downstream through natural flow processes. Rivers below dams become what scientists call "armored," that is, they lack the small gravel habitat salmon need to create their "redds," or nests. In salmon country, fisheries biologists often recommend a gravel replacement program over the life of a license.

[FN18]. The impetus for ECPA was industry's fear that the municipal preference for original licenses would be applied to relicensings. If so, the financial benefits of operating projects whose principal capital costs were amortized over the first term of the license would go to municipal utilities rather than the investor-owned utilities

that built the projects. See John D. Echeverria, The Electric Consumers Protection Act of 1986, 8 E nergy L.J. 61, 62-65 (1987). State and federal resource agencies, as a result of the give and take of the legislative process, finally gained the explicit right to recommend conditions in the FERC licensing process after years of documented FERC abuse of the natural resource values in riverine ecosystems. It turns reason on its head to interpret this long overdue recognition of the resource agencies' role in the FERC process as an implied repeal or pre-emption of the states' separate and independent s 401 authority to protect and restore the existing and designated uses of their waters. That such a long-overdue recognition of public interest values in the FERC licensing process might be turned against rather than amplify their importance is even more perverse in light of the Commission's historically poor record for natural resource protection.

[FN19]. 495 U.S. 490 (1990).

[FN20]. 16 U.S.C. s 821 (1988).

[FN21]. California v. United States, 438 U.S. 645, 670-79 (1978).

[FN22]. Rock Creek, 495 U.S. at 495.

[FN23]. Id. at 498, 506.

[FN24]. 328 U.S. 152 (1946).

[FN25]. Rock Creek, 495 U.S. at 497-98. In First Iowa, the Court found that a condition on a state water rights permit requiring the return of water diverted for hydropower production to "the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life" conflicted with federal requirements and "[struck] at the heart of the present project." 328 U.S. at 166-67, 170-71 (quoting I owa Code s 7771 (1939)).

[FN26]. Rock Creek, 495 U.S. at 497. Nowhere could that coordinate role be more clear than in the carefully balanced federal-state partnership designed by Congress to preserve the quality of our Nation's waters. Congress sought to blend federal and state regulation of water quality through state standard setting, federal oversight and approval of those standards, and state conditioning of federally licensed activities affecting water quality.

[FN27]. 466 U.S. 765 (1984).

[FN28]. 16 U.S.C. s 797(e) (1988).

[FN29]. Escondido, 466 U.S. at 770.

[FN30]. Id. at 773.

[FN31]. Id. at 775 (emphasis added).

[FN32]. 809 F.2d 41 (D.C. Cir.), cert. denied, 484 U.S. 816 (1987).

[FN33]. Id. at 43-44.

[FN34]. Id. at 53.

[FN35]. Id. at 45 (quoting 33 U.S.C. s 1251(a) (1982)).

[FN36]. Id. at 53.

[FN37]. Id. at 47 (citing Scenic Hudson Preservation Conference v. Callaway, 499 F.2d 127 (2d Cir. 1974)).

[FN38]. Id.

[FN39]. Congress did not so limit state authority, even though the state courts had validated a number of s 401 conditions, similar to the instream flow requirement in Jefferson County, which were not directly associated with a point source discharge of pollutants. See, e.g., Power Auth. of New York v. Williams, 475 N.Y.S.2d 901, 904 (N.Y. App. Div. 1984) (upholding the denial of a s 401 certification because of the effects of a transfer of water from the upper reservoir of a dam to the lower reservoir, even though the discharge would not contain "a specific and identifiable pollutant"), appeal denied, 471 N.E.2d 462 (N.Y. 1984); Arnold Irrigation Dist. v. Department of Envtl. Quality, 717 P.2d 1274, 1279 (Or. Ct. App. 1986) (holding that local land use laws and plans, if related to water quality, are proper subjects of a s 401 certification), review denied, 726 P.2d 377 (Or. 1986); see also Environmental Defense Fund v. Tennessee Water Quality Control Bd., 660 S.W.2d 776, 778-83 (Tenn. Ct. App. 1983) (considering a host of water quality concerns going far beyond the immediate impacts of point source discharges).

[FN40]. 33 U.S.C. s 1341(a)(1) (1988).

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 in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of [Sections 301, 302, 303, 306, and 307 of the Clean Water Act].... No license or permit shall be granted until the certification required by this section has been obtained ....

