

January 2000

Section 401 of the Clean Water Act and its Application to Nonpoint Source Pollution in California

Scott Smithline

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Environmental Law Commons](#)

Recommended Citation

Scott Smithline, *Section 401 of the Clean Water Act and its Application to Nonpoint Source Pollution in California*, 30 Golden Gate U. L. Rev. (2000).
<http://digitalcommons.law.ggu.edu/ggulrev/vol30/iss1/7>

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

NOTE

SECTION 401 OF THE CLEAN
WATER ACT AND ITS
APPLICATION TO NONPOINT
SOURCE POLLUTION
IN CALIFORNIA

I. INTRODUCTION

The Ninth Circuit Court of Appeals recently held in *Oregon Natural Desert Ass'n v. Dombeck*¹ (“*Dombeck*”) that “certification under Section 401 of the Clean Water Act is not required for grazing permits or other federal licensed activities that may cause pollution solely from nonpoint sources.”² The court not only excluded grazing from the certification requirement under Section 401 of the Clean Water Act (the Act), but also ruled that all discharges from solely nonpoint sources are excluded from the state certification process.³ By upholding the validity of the grazing permit in the absence of state certification, the court substantially limited states’ ability to regulate nonpoint source pollution originating on federal lands. This

¹ 172 F.3d 1092 (9th Cir. (1998)).

² *Id.* at 1099. “Nonpoint source” is not specifically defined in the Act’s definition section, but is generally associated with agricultural practices. Section 208(b)(2)(F) of the Act partially defines nonpoint sources as return flows from irrigated agriculture, runoff from manure disposal and land used for livestock production.

³ *Dombeck*, 172 F.3d at 1094. 33 U.S.C. § 1341. Section 401 authorizes a state to regulate any activity within its jurisdiction that requires federal permitting or licensing, to ensure that the activity complies with the state’s water quality standards. The power is in the form of a “certification” granted by the state that the activity will comply with applicable standards.

102 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

note addresses the *Dombeck* opinion and its relation to the State of California's nonpoint source water pollution.

A brief description of Section 401 provides contextual support for the court's holding in *Dombeck*. In addition, the full impact of the *Dombeck* decision on California water quality cannot be understood without a discussion of the current nonpoint source pollution issues, and pollution control mechanisms currently in place on federal lands within California. Therefore, a brief analysis of nonpoint source pollution issues and policy (generally in the context of grazing) will precede the *Dombeck* case analysis.

II. BACKGROUND

In drafting the Clean Water Act (the Act),⁴ Congress attempted to divide water pollution into two distinct categories.⁵ The Act generally provides for federal control, or oversight, of "point sources" and state control of "nonpoint sources."⁶ However, this division of authority is blurred by provisions in the Act, which delegate authority to the states to manage water

⁴ Federal Water Pollution Control Act §§ 101 to 607, 33 U.S.C. §§ 1251 to 1387 (1994).

⁵ Under the Act, water pollution has been divided into point sources, and nonpoint sources. Point sources are defined in, and are directly regulated by, the Act through the National Pollutant Discharge Elimination System (NPDES). "The term point source means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362 (14) (1994).

⁶ See *Dombeck*, 172 F.3d at 1096-97. "The Clean Water Act defines point sources as 'discernible, confined and discrete conveyances' such as a pipe, ditch, or machine. 33 U.S.C.A. 1362." *Id.* at 1095. For the definition of discharge see *infra* at footnote 10. "The district court reasoned that because the unqualified term 'discharge' is defined as including, but is not limited to, point source releases, it must include releases from nonpoint sources as well." *Id.* at 1096.

quality within its borders.⁷ Section 401 of the Act is one of several such provisions. Section 401 requires:

Any applicant for a federal license or permit to conduct any activity, including but not limited to, the construction or operation of facilities, which may result in *any discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.⁸ (emphasis added)

The division of authority is further blurred by Section 402 of the Act. Section 402 permits states to regulate point source discharges after developing a federally approved National Pollutant Discharge Elimination System (NPDES) program.⁹ Hence, the federal grant of authority to the state does not make Section 401 controversial. Rather, the controversy over Section 401 centers on which types of discharges fall within its purview, and thus within the jurisdiction of the state.

⁷ Section 208 of the Act requires states to monitor and control nonpoint source pollution. Under Section 208 (b)(2)(F) the states are required to "(i) identify...agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and the cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288 (b)(2)(F) (1994).

⁸ 33 U.S.C. § 1341 (1994).

⁹ 33 U.S.C. § 1342 (b) (1994). Under Section 1342 of the Act (FWPCA Section 402), states which chose to implement their own NPDES program submit to the Administrator a "full and complete description of the program it proposes to establish and administer," and "shall submit a statement from the attorney general ... that the laws of the state...provide adequate authority to carry out the described program." 33 U.S.C. § 1342 (b) (1994).

104 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

A confounding issue is that Congress failed to adequately distinguish between its different uses of the word "discharge" in the Act.¹⁰ While Congress clearly intended to create more than one meaning for the term discharge, it did not clarify what the different meanings are or specify when they apply. Additionally, two district courts within the Ninth Circuit territory reached opposite conclusions with regard to the definition of "discharge" for purposes of applying Section 401.¹¹ The correct interpretation of the term "discharge," as used in Section 401 of the Act, is the keystone to a correct interpretation of Section 401.

Historically, California has not applied Section 401 certification to purely nonpoint source discharges resulting from federally licensed activities. A definitive interpretation of the Clean Water Act sanctioning such a use of Section 401 certification may impel some California regional water boards to implement the statute accordingly.¹²

In California, where the federal government owns 44.6 percent of the state's 101 million acres,¹³ nonpoint source pollution

¹⁰ The term "discharge" is defined twice in the Act:

The term "discharge of a pollutant," and the term "discharge of pollutants," each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. 33 U.S.C. § 1362 (12) (1994). The term "discharge" when used without qualification includes a discharge of a pollutant, and discharge of pollutants. 33 U.S.C. § 1362 (16) (1994).

