

[FN175]. Northwest Env'tl. 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 Env'tl. 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.

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[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 Env'tl. 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.

[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 Env't. 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.

[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 Env'tl. 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).

[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 Env'tl. L. 157 (1994); Michael C. Blumm, The Rhetoric of Water Reform Resistance: A Response to Hobbs' Critique of the Long's Peak Report, 24 Env'tl. L. 171 (1994); Gregory J. Hobbs, Interpreting the Ecological Integrity Myth: (A Response to Professor Blumm), 24 Env'tl. L. 1185 (1994); and Michael C. Blumm, Pinchot, Property Rights, and Western Water: (A Reply to Gregory Hobbs), 24 Env'tl. 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 Env'tl. Enforcement J. 3, 8 n.15 (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).

[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.

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).



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

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 Env'tl. 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 Env'tl. 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

[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

[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 Env'tl. 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.").

that built the projects. See John D. Echeverria, The Electric Consumers Protection Act of 1986, 8 Energy 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 Iowa 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).

[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

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 protect aquatic 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.

[FN<sub>a</sub>]. 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).

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



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

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]

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]

Congress clearly meant to leave 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 "shall be 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,

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 401 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.

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?

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

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 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

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]

construct a new hydroelectric power project on the Dosewallips River. The Elkhorn Project, named after a nearby Forest Service campground, was to include 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.

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

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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