Id. (emphasis added). The water quality certification was first introduced to federal water pollution control law by s 21(b) of the Water Quality Improvement Act of 1970, well before there was a permit requirement for the "discharge of pollutants," a program initiated with the 1972 Federal Water Pollution Control Act Amendments. Section 21(b) stated in relevant part:

Any applicant for a Federal license or permit to conduct any activity ... which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification ... that such activity will be conducted in a manner which will not violate applicable water quality standards.

Water Quality Improvement Act of 1970, Pub. L. No. 91-224, s 21(b)(1), 84 Stat. 91, 108 (1970) (emphasis added). This is relevant to congressional intent whether s 401 is somehow limited to point source discharges of pollutants, as Tacoma argued in this case.

[FN41]. The reference to s 303 of the CWA in s 401(a) is to the water quality standards section of the Act. See EPA's regulations implementing s 401, 40 C.F.R. s 121.2(a)(3) (1994) ("[T]he activity will be conducted in a manner which will not violate applicable water quality standards.").

[FN42]. 33 U.S.C. s 1341(d) (1988).

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 [301 or 302 of this Act] ... and with any other appropriate requirement of State law ... and shall become a condition on any Federal license or permit subject to the provisions of this section.

Id.

[FN43]. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1908 (1994).

[FN44]. Id.

[FN45]. See, e.g., Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982) (including cases cited therein); Lake Erie Alliance for the Protection of the Coastal Corridor v. U.S. Army Corps of Engineers, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981), aff'd, 707 F.2d 1392 (3d Cir.), cert. denied, 464 U.S. 915 (1983).

[FN46]. 33 U.S.C. ss 1311(b)(1)(C), 1313 (1988).

[FN47]. 33 U.S.C. s 1313(c)(2)(A) (1988); 40 C.F.R. ss 131.2, 131.6(a), 131.10 (1994).

[FN48]. Katherine Ransel & Erik Meyers, State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant, 7 V a. J. Nat. Resources L. 339, 341-42 (1988). In addition, s 510 of the CWA expressly preserved the states' authority to establish and enforce water quality standards more stringent than those established under federal law. 33 U.S.C. s 1370 (1988).

[FN49]. 33 U.S.C. s 1313(c)(2)(A) (1988); 40 C.F.R. ss 131.10, 131.11 (1994).

[FN50]. 40 C.F.R. s 131.10 (1994).

[FN51]. 40 C.F.R. ss 131.10(e), (g), 131.20(b) (1994).

[FN52]. 40 C.F.R. s 131.10(g), (h) (1994).

[FN53]. 40 C.F.R. s 131.11 (1994); see also, e.g., Executive Summary to U.S. Environmental Protection Agency, Pub. No. 440/5-90-004, Biological Criteria: National Program Guidance for Surface Waters , at vii-ix (Apr. 1990).

[FN54]. 40 C.F.R. s 131.12 (1994).

[FN55]. W ash. Admin. Code s 173-201A-130(33) (1992).

[FN56]. W ash. Admin. Code s 173-201A-030(1)(b)(iii) (1992). Class AA waters must "markedly and uniformly

exceed the requirements" necessary for these uses. W ash. Admin. Code s 173-201A-030(1)(a) (1992).

[FN57]. W ash. Admin. Code s 173-201A-070(1) (1992) (Washington's expression of the federal antidegradation policy).

[FN58]. Washington Dep't of Ecology v. PUD No. 1 of Jefferson County, 849 P.2d 646, 649-57 (Wash. 1993), aff'd, 114 S. Ct. 1900 (1994).

[FN59]. For those interested in the preservation of existing instream uses of water in Washington State, the Washington Supreme Court's opinion is a breakthrough. As far as the author is aware, it is the first time any court, state or federal, has ruled that the antidegradation requirement is mandatory on the state. But cf. Arnold Irrigation Dist. v. Department of Envtl. Quality, 717 P.2d 1274, 1279 (Or. Ct. App. 1986) (suggesting that Oregon has a mandatory duty to condition a s 401 certification on compliance with any state law that has a relationship to water quality).

In short, section 401 requires states to certify compliance with state waterquality standards. Washington's standards prohibit the degradation of the state's waters, and prohibit the degradation of fish habitat and spawning in the Dosewallips in particular. Therefore, section 401 required Ecology to certify that the Elkhorn project would not degrade fish habitat and spawning in the Dosewallips. Given that Ecology's fisheries biologists determined that the instream flows urged by Tacoma risked such degradation, Ecology therefore could not issue the 401 certificate without imposing more protective instream flow conditions. Absent such a condition, Ecology could not assure compliance with state water quality standards.