¹¹ The United States District Court for the District of Oregon held in the case upon which this appeal is based that "§ 401 applies to all federally permitted activities that may result in a discharge, including discharges from non-point sources." Oregon Natural Desert Ass'n v. Thomas, 940 F. Supp. 1534, 1541, (1996). In contrast, the United States District Court for the District of Idaho reached the opposite conclusion when deciding whether pollution caused by erosion resulting from a logging road required Section 401 certification. In *Caswell*, the court held that "since the forest road project is a nonpoint source activity and since the Forest Service has complied with the requisite federal and state requirements regarding the Act, Section 401 certification is not required." Idaho Conservation League v. Caswell, No. 95-394, 1996 U.S. Dist. LEXIS 21980, at 26 (D. Idaho Aug. 12, 1996).

¹² Telephone Interview with Anonymous, chief planner, California Regional Water Quality Control Board (April 25, 1999).

¹³ Public Land Statistics 1997. United States Department of the Interior, Bureau of Land Management: Public Land Statistics 1997, Vol. 182, March 1998, p. 7.

from federal lands is a significant problem. The majority of the federal land in California is owned by the United States Forest Service (USFS) which owns 20 million acres.¹⁴ The Bureau of Land Management (BLM), which owns 14 million acres, also controls a large portion of federal land in California.¹⁵ In 1996, the USFS authorized grazing of 372,555 Animal Unit Months (AUMs) on USFS lands in California.¹⁶ Grazing activities can adversely impact the environment by removing native vegetation, causing soil erosion, compaction, and creating excessive sediment, pathogen, and nutrient loads into rivers, streams, and stationary bodies of water.¹⁷ As cattle tend to concentrate around streams and other bodies of water, they trample streamside vegetation, resulting in streamside instability, and accelerated bank erosion.¹⁸ In addition, increased sedimentation and trampled stream banks increase water temperature and create conditions uninhabitable for trout and salmonids.¹⁹ Furthermore, nutrient loading occurs as a result of animals “defecating directly into the flowing water.”²⁰ The increased livestock fecal matter (nutrient loading) introduces excessive amounts of bacteria into the water and reduces the available oxygen in the water.²¹ As half of Cali-

¹⁴ USDA Forest Service; *Areas by State* (visited Dec. 12, 1999) <<http://www.r5.fs.fed.us/forestmanagement/html/facts.html>>.

¹⁵ United States Department of the Interior, Bureau of Land Management: *Public Land Statistics 1997*, Vol. 182, March 1998, p. 10. *See also* *Public Land Statistics 1997*, p. 10.

¹⁶ United States Department of Agriculture, Forest Service: *Range Management Grazing Statistical Summary FY 1996*, p. 34. (An animal unit month is the amount of forage required to support a mature 1000 pound cow for one month). The National Forest Service authorized a total of 633 permittees to graze over 100,000 animals on NFS lands in California in 1996.

¹⁷ *Water Quality Control Plan for the Lahontan Region, CRWQCB, 1994*, p. 4.9-21.

¹⁸ *Id.* at 4.9-20.

¹⁹ *Id.* *See*: Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 *Conservation Biology* 636 (1994).

²⁰ University of California at Davis Center for Range and Forested Ecosystems, *Rangeland Watershed Program Fact Sheets, Fact Sheet No. 20: Reducing Stream Impacts with Water Developments—An Example* (visited Nov. 8, 1998) <<http://agronomy.ucdavis.edu/calrng/h20.htm>>.

106 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

ifornia's fresh water originates from National Forest Lands, the damage caused by nonpoint source pollution on federal lands threatens the state's source of clean water.²² The state's current nonpoint pollution control system fails to adequately protect the water resource.

III. FACTS AND PROCEDURAL HISTORY

In *Dombeck*,²³ the Ninth Circuit considered whether the United States Forest Service violated Section 401 of the Clean Water Act²⁴ by issuing a grazing permit to a rancher without first obtaining certification by the State of Oregon acknowledging that the grazing would not violate the state's water quality standards.²⁵ The court's decision hinged upon the interpretation of the term "discharge" as it appears in Section 401 of the Act.²⁶

In *Dombeck*, the United States Forest Service (USFS) granted the Burils' a permit to graze fifty head of cattle within the Malheur National Forest in 1993.²⁷ The cattle, which graze for several months of the year, pollute two nearby waterways by increasing the temperature, sediment load, and waste levels

²¹ Alia Miles, *Searching for the Definition of "Discharge": Section 401 of the Clean Water Act*, 28 ENVIRONMENTAL LAW 202 (1998).

²² USDA Forest Service, Pacific Southwest Region, *Facts about National Forests in California* (visited April 29, 1999) <<http://www.r5.fs.fed.us/forestmanagemenet/html/facts.html>>.

²³ Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. (1998)).

²⁴ See *id.* at 1095. Section 401 of the Clean Water Act (the Act) requires: "Any Applicant for a federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates. . . that any such discharge will comply with applicable provisions of Sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . No license or permit shall be granted until the certification required by this section has been obtained or has been waived." 33 U.S.C. § 1341 (a)(1) (1994).

²⁵ See *Dombeck*, 172 F.3d at 1094.

²⁶ See *id.* at 1095. The term discharge is used in the unqualified form in Section 401.

²⁷ See *id.* at 1094.

of the water.²⁸ In 1994, the Oregon Natural Desert Association (ONDA) filed a suit under the citizen suit provision of the Act (33 U.S.C. § 1365) and the Administrative Procedures Act (5 U.S.C. § 702).²⁹ ONDA claimed that the USFS had violated Section 401 of the Act by issuing the grazing permit before obtaining the state's certification that the grazing allowed under the permit would not cause any violations of the state's water quality standards.³⁰ The United States District Court for the District of Oregon granted plaintiff's summary judgment motion, holding that the USFS is required to obtain certification from the state before granting permits which may cause non-point source pollution.³¹

The key to the district court's decision was its holding regarding the definition of the term "discharge." The district court held that the unqualified term "discharge," as used in Section 401, includes both point and nonpoint sources.³² The Ninth Circuit reversed the district court's holding, concluding that the term "discharge" does not include nonpoint sources.³³

As this note will explain, the Ninth Circuit's analysis of the term "discharge" is inconsistent with the plain meaning of the term as defined in the Act, the Act's legislative history, and the structure of the Act. All suggest a broader interpretation of the term "discharge."³⁴

²⁸ *Dombeck*, 172 F.3d at 1094.

²⁹ *See id.* The Confederated Tribes of the Warm Springs Reservation intervened as plaintiffs, and the Burrils, Grant County, and the Eastern Public Lands Coalition intervened as defendants. *See id.*

³⁰ *See id.*

³¹ *See id.*

³² *See Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534, 1540 (D. Or. 1996).

³³ *See Dombeck*, 172 F.3d at 1098.

³⁴ The term "broader" is used in this sentence to mean broader than the Ninth Circuit's interpretation.

108 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

IV. THE CLEAN WATER ACT SUPPORTS A BROAD INTERPRETATION OF THE TERM "DISCHARGE"

A. THE PLAIN MEANING OF SECTION 401 DOES NOT LIMIT "DISCHARGE" TO POINT SOURCE DISCHARGES.

Section 401 of the Clean Water Act (the Act) uses the term "discharge" in its unqualified form. There is agreement among the courts that the unqualified form of the term "discharge" is broader than the term when it is used in conjunction with the word "pollutant." The courts have not reached consensus, however, over what additional discharges are captured by the larger definition.

In *Dombeck*, the Ninth Circuit held that the unqualified term is broader because it "includes all releases from point sources, whether polluting or nonpolluting."³⁵ The Ninth Circuit simply adopted an interpretation of the term "discharge" used by the District of Columbia Circuit court in *National Wildlife Federation v. Gorsuch* ("*Gorsuch*").³⁶ However, the Ninth Circuit did not specify how *Gorsuch* supports its interpretation of the term "discharge."

Further, the Ninth Circuit did not explain why inclusion of nonpolluting point sources in the definition of "discharge" necessarily precludes an interpretation of the term that includes additional meanings. No language exists in the statute or cases that necessarily limits the definition of the term discharge to only polluting and nonpolluting point sources, as opposed to point sources and nonpoint sources.

The sole issue in *Gorsuch* was "whether certain dam-induced water quality changes constitute the 'discharge of a pollutant' as that term is defined in section 502(12) of the Act,"

³⁵ *Dombeck*, 172 F.3d at 1098 (citing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)).

³⁶ See *Gorsuch*, 693 F.2d 156.

and thus should be regulated under Section 402 of the Act.³⁷ In *Gorsuch*, the court asserted that dam operators were required to operate under Section 402 of the Act and obtain a National Pollutant Discharge Elimination System (NPDES) permit.³⁸ The United States Environmental Protection Agency (EPA) argued that the water quality changes caused by the dam did not fall within the statutory definition of “discharge of pollutants,” and thus were not subject to the Section 402 permit process.³⁹ The EPA also stated that the discharge from the dam should be regulated under Section 208 of the Act which addresses areawide waste treatment management.⁴⁰ The *Gorsuch* court deferred to the EPA’s interpretation.⁴¹

Relying on *Gorsuch*, the Ninth Circuit held that the term “discharge,” as used in Section 401, refers to nonpolluting point sources, rather than nonpoint sources.⁴² The Ninth Circuit based its conclusion on the fact that the discharge at issue in *Gorsuch* was held to be a point source void of pollutants as de-

³⁷ See *id.* at 161. Section 502 (12) of the Act is the definition of “discharge of a pollutant.” The section reads: “The term discharge of a pollutant and the term ‘discharge of pollutants’ each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or to the ocean from any point source other than a vessel or other floating craft.” 33 U.S.C. § 1361 (12) (1994).

³⁸ See *Gorsuch*, 693 F.2d at 164-65. “The Wildlife Federation, joined by plaintiff-intervenor State of Missouri, argues that in light of the remedial purpose of the Act, this phrase [discharge of pollutants] should be read broadly enough to cover these dam-induced changes.” *Id.* Once included in the definition of “discharge of pollutants,” the discharge would require a National Pollutant Discharge Elimination System permit under the Act. See *id.* at 165.

³⁹ See *id.* The EPA is the federal agency responsible for administering the Act; “EPA certainly has responsibility for administering the Act.” *Id.* at 169. “As a general rule, courts must give ‘great deference to the interpretation given the statute by the officers or agency charged with its administration.’” *Id.* at 166 (citing *EPA v. National Crushed Stone Ass’n*, 449 U.S. 64, 83, 1980). The EPA stated, “Accordingly, we do not believe that the discharge from a dam constitutes a “discharge of pollutants” within the meaning of the Federal Water Pollution Control Act.” *Id.* at 169 n.39.

⁴⁰ See *Gorsuch*, 693 F.2d at 179.

⁴¹ See *id.* at 171. “We conclude from that analysis that EPA’s interpretation of the specific provisions of the Act is reasonable and not inconsistent with the legislative purposes and so must be upheld.” *Id.*

⁴² See *Dombeck*, 172 F.3d at 1098.