Jefferson County, 849 P.2d at 650 (emphasis added). This suggests the availability of a mandamus action against the State of Washington if it permits any activity that degrades existing uses of state waters.

[FN60]. Jefferson County, 849 P.2d at 653. Washington's Water Resources Act of 1971 requires that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." Wash. Rev. Code s 90.54.020(3)(a) (1994).

[FN61]. Jefferson County, 849 P.2d at 653-54. The Court went on in any event to analyze carefully Tacoma's pre-emption argument, which it found wanting. Id. at 657.

[FN62]. Washington Dep't of Ecology v. PUD No. 1 of Jefferson County, 849 P.2d 646 (Wash. 1993), petition for cert. filed, 114 S. Ct. 55 (June 1, 1993) (No. 92-1911).

[FN63]. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1908 (1994). The court noted the contrasting holdings of Georgia Pacific Corp. v. Department of Envtl. Conservation, 628 A.2d 944, 35 Env't Rep. Cas. (BNA) 2052 (Vt. 1992) (upholding s 401 state certification conditions imposed on a hydroelectric facility to protect aesthetics and recreation), cert. vacated, 114 S. Ct. 2670 (1994), and Power Auth. of New York v. Williams, 457 N.E.2d 726, 729 (N.Y. 1983) (holding that FPC jurisdiction "pre-empts all State licensing and permit functions").

[FN64]. Briefs amici curiae were filed in support of Tacoma on behalf of the Pacific Northwest Utilities (including 11 utilities); the Northwest Hydroelectric Association (including 54 different utilities or other member organizations); American Forest & Paper Association, American Public Power Association, Edison Electric Institute, and the National Hydropower Association; Niagra Mohawk Power Corporation; and the Western Urban Water Coalition (representing 20 urban water utilities).

In support of the State of Washington, briefs amici curiae were filed by the National Association of Attorneys

General on behalf of 44 states; American Rivers, on behalf of 18 natural resources conservation and fishing organizations; and the United States.

[FN65]. Jefferson County, 114 S. Ct. at 1910.

[FN66]. Id. at 1911.

[FN67]. Id. at 1910-11.

[FN68]. Id. at 1911.

[FN69]. Wash. Admin. Code s 173-201A-030(1)(b)(iii) (1992).

[FN70]. Jefferson County, 114 S. Ct. at 1910-12.

[FN71]. Id. at 1912 (citing Wash. Admin. Code s 173-201A- 030(1)(b)(iii) (1992)).

[FN72]. Id.

[FN73]. Id. at 1908.

[FN74]. Id. at 1909.

[FN75]. Id. (citing 33 U.S.C. s 1341(d) (1988)) (emphasis added).

[FN76]. Id. (citing H.R. Conf. Rep. No . 830, 95th Cong., 1st Sess. 96 (1977)).

[FN77]. Id. (citing 40 C.F.R. s 121.2(a)(3) (1992), and U.S. Environmental Protection Agency, Doc. No. MD-108, Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes 23 (1989)).

[FN78]. Id. (citing Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)).

[FN79]. Id. at 1915 (Thomas, J., dissenting).

[FN80]. H.R. Rep. No. 911, 92d Cong., 2d Sess. 121 (1972), reprinted in Senate Comm. on Public Works , 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 , at 808 (Comm. Print 1973).

[FN81]. H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), reprinted in Senate Comm. on Environment and

Public Works, 95th Cong., 2d Sess., A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act 280 (Comm. Print 1978).

[FN82]. Jefferson County, 114 S. Ct. at 1908.

[FN83]. Id. at 1912.

[FN84]. Id. at 1913.

[FN85]. Id. at 1913 (citing 33 U.S.C. s 1362(19) (1988)).

[FN86]. Id.