110 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

fined in the Act.⁴³ However, the *Gorsuch* court never addressed the term “discharge” as it appears in Section 401 of the Act. In fact, Section 401 is mentioned only once in the opinion, in a footnote.⁴⁴ Specifically, the *Gorsuch* court held only that the dam discharge at issue did not fall within the definition of “discharge of pollutants” as found in Section 402 of the Act.⁴⁵ Further, the simple fact that the dam discharge falls within the purview of Section 208 does not speak to whether or not it falls within the definition of “discharge” under Section 401.⁴⁶ Finally, in light of the Ninth Circuit’s reliance on *Gorsuch*, it is significant to note the *Gorsuch* court’s admonishment regarding the narrowness of its own decision.⁴⁷ As stated above, the *Gorsuch* court did not address, nor did it indicate an intent to rule on, the issue of the definition of the term “discharge” as used in Section 401 of the Act.

The second main holding in *Dombeck* was that the interpretation of the Act affirmatively prohibits the term “discharge” from including nonpoint sources.⁴⁸ To support the holding that “discharge” does not include nonpoint sources, the Ninth Circuit referenced other sections of the Act which have been determined not to govern nonpoint sources. Specifically, the

⁴³ See *id.* Dams are capable of creating point source and nonpoint source discharges. The EPA, however, considers dams to be nonpoint sources, and regulates them as such. See *National Wildlife Federation*, 693 F.2d at 168.

⁴⁴ *Id.* at 183, n.78. The *Gorsuch* court noted that the issue in that case was largely limited to existing dams, because, “new dams cannot be built unless they comply with state water quality requirements.” *Id.* at 183.

⁴⁵ See *id.* at 161.

⁴⁶ The *Gorsuch* court held only that the discharge at issue was not subject to the NPDES permit requirements. See *Id.* It does not affirmatively bear on the meaning of what is included in the term discharge of an entirely different section of the Act.

⁴⁷ The *Gorsuch* court stated: “In closing, we emphasize the narrowness of our decision. It is not our function to decide whether EPA’s interpretation of the term ‘discharge of a pollutant’ is the best one or even whether it is more reasonable than the Wildlife Federation’s interpretation. We hold merely that EPA’s interpretation is reasonable, not inconsistent with congressional intent, and entitled to great deference; therefore, it must be upheld. The judgment of the district court is reversed.” *Gorsuch*, 693 F.2d at 183.

⁴⁸ See *Dombeck*, 172 F.3d at 1097. Here the Ninth Circuit states that the an interpretation of the term discharge that includes nonpoint sources is “contrary to the structure and plain meaning of the Act.” *Id.*

court cited *Oregon Natural Resources Council v. USFS (USFS)*.⁴⁹

In *USFS*, the Oregon Natural Resources Council (ONRC) claimed the USFS's plan to build roads in conjunction with a timber sale to Bugaboo Timber Company violated the Clean Water Act's provisions, which require the USFS to meet certain state water quality standards.⁵⁰ The Oregon Natural Resources Council alleged that a violation of state water quality standards provided standing to sue under Section 1365, the citizen suit provision of the Act.⁵¹ Although Section 1365 does not mention state water quality violations on its face, it does authorize citizen suits under Section 1311 (Effluent Limitations).⁵² The ONRC alleged standing under Section 1311(b)(1)(c) because this section specifically refers to state water quality standards.⁵³ In affirming the district court's decision, the Ninth Circuit held that the mere fact that Section 1311 of the Act referenced state water quality standards does not mean that Section 1311 applies to nonpoint sources.⁵⁴ The *USFS* court concluded that the "title and construction of Section 1311(b)(1) constricts the limitations set forth within that section to effluent limitations."⁵⁵ Further, by definition, those limitations are only applicable to point sources.⁵⁶

⁴⁹ *Oregon Natural Resources Council v. USFS*, 834 F.2d 842 (9th Cir. 1987).

⁵⁰ *See id.*, 834 F.2d at 848.

⁵¹ *Id.*

⁵² 33 U.S.C. § 1365 (1994).

⁵³ *See USFS*, 834 F.2d at 849. "It is plaintiffs' contention that because section 1311(b)(1)(C) incorporates state water quality standards established pursuant to section 1313 and does not explicitly refer to point sources, plaintiffs are entitled to sue under the citizen suit provision of the Act to enforce state water quality standards affected by nonpoint sources." *Id.*

⁵⁴ The *USFS* court explained that "effluent limitations may be derived from state water quality standards and may be enforced when included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable in section 1311(b)(1)(C), but it is the 'limitations necessary to meet' those standards, or 'required to implement' the standards." *Id.* at 850.

⁵⁵ *Id.*

⁵⁶ *Id.*

112 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

The Ninth Circuit's reliance on *USFS* is unfounded for two reasons. First, the facts of the two cases are disparate.⁵⁷ Even assuming that the *USFS* court was correct to conclude that Section 1311 does not apply to nonpoint sources, this argument does not logically apply to *Dombeck*. The focus of *USFS* was the title of the section at issue, Section 1311.⁵⁸ In contrast, the Ninth Circuit in *Dombeck* focused on Section 401 of the Act. Unlike the Oregon Natural Resources Council (ONRC), the Oregon Natural Desert Association, in the instant case, relied on the state water quality standards referenced in Section 401, not Section 1311(b)(1)(c).⁵⁹ Section 401 is entitled "Certification," and the provisions therein may not be categorically restricted to point source limitations based on the section title as they were in *USFS*. Therefore, the *Dombeck* court could not conclude, based on *USFS*, that the title "Certification" by definition limits Section 401 to point sources. In addition, the Ninth Circuit did not base its ruling solely on the fact that Section 401 references state water quality standards. As mentioned above, the very definition of the word "discharge" is at issue.