[FN87]. It may be because the United States rejected FERC's position on the Clean Water Act instream flow condition that it danced around the question of how conflicts between the states and FERC should be resolved as a conciliatory gesture to FERC. Brief for the United States as Amicus Curiae Supporting Affirmance at 22-29, Jefferson County, 114 S. Ct. 1900 (1994) (No. 92-1911). Indeed, even Tacoma argued in its Reply Brief that FERC was required to include the state's conditions. Petitioner's Reply Brief at 3-6, Jefferson County, 114 S. Ct. 1900 (1994) (No. 92-1911). And FERC has consistently held that view in the past. See, e.g., Town of Summersville, 60 Fed. Energy Reg. Comm'n Rep. (CCH) P 61,291, 61,990 (Sept. 25, 1992); Carex Hydro, 52 Fed. Energy Reg. Comm'n Rep. (CCH) P 61,216, 61,779 (Aug. 29, 1990). This is one point on which all the parties and amici agreed, except, of course, for the United States, which did not disagree but simply refused to confront the issue.

Tacoma's strategy was no doubt based on the hope that if the Supreme Court agreed that FERC had no discretion but to include the states' conditions, that, coupled with the Court's decision in California v. FERC, would force the Court to determine what would happen in the event of a conflict between a state and FERC. Given the dire consequences Tacoma predicted for the industry if the states were to prevail, it no doubt believed that if forced to decide the issue, the Court would do so in favor of exclusive FERC jurisdiction over stream flows.

[FN88]. Jefferson County, 114 S. Ct. at 1914.

[FN89]. Id. (comparing Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 778 n.20 (1984)) (emphasis added). See supra text accompanying notes 27-31.

[FN90]. 33 U.S.C. s 1341(d) (1988) ("[A]ny certification ... under this section shall set forth ... limitations ... and shall become a condition on any Federal license or permit.").

[FN91]. Tunbridge Mill Corp., 68 Fed. Energy Reg. Comm'n Rep. (CCH) P 61,078, 61,388-90 (July 15, 1994) (denying three state conditions on a proposed dam license that FERC held were unrelated to water quality).

[FN92]. Jefferson County, 114 S. Ct. at 1909.

[FN93]. 33 U.S.C. s 1341(a) (1988).

[FN94]. Jefferson County, 114 S. Ct. at 1913.

[FN95]. Id.; see, e.g., U.S. Environmental Protection Agency, National Guidance: Wetlands and Nonpoint Source Control Programs 14 (1990); Wetlands and 401 Certification , supra note 77.

[FN96]. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, s 21(b)(1), 84 Stat. 91, 108 (1970) (codified as amended at 33 U.S.C. ss 1151 note, 1152, 1155, 1156, 1158, 1160-1175 (1988)).

[FN97]. H.R. Rep. No. 911, 92d Cong., 2d Sess. 121 (1972), reprinted in Senate Comm. on Public Works , 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 , at 808 (Comm. Print 1973). It should be noted that none of the parties disagreed that the provision requires compliance with state water quality standards.

[FN98]. 33 U.S.C. s 1362(12) (1988) (emphasis added).

[FN99]. 33 U.S.C. s 1362(16) (1988) (emphasis added); see also Ransel & Meyers, supra note 48, at 348-53 (providing an extensive discussion of the breadth of these terms).

[FN100]. 33 U.S.C. s 1344 (1988).

[FN101]. For other permits and licenses about which there appears to be no argument, see Ransel & Meyers, supra note 48, at 344-48.

[FN102]. Oregon Natural Desert Ass'n v. Thomas, No. 94-522 (D. Or. filed May 11, 1994). Both parties moved for summary judgment. A hearing was held on April 3, 1995 before Judge Haggerty, and a ruling is currently pending.

[FN103]. 33 U.S.C. s 1341(a)(1) (1988).

[FN104]. Plaintiff's Compl. at 7-8, Oregon Natural Desert Ass'n (No. 94- 522). Camp Creek, also the name of the allotment, is tributary to the John Day River, a major Columbia River tributary. According to the plaintiffs, the creek suffers water quality degradation because of grazing activities, including sediment, temperature, fecal coliform and fecal streptococci loading. Id.

[FN105]. This notice is prerequisite to filing a CWA citizen suit. 33 U.S.C. s 1365(b) (1988).

[FN106]. Plaintiff's Compl. at Ex. B, Doc. 12, Oregon Natural Desert Ass'n (No. 94-522) (letter from Regional Forester John E. Lowe responding to the notice of intent to sue).

[FN107]. The Oregon groups report that there are about 27,000 permits to graze livestock on public lands, most of which include streams and their riparian areas. This suit could, they say, affect some 3.2 million acres of riparian areas on Forest Service and Bureau of Land Management lands. Fact sheet, John Day River Clean Water Act Lawsuit, ONDA, May 11, 1994.