The second factor rendering the *USFS* analogy inapt is the Ninth Circuit's conclusion that "reference to water quality standards in section 1311 (b)(1)(c) did not sweep nonpoint sources into the scope of section 1311."⁶⁰ This assertion is no longer tenable after the United States Supreme Court decision in *PUD No. 1 v. Washington Dep't of Ecology (PUD No. 1)*.⁶¹

In *PUD No.1*, the State of Washington used the certification power vested in it under Section 401 to issue a minimum stream flow limitation as a condition on the certification for

⁵⁷ Compare *supra* text accompanying note 50 with *supra* text accompanying notes 27-34.

⁵⁸ The plaintiff in *USFS* relied on a reference in Section 1311 (Effluent Limitations) as a basis for their claim. *Id.* at 849.

⁵⁹ See *Dombeck*, 172 F.3d at 1095.

⁶⁰ *Id.* at 1097.

⁶¹ *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994).

construction of a dam that involved at least two point source discharges.⁶² The utility company building the dam claimed that “the minimum stream flow requirement imposed by the State was unrelated to these specific discharges, and that as a consequence, the State of Washington lacked the authority under section 401 to condition its certification on maintenance of stream flows.”⁶³ The United States Supreme Court in *PUD No. 1* upheld the conditions placed on the dam by the state.⁶⁴ In doing so the Court held that Section “401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”⁶⁵

In *PUD No. 1*, the Supreme Court reached the exact opposite conclusion than the Ninth Circuit court in *Dombeck* by holding that “[S]ection 301 in turn incorporates section 303 by reference.”⁶⁶ The Court further held that “[t]his provision of section 301 [33 U.S.C.A § 1311] expressly refers to state water quality standards, and is not limited to discharges.”⁶⁷ The Ninth Circuit’s decision that Section 1311(b)(1)(c) is, “by definition, applicable only to point sources,” is irreconcilable with Supreme Court’s conclusions in *PUD No. 1*.⁶⁸ If the Supreme Court did not limit Section 1311 to discharges, the Ninth Circuit cannot limit Section 1311 to only point source discharges.⁶⁹ The *Dombeck* court erroneously relied on *PUD No. 1* to support its conclusion that Section 401 does not apply to discharges

⁶² See *id.* at 711. While the dam did involve discharges, the minimum stream flow requirement was not one of them. The state of Washington used the fact that there were discharges to regulate a non discharge aspect of the project, i.e. minimum stream flows. See *id.*

⁶³ See *id.*

⁶⁴ See *id.* at 712.

⁶⁵ *PUD No. 1 of Jefferson County*, 511 U.S. at 712.

⁶⁶ See *id.* at 713.

⁶⁷ See *id.* n.3.

⁶⁸ *Dombeck*, 172 F.3d at 1097.

⁶⁹ The Supreme Court expounded upon the issue at length. In addition to the above statements on the issue, the Court held that, “ensuring compliance with § 303 is a proper function of the § 401 certification.” *PUD No. 1 of Jefferson County*, 511 U.S. at 712.

114 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

resulting solely from nonpoint sources. The Ninth Circuit rests on a misrepresentation of *PUD No. 1*.

In *Dombeck*, the Ninth Circuit interpreted *PUD No. 1* to hold that the state is “free to impose such water quality limitations” once the threshold condition of a point source discharge is met.⁷⁰ However, the Court in *PUD No. 1* never addressed the specific requirement of the discharge, and whether or not it had to be a point source or nonpoint source discharge. Additionally, the Ninth Circuit stated that “*PUD No. 1* did not broaden the meaning of the term ‘discharge’ under section 1341.”⁷¹ Likewise, the *PUD No. 1* Court did not limit the meaning of the term “discharge” to point sources. The nature of the threshold discharge was not the pivotal issue in *PUD No. 1*. The central question, rather, was whether the entire activity including non-discharge components could be limited.⁷² The Court held that it could be limited.⁷³

Further, the *Dombeck* court made two incorrect assumptions in its interpretation of *PUD No. 1*. First, as mentioned, there is no specific requirement in *PUD No. 1* that the threshold discharge be a point source discharge.⁷⁴ Second, the conditions the state may impose on certification may be placed on the “activity as a whole,” and are not limited to “water quality limitations” as stated by the Ninth Circuit. Here, as in *Gorsuch* and *USFS*, the *Dombeck* court has misread prior precedent because none of these cases directly address the definition of the term “discharge” as used in Section 401.

⁷⁰ *Dombeck*, 172 F.3d at 1097-98.

⁷¹ *Id.* at 1098.

⁷² See *PUD No. 1 of Jefferson County*, 511 U.S. at 710. “The principal dispute in this case concerns whether the minimum stream flow requirement that the State imposed on the Elkhorn Project is a permissible condition of a § 401 certification under the Clean Water Act.” *Id.*

⁷³ See *id.* at 723. “In summary, we hold that the State may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard.” *Id.*

⁷⁴ See *supra* note 72. The question in *PUD No. 1* was whether a non discharge condition could be placed on state certification.

The plain meaning of Section 401 does not support an interpretation of the term “discharge” that is limited to point source discharges. While the courts have yet to thoroughly interpret the meaning of the term “discharge” as used in Section 401, the Supreme Court’s ruling in *PUD No. 1* clearly refutes the *Dombeck* court’s conclusion that Section 401 certification is limited to point source discharges.