[FN108]. "New" license is a term of art under the FPA; it means what the public would commonly understand as a relicense. A license to construct and operate a hydropower plant for the first time is called an "original" license. See, e.g., 16 U.S.C. ss 800(a), 808(a)(1) (1988).

[FN109]. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1910 (1994); 33 U.S.C. s 1313(c)(2)(A) (1988).

[FN110]. For example, the state could impose conditions which facilitate the safe passage of migrating salmon past the dam.

[FN111]. 746 F.2d 466 (9th Cir. 1984), cert. denied, 471 U.S. 1116 (1985).

[FN112]. Id. at 470.

[FN113]. Id. at 476.

[FN114]. See 40 C.F.R. s 131.10(g)(4) (1994).

[FN115]. 16 U.S.C. s 799 (1988).

[FN116]. See H.R. Rep. No. 507, 99th Cong., 2d Sess. 11 (1986), reprinted in 1986 U.S.C.C.A.N. 2496, 2498 (discussing the history of the Federal Power Act).

[FN117]. 33 U.S.C. s 1257(a) (1988).

[FN118]. Both the CWA and ECPA make this abundantly clear. See, e.g., S. R ep. No . 414, 92d Cong., 1st Sess. 69 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3735 (prohibiting the Federal Power Commission (now FERC) from granting a license for hydroelectric generation if a state denies certification); H.R. C onf. Rep. No. 934, 99th Cong., 2d Sess. 22 (1986), reprinted in 1986 U.S.C.C.A.N. 2537, 2538 ("Projects licensed years earlier must undergo the scrutiny of today's values as provided in this law and other environmental laws applicable to such projects. If nonpower values cannot be adequately protected, FERC should exercise its authority to restrict or ... even deny a license on a waterway." (emphasis added)).

[FN119]. 16 U.S.C. s 803(j) (1988).

[FN120]. Tunbridge Mill Corp., 68 Fed. Energy Reg. Comm'n Rep. (CCH) P 61,078, 61,389 (July 14, 1994).

[FN121]. Id. at 61,388.

[FN122]. 33 U.S.C. s 1341(d) (1988); accord Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982).

[FN123]. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 776 (1984).

[FN124]. Id. at 777.

[FN125]. Id.; 16 U.S.C. s 797(e) (1988).

[FN126]. 16 U.S.C. s 811 (1988).

[FN127]. Escondido, 466 U.S. at 775.

[FN128]. Id. at 778.

[FN129]. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects or any Foreign State." U.S. Const . amend XI.

[FN130]. See, e.g., Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982) (including cases cited therein); Lake Erie Alliance for the Protection of the Coastal Corridor v. U.S. Army Corps of Engineers, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981), aff'd, 707 F.2d 1392 (3d Cir. 1983), cert. denied, 464 U.S. 915 (1983).

[FN131]. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984).

[FN132]. The State of Vermont and American Rivers have moved for reconsideration of FERC's order rejecting the State of Vermont's conditions. FERC recently stayed the time its rules dictate it must rule on a motion for reconsideration, so that the motion would not automatically be denied. Thus, FERC's decision is not yet final for purposes of judicial review. The State of Vermont also argued in its petition for rehearing that FERC violated the Administrative Procedure Act and the Due Process Clause because it gave no notice that it would review the conditions, provided no opportunity to the state to be heard, took no evidence on the issue, and made no findings to support its legal conclusion. Petition for Rehearing, Tunbridge Mill Corp., No. 1109-000 (Fed. Energy Reg. Comm'n filed Aug. 12, 1994).

[FN133]. See generally the debate between Gregory J. Hobbs and Michael C. Blumm: Gregory J. Hobbs, Ecological Integrity, New Western Myth: A Critique of the Long's Peak Report, 24 Envtl. L. 157 (1994); Michael C. Blumm, The Rhetoric of Water Reform Resistance: A Response to Hobbs' Critique of the Long's Peak Report, 24 Envtl. L. 171 (1994); Gregory J. Hobbs, Interpreting the Ecological Integrity Myth: (A Response to Professor Blumm), 24 Envtl. L. 1185 (1994); and Michael C. Blumm, Pinchot, Property Rights, and Western Water: (A Reply to Gregory Hobbs), 24 Envtl. L. 1203 (1994).

[FN134]. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1912 (1994). The majority ignored Justice Scalia's comment during oral argument that it is "the Clean Water Act, not the Voluminous Water Act!" Jay Manning, Two Views on the U.S. Supreme Court's Elkhorn Decision: Ramifications for States and the Environment -- State Authority Under Section 401, 9 Nat'l Envtl. Enforcement J. 3, 8 n.15 (1994).

[FN135]. See Gregory J. Hobbs, Jr. & Bennett W. Raley, Water Quality Versus Water Quantity: A Delicate Balance, 24 Rocky Mtn. Min. L. Inst. ss 24.01, 24.03[1] (1988) (providing an interesting, if biased, account).

[FN136]. 33 U.S.C. s 1313(c)(2)(A) (1988).

[FN137]. National Audubon Soc'y v. Superior Ct. of Alpine County ( Mono Lake), 658 P.2d 709, 719 (Cal.), cert. denied, 464 U.S. 977 (1983).

[FN138]. In Mono Lake, the California Supreme Court restrained a proposed diversion from Mono Lake to the City of Los Angeles because additional water withdrawals from the lake would harm the public trust values by reducing the aquatic organisms on which brine shrimp feed, thereby damaging the shrimp industry and a gull population. Id. at 732. Both the ongoing and additional diversions were or would have been pursuant to vested water rights granted to the City decades earlier. Id. at 711.

[FN139]. An excellent treatment of the intersection of the prior appropriation doctrine, the public trust doctrine, and water pollution can be found in Ralph W. Johnson, Water Pollution and the Public Trust Doctrine, 19 Envtl. L. 485 (1989).

[FN140]. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1913 (1994) (emphasis added).

[FN141]. Id. at 1913-14 (quoting Senate Comm. on Env't and Pub. Works, 95th Cong., 2d Sess., A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act 532 (Comm. Print 1978) (statement of Sen. Baker)).

[FN142]. 33 U.S.C. s 1365 (1988).

[FN143]. See, e.g., Jeffery G. Miller , Citizen Suits: Private Enforcement of Federal Pollution Control Laws (1987). NPDES stands for National Pollution Discharge Elimination System, adopted by the Federal Water Pollution Control Act Amendments of 1972, and requires a permit for the discharge of pollutants from point sources into waters of the United States. 33 U.S.C. s 1342 (1988 & Supp. V 1993).

[FN144]. Instream flow advocates have waited over a decade for the state to set instream flow requirements for approximately two-thirds of Washington waters. This situation exists despite the mandatory language of Washington's base flow statute. Wash. Rev. Code s 90.54.020(3)(a) (1994); see supra note 60.

[FN145]. See supra note 71 and accompanying text.

[FN146]. Paul Thompson et al., Poison Runoff: A Guide to State and Local Control of Nonpoint Source Water Pollution (Natural Resources Defense Council 1989).

[FN147]. Id. at 2-3 (endnotes omitted).

[FN148]. Id. at 38.

[FN149]. See 33 U.S.C. s 1362(14) (1988), which excepts "agricultural stormwater discharges and return flows" from the definition of point source. Only point sources of pollutants, a term of art under the CWA, are subject to the NPDES permitting system.

[FN150]. See, e.g., Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 121-23 (2d Cir. 1994) (citing Natural Resources Defense Council v. Train, 396 F. Supp. 1393 (D.D.C. 1975), aff'd, 568 F.2d 1369 (D.C. Cir. 1977), and Higbee v. Starr, 598 F. Supp. 323 (E.D. Ark. 1984), aff'd, 782 F.2d 1048 (8th Cir. 1985) (table)).

[FN151]. 33 U.S.C. ss 1319(d), 1365(a)(2), (d) (1988) (all three sections must be read together).

[FN152]. 33 U.S.C. s 1365(a)(1) (1988).

[FN153]. Id. s 1365(f).

[FN154]. Id. (emphasis added). Effluent limitation (but not effluent standard) is defined elsewhere in the Act as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." Id. s 1362(11) (emphasis added).

[FN155]. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1909 (1994) (citations omitted).

[FN156]. 33 U.S.C. s 1341(d) (1988).

[FN157]. Id. s 1365(f).

[FN158]. Id. s 1313(d).

[FN159]. See, e.g., Alaska Ctr. for the Env't v. Reilly, 762 F. Supp. 1422, 1425 (W.D. Wash. 1991) (stating that in ten years, the state had not submitted a single TMDL to EPA).