B. THE STRUCTURE AND LEGISLATIVE HISTORY OF SECTION 401 DOES NOT LIMIT “DISCHARGE” TO POINT SOURCE DISCHARGES

To analyze the statutory definition of the term “discharge,” the Ninth Circuit examined the language of the statute as a whole, its object and its policy.⁷⁵ The court’s analysis “hinge[d] on the interpretation of the term ‘discharge’ as used in section (401),” to determine whether it includes nonpoint source discharges.⁷⁶

The Ninth Circuit stressed the legislative intent underlying the 1972 enactment of the Clean Water Act, stating that it replaced a system based on water quality standards with one relying on point source effluent limitations.⁷⁷ The Ninth Circuit emphasized two important flaws identified by Congress with the old statute. First, the statute was cumbersome to enforce, requiring regulators to work backward starting from a polluted body of water and search for responsible parties upstream.⁷⁸ Second, the statute provided no incentives to deter polluting into bodies of water that met water quality stan-

⁷⁵ See *Dombeck*, 172 F.3d at 1096.

⁷⁶ *Id.* at 1095.

⁷⁷ See *id.* at 1096-97. “The Clean Water Act thus overhauled the regulation of water quality.” *Id.* at 1096. The effect of the 1972 enactment was to place limits on each individual discharger, regardless of the quality of the water into which the discharge was received. See *id.* Prior to the 1972 amendments (also known as the Clean Water Act), water pollution was controlled by focussing on maintaining water quality standards in bodies of water. Polluters were limited by the degree of pollution in the body of water their effluent was entering rather than by the pollution they were contributing themselves. See *id.*

⁷⁸ *Dombeck*, 172 F.3d at 1096.

116 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

dards.⁷⁹ Additionally, the old statute focused on the effects rather than the causes of pollution.⁸⁰

The Ninth Circuit interpreted the adoption of the 1972 amendments to mean that the Act “only banned discharges from point sources.”⁸¹ Thus, the Ninth Circuit held that non-point sources are not directly regulated by the Act.⁸² Instead, nonpoint sources are regulated by the states through various provisions of the Act which confer upon the state the charge of “identification and control of nonpoint source pollution.”⁸³ The Ninth Circuit also discussed the legislative intent underlying changes made in the language of Section 401 by the 1972 enactment.⁸⁴ The court noted that prior to 1972 Section 401 required federally licensed activities to receive state certification that the activities would not violate the applicable state water quality standards.⁸⁵ The term “activities” in Section 401 was replaced with the word “discharge” in the 1972 amendment. The amended Section 401 requires that “any discharge from the licensed activity comply with the applicable provisions of Sections 1311, 1312, 1313, 1316, and 1317 of Title 33. 33 U.S.C. § 1341(a)(1).”⁸⁶ The court cited a 1971 Senate Report to highlight the significance of the change.⁸⁷

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *Id.* The court stated that this is “presumably because they could be more easily identified and regulated that (sic) nonpoint source polluters.” *Id.* (citing *Natural Resources Defense Council v. EPA*, 915 F. 2d 1314, 1316 (9th Cir. (1990))).

⁸² *See Dombeck*, 172 F.3d at 1096. The Ninth Circuit stated that the “Act provides no direct mechanism to control nonpoint sources.” *Id.* at 1097 (citing *Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 791 (4th Cir. (1988))).

⁸³ *Id.* at 1096-97 (citing 33 U.S.C. § 1288 (b)(2)).

⁸⁴ *See id.* at 1097.

⁸⁵ *See id.* (citing Pub. L. 91-224, § 21(b)(1), 84 Stat.91 (1970)).

⁸⁶ *Id.*

⁸⁷ *See Dombeck*, 172 F.3d at 1097. “The statute was thus amended to assure consistency with the bill’s changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.” *Id.* (citing S. Rep. No. 414, at 69 (1971)).

The Ninth Circuit found that the 1972 amendments are evidence of Congressional intent to limit Section 401 to discharges from point sources.⁸⁸ While the emphasis of the Clean Water Act's enforcement scheme may have shifted to controlling point sources, the facts presented by the court do not support narrowing the Act to exclude nonpoint source discharges from the Act's purview.

Additionally, the Ninth Circuit has taken a position doctrinally inconsistent with its own precedent. Previously, the Ninth Circuit in *Northwest Environmental Advocates v. City of Portland (NWEA)* held that "nowhere does Congress evidence an intent to preclude the enforcement of water quality standards that have not been translated into effluent discharge limitations."⁸⁹ In *NWEA* the Ninth Circuit additionally held that "[b]y introducing limitations into the CWA scheme, Congress intended to improve enforcement, not to supplant the old system."⁹⁰ Both of these statements are in direct and irreconcilable conflict with *Dombeck*. For example, the *Dombeck* court specifically held that the 1972 enactment of the Act "overhauled the regulation of water quality," and "largely supplanted the 1970 Water and Environmental Quality Improvement Act."⁹¹ In contrast, the *NWEA* court determined that the Act had not supplanted the old system. These cases reveal that the Ninth Circuit has not developed a consistent position on this issue. In fact, the Ninth Circuit was forced to vacate its original opinion in *NWEA* (holding that citizens could not sue to enforce water quality standards on a permit that had not been translated into effluent limits) after the United States Supreme Court decision in *PUD No. 1*.⁹² Therefore, this is fur-

⁸⁸ See *id.* at 1096-1097.

⁸⁹ *Northwest Environmental Advocates v. City of Portland (NWEA)*, 56 F.3d 979, 986 (9th Cir. (1995)). In *NWEA*, the court upheld the limitation of a nonpoint source as part of a NPDES permit. See *id.* at 990.

⁹⁰ *Id.* at 986.

⁹¹ *Dombeck*, 172 F.3d at 1096.

⁹² See *NWEA*, 56 F.3d 979. Before *PUD No. 1*, the *NWEA* court held that citizens do not have standing to sue under the Act to enforce water quality standards that are part of a NPDES permit, unless they have been translated into effluent limitations. After *PUD No. 1*, the *NWEA* decision was vacated and the Ninth Circuit held that

118 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

ther evidence that water quality standards which are not effluent or permit based can be enforced under Section 401 of the Clean Water Act.