[FN160]. 11 F.3d 900 (9th Cir. 1993); see also Craig N. Johnston, Don't Go Near the Water: The Ninth Circuit Undermines Water Quality Enforcement, 24 Envtl. L. 1289, 1321-23 (1994).

[FN161]. 11 F.3d 900, 907 (9th Cir. 1993) (quoting Excerpt of Record at 84).

[FN162]. Id. at 909-10.

[FN163]. Id. at 912 (Pregerson, J., dissenting).

[FN164]. Id. at 910.

[FN165]. The panel noted that prior to 1972 only one enforcement action had been brought. Id. at 909.

[FN166]. Id. at 910 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3745).

[FN167]. 33 U.S.C. s 1313(d) (1988).

[FN168]. Id. s 1315(b).

[FN169]. 40 C.F.R. s 130.7(b)(5)(i) (1994).

[FN170]. 40 C.F.R. s 130.7(b)(iv) (1994). States are then to determine pollutant loads, including thermal allocations, required to attain and maintain applicable narrative and numeric water quality standards. 33 U.S.C. s 1313(d)(1)(A)-(C). Thermal loads must assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, the estimate of which must take into account both "flow rates" and the "dissipative capacity of the identified waters." Id.

The most current s 303(d) list in Washington State has two river segments listed for lack of sufficient instream flows to sustain indigenous fisheries. The Washington Department of Ecology noted with respect to instream flows:

The narrative criteria could also interpreted [sic] to list waterbody segments that lack adequate instream flows to protect fish habitat because of excessive withdrawals or diversions....

The Instream Flow Incremental Methodology (IFIM) developed by The U.S. Fish and Wildlife Service is used to model how changes in flow affects [sic] habitat availability for aquatic life.... Streams for which instream flow is found to be inadequate due to anthropogenic activities are in violation of the antidegradation clause of the water quality standards and considered for the list.

Wash. Dep't of Ecology, Pub No. 94-73a, Responsiveness Summary for Comments Received on the 1994 Section 303(d) List 5 (May 1994). The Department cited the Washington Supreme Court's decision in Jefferson County in support of this determination. Id.

[FN171]. While the government can sue for wholly past violations, citizens cannot. Instead, the violations must be alleged to be continuing or ongoing. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987).

[FN172]. Northwest Envtl. Advocates v. City of Portland, 11 F.3d 900, 910 (9th Cir. 1993).

[FN173]. 33 U.S.C. s 1251(a) (1988).

[FN174]. See generally 2 William H. Rodgers, Jr., Environmental Law s 4.18B- C (1986); see also Thompson et al., supra note 146, at 15-34.

[FN175]. Northwest Envtl. Advocates, 11 F.3d at 907.

[FN176]. Id.

[FN177]. 834 F.2d 842, 848-51 (9th Cir. 1987).

[FN178]. Id. at 851.

[FN179]. Id. at 851-52 (citing Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 697 (9th Cir. 1984), rev'd, 485 U.S. 439 (1988), and City of Las Vegas v. Clark County, 755 F.2d 697, 704 (9th Cir. 1985)).

[FN180]. Id. at 848, 851.

[FN181]. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1909 (1994).

[FN182]. Id. (citing H.R. Conf. Rep. No . 830, 95th Cong., 1st Sess. 96 (1977)).

[FN183]. Northwest Envtl. Advocates v. City of Portland, 11 F.3d 900, 912 (9th Cir. 1993) (citations omitted).

[FN184]. Almost 10 years ago, William H. Rodgers, Jr. noted:
One injunction has been entered, based partly on water quality considerations, against the construction of 6.2 miles of paved road by the Forest Service to make possible timber harvesting in the Klamath River Basin in northern California. The predictions were that the turbidity and suspended standards in affected streams would be violated to the detriment of anadromous fish. The far-reaching implications are obvious: here is a prominent nonpoint source activity (construction) engaged in by the nation's biggest builder (the United States) producing commonplace violations (of turbidity and suspended sediment standards). The question that needs answering is why hundreds of decisions of this sort cannot be found. The differences between a harbinger and a deviant are not all that obvious.
2 Rodgers , supra note 174, s 4.18B, at 281 (emphasis added, citations omitted).

[FN185]. 33 U.S.C. s 1377(e) (1988).