Analyzing the statute as a whole, the Ninth Circuit noted that "discharge" is used consistently throughout the Act in reference to a point source discharge.⁹³ The Ninth Circuit also pointed out that "runoff" is used in multiple sections of the Act to describe nonpoint sources of pollution.⁹⁴ The Ninth Circuit then suggested that Congress would have used "runoff" in Section 401 had it intended for that section to apply to nonpoint sources, thereby, justifying its position to not include nonpoint sources within the scope of Section 401.⁹⁵

To support this claim of legislative intent, the *Dombeck* court quoted *Trustees for Alaska v. EPA*.⁹⁶ In *Trustees for Alaska*, the Ninth Circuit stated that "Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants."⁹⁷ However, the relevant issue in *Trustees for Alaska* was whether the discharge from a mining sluice box was a point source, and hence, subject to the NPDES permitting process.⁹⁸ The *Trustees for Alaska* court did not interpret the term "discharge" as

because Section 402 requires compliance with Section 301, and Section 301 incorporates by reference the water quality standards in Section 303, that citizens have jurisdiction to sue for a violation of a water quality standard within a NPDES permit. *See id.* at 988. "Jefferson County cast into considerable doubt our holding in Northwest that citizens do not have standing under the Clean Water Act to enforce water quality standards unless they have been translated into end-of-pipe effluent limitations." *Id.* at 981.

⁹³ *See Dombeck*, 172 F.3d at 1098. "The terminology employed throughout the Clean Water Act cuts against ONDA's argument that the term 'discharge' includes nonpoint source pollution like runoff from grazing." *Id.*

⁹⁴ *See id.* "The term 'runoff' is used throughout 33 U.S.C. § 1288, describing urban wastewater plans, and 33 U.S.C. § 1414(f), providing guidelines for identification of nonpoint sources of pollution. Section 1341 contains no reference to runoff." *Id.*

⁹⁵ *See id.* at 1098.

⁹⁶ *See Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. (1984)).

⁹⁷ *Id.* at 558 (citing *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. (1978))).

⁹⁸ *See id.* at 557-58.

used in Section 401 of the Act.⁹⁹ Further, the text of the Act does not so narrowly “classify” point sources as the *Dombeck* court states. For instance, Section 304(f)(2)(b) includes runoff as a nonpoint source, along with many others such as “disposal of pollutants in wells or subsurface excavations.”¹⁰⁰ By suggesting that Congress would have used the term “runoff” in Section 401, as it did in Section 1323, if it “intended to require certification for runoff as well as discharges,” the Ninth Circuit created a false dichotomy.¹⁰¹ The court ignored extant nonpoint source discharges by classifying all sources as either point source discharges or runoff.¹⁰² For example the Ninth Circuit failed to explain how the bovine waste at issue in *Dombeck*, of which a portion is directly deposited into the streams, would be covered by the definition of the term “runoff.”¹⁰³

The holding in *Dombeck* conflicts with the policy of the Act as stated by the *Dombeck* court. The court concluded that the Act focuses on point source polluters “presumably because they could be identified and regulated more easily.”¹⁰⁴ However, in *Dombeck*, the source of the bovine waste was clearly identified, and the subject of a Forest Service grazing permit.¹⁰⁵ As a result, there is no dispute over which cattle, or which range was the cause of the pollution. Therefore, since the intent of Con-

⁹⁹ See generally *Trustees for Alaska*, 749 F.2d 549. The *Trustees for Alaska* court did not discuss Section 401 of the Act.

¹⁰⁰ 33 U.S.C. § 1314 (f)(2)(D) (1994). Among the nonpoint sources in that section are: runoff from various activities, construction activity, disposal of pollutants in wells or in subsurface excavations, saltwater intrusion resulting from reductions of freshwater flow, changes in the flow of any navigable waters. 33 U.S.C. § 1314 (f)(2)(A)-(F) (1994).

¹⁰¹ *Dombeck*, 172 F.3d at 1098.

¹⁰² As such, the court assumes that all nonpoint source discharges conceivable under Section 401 are subsumed by the definition of the term “runoff”.

¹⁰³ See *id.* “The cattle in question wade in the John Day River and thus introduce their waste directly into the stream.” *Id.*

¹⁰⁴ *Id.* at 1096.

¹⁰⁵ See *id.* at 1094. “In 1993 the Forest Service issued a permit allowing Robert and Diana Burrell to graze 50 head of cattle in Oregon’s Malheur National Forest. The cattle graze several months a year in and around Camp Creek and the Middle Fork of the John Day River, polluting these waterways with their waste, increased sedimentation, and increased temperature.” *Id.*

120 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

gress was to amend the Act in order to make enforcement more effective, it is doubtful that Congress intended identifiable nonpoint source polluters to escape regulation.

Another issue the court failed to address is the placement of Section 401 in the Act. If state certification was intended to apply only to point source discharges, Congress would have simply added Section 401 as a subsection of Section 301. The fact that Section 401 has its own section parallel to Section 301 implies that it is not logically confined to the narrow reading offered by the court. Section 401 is more reasonably read as a second layer protection to the states, allowing an independent certification of point and nonpoint source pollution.

Under the *Dombeck* holding, Section 401 is restricted to state certification of discharges that are already heavily regulated through NPDES permits.¹⁰⁶ Under this scenario, the purpose of Section 401 is conspicuously constricted. In addition, under *Dombeck's* holding that the "term 'discharge' in Section [401] is limited to discharges from point sources," current certifications are put at risk of being declared invalid.¹⁰⁷ For instance, water quality standards that are part of NPDES permits associated with dams are clearly not point source discharges, and may be at risk of being declared invalid under the *Dombeck* opinion. The plain meaning of the Act, the Acts legislative history, and structure all support a broad reading of the term "discharge" in Section 401 that includes nonpoint source discharges.

V. CALIFORNIA WOULD BENEFIT FROM SECTION 401
CERTIFICATION FOR SOLELY NONPOINT SOURCE POLLUTION.

This section explores the potential effects of the *Dombeck* decision on California's water quality. Specifically, the *Dombeck* decision reduces the state's ability to regulate nonpoint source pollution, a leading source of water pollution within the

¹⁰⁶ See *surpa*, n. 4-9. Point sources are regulated through the NPDES permit process either by the federal government or through an approved state permitting program.

¹⁰⁷ *Dombeck*, 172 F.3d at 1097.

state. The United States Environmental Protection Agency (EPA) has identified nonpoint source pollution as a “major cause of water quality impairment” in California.¹⁰⁸

The California State Water Resources Control Board (CSWRCB), which is responsible for managing nonpoint source pollution within the state,¹⁰⁹ entered into formal agreements with the United States Forest Service (USFS)¹¹⁰ and the Bureau of Land Management (BLM).¹¹¹ Both agreements require the federal agencies to take responsibility for nonpoint source pollution on land under their jurisdiction.

The California State Water Resources Control Board entered into a Management Agency Agreement (MAA) with the USFS in 1981.¹¹² The MAA designated the USFS as the water quality management agency for National Forest System lands in California.¹¹³ Additionally, the MAA puts the USFS in charge of regulating and monitoring nonpoint source pollution on Forest Service land in the state of California.¹¹⁴ The agreement “contemplates” waiving the USFS’s obligation to comply with nonpoint source waste discharge and reporting requirements, provided that the USFS has reasonably implemented

¹⁰⁸ EPA Region 9, *California Nonpoint Source Program* (visited Sept. 27, 1998) <<http://www.epa.gov/region09/water/nonpoint/cal/index.htm>>.

¹⁰⁹ Section 208 of the Clean Water Act requires SWRCB to manage nonpoint source pollution.

¹¹⁰ Management Agency Agreement between the State Water Resources Control Board, State of California and the Forest Service, United States Department of Agriculture (May 26, 1981) (on file with author).

¹¹¹ Memorandum of Understanding Between the Bureau of Land Management, U.S. Department of the Interior and the California State Water Resources Control Board for Planning and Coordinating of Nonpoint Source Water Quality Policies and Activities (Jan. 27, 1993) (on file with author).

¹¹² Management Agency Agreement Between the State Water Resources Control Board, State of California and the Forest Service, United States Department of Agriculture (May 26, 1981) (on file with author).

¹¹³ *See id.* at 2.

¹¹⁴ *See id.* “The Forest Service Agrees: (a) To accept responsibility of the Water Quality Management Agency designation for NFS [Forest Service] lands in the State of California.” *Id.*

122 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

Best Management Practices (BMPs).¹¹⁵ In this context, BMPs are nonpoint source pollution control management measures that are designed to ensure compliance with state water quality standards.¹¹⁶

The agreement between the USFS and the CSWRCB has been ineffective in regulating water quality on Forest Service lands in California. Under the MAA, California relies on the USFS to self-regulate and monitor activities creating nonpoint source pollution.¹¹⁷ Thus, the state is placed in a reactive position, often requiring the state to wait for a violation before it can act against the USFS. Further, the USFS has repeatedly shown that it is incapable and unwilling to effectively regulate its nonpoint source pollution.¹¹⁸

Specifically, the USFS has not effectively managed water quality impacts from grazing. The main tool the USFS uses to ensure compliance with BMPs is the Best Management Prac-

¹¹⁵ See *id.* at 2-3. The term “contemplates” was the subject of dispute between the USFS and the State Water Resources Control Board (CSWRCB). The USFS asserted that compliance with BMPs categorically exempted them from reporting waste discharge requirements under the MAA. In a Memorandum by Walt Petit, the executive director of the CSWRCB, Mr. Petit stated that “the MAA only indicated a ‘contemplation’ that compliance with BMPs would result in a waiver of waste discharge requirements.” Memorandum from Walt Petit, Executive Director, Interpretation of CSWRCB’s Management Agency Agreement with United States Forest Service at 3 (Jan. 23, 1995) (on file with author).

¹¹⁶ Management Agency Agreement Between the State Water Resources Control Board, State of California and the Forest Service, United States Department of Agriculture (May 26, 1981) (on file with author) p. 2.

¹¹⁷ *Id.* at 2. “The Forest Service agrees: (b) to implement on NFS lands statewide the practices and procedures in the Forest Service 208 Report.” *Id.* The 208 Report “sets forth the practices and procedures for controlling nonpoint sources of pollution on designated federal lands.” Memorandum from Walt Petit, Executive Director, Interpretation of CSWRCB’s Management Agency Agreement with United States Forest Service (Jan. 23, 1995) (on file with author) at 2.

¹¹⁸ In *Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688 (9th Cir. 1986) [hereinafter *Peterson*], the USFS argued that it did not have to comply with the state Water Quality Management Plan because the BMP requirement in the MAA superceded. The court held that BMPs are “merely a means to achieve the appropriate state Plan water quality standard,” and “adherence to the BMPs does not automatically ensure that the applicable state standards are being met.” *Id.* at 697. *Peterson* exemplifies how the USFS has not put water quality as a priority, but rather has attempted to use the MAA as a license to pollute.

tices Evaluation Program (BMPEP) for the Pacific Southwest Region.¹¹⁹ Results from the BMPEP show that Range Management BMPs were implemented only 56 percent of the time.¹²⁰ Even when Range Management BMPs were implemented, they were considered effective only 83 percent of the time.¹²¹ Further, at the time of the BMPEP, the USFS had not complied with the MAA requirement of creating Allotment