[FN186]. These are the Pueblo San Juan, the Pueblo Isleta, and the Pueblo Sandia, all located in New Mexico.

[FN187]. These are the Flathead Tribe in Montana and the Tulalip Tribes in Washington. Eight other tribes have applied for s 401 authorization, and are at various stages in the approval process.

[FN188]. 33 U.S.C. s 1377(e) (1988).

[FN189]. Ransel & Meyers, supra note 48, at 378-79.

END OF DOCUMENT

EXHIBIT L

## Luster, Tom

**From:** Lavigne, Ronald (ATG)
**Sent:** Friday, April 30, 1999 3:45 PM
**To:** Kenny, Ann; Fitzpatrick, Kevin; Manning, Sandra; Hegy, Terra; Austin, Lisa; Moore, Bill; Selby, Melodie; Luster, Tom; Lund, Perry; McMillan, Andy; Shorin, Bonnie; Ehlers, Paula; Meyers, Doug; 'Lynch, Patty'
**Cc:** Lavigne, Ronald (ATG); Hellwig, Raymond
**Subject:** RE: Summary of yesterdays meeting

I have some legal concerns regarding the agreements that were apparently reached at the Wednesday meeting.

1. The state does not always have the option of holding a 401 certification in abeyance because a state waives its ability to issue a 401 certification one year after an application has been made. Nor am I aware of any legal authority to deny a 401 certification without prejudice. If a 402 permit insures compliance with WQSs, than it is legally appropriate for the 401 certification to simply incorporate by reference the requirements of the 402 permit so long as the 402 permit covers all the discharges that would be subject to the 401 certification. However, if the 402 permit does not insure compliance with WQSs for all discharges sought to be covered under the 401 certification than the 401 program has two options: i) issue the 401 certification with whatever additional conditions are necessary to insure compliance with WQSs or ii) deny the 401 certification.

2.a. There is no legal justification for failing to address stormwater impacts from small, medium and some large projects. The 401 certification must insure compliance with WQSs regardless of the size of the project. As a policy matter the state could decide to waive 401 certification for certain sized projects. However, if a 401 certification is issued it must include conditions necessary to insure compliance with WQSs for all discharges, including stormwater discharges, regardless of the size of the project.

2.b. We need more than the so called "presumptive approach" to adequately defend 401 certifications, especially where the presumption makes little sense. We've gotten away with the presumptive approach in the 402 context in large part because the 402 permit process provides 5 year opportunities to revisit the presumption. Consequently, the PCHB had been willing to defer to Ecology's presumption that BMPs will eventually get to compliance with WQSs. We don't have that luxury in the 401 context because 401 certifications, unlike 402 permits, are not reissued every 5 years. Consequently, in drafting a 401 certification, the 401 program must be able to conclude that BMPs will actually result in compliance with WQSs. If this is not the case (and it won't be in many instances) than the 401 certification must include whatever additional conditions are necessary to meet WQSs.

I share some of the concerns with the draft policy and will continue to work with Sandy to fine tune the policy. Nonetheless, the 401 program should be commended for taking on this difficult issue.

ron

-----Original Message-----
**From:** Kenny, Ann
**Sent:** Friday, April 30, 1999 11:21 AM
**To:** Fitzpatrick, Kevin; Manning, Sandra; Hegy, Terra; Austin, Lisa; Moore, Bill; Selby, Melodie; Luster, Tom; Lund, Perry; McMillan, Andy; Shorin, Bonnie; Ehlers, Paula; Meyers, Doug; 'Lynch, Patty'
**Cc:** Lavigne, Ronald (ATG); Hellwig, Raymond
**Subject:** RE: Summary of yesterdays meeting

Sandy, I need to echo Kevin's concerns. The revised documents you sent don't fully reflect what I thought we had agreed to at Wednesday's meeting.

Based on my notes of what we had on the put on the easel, we had agreed to the following:

1. Where there is a 402 permit in place or pending, the 401 permit would defer to the 402 permit. If the 402 permit is out of compliance the 401 would be held in abeyance or denied without prejudice. (This point is more or less accurately presented if we get Kevin's point regarding the municipal stormwater issues.)

2. For 401 permit where there is no 402, we agreed to take a <u>three-tiered approach</u>:

a. Most small, medium and some large projects would not be reviewed for stormwater compliance issues. [We agreed that we would need to very carefully analyze which projects would fall into each category and develop some clear criteria.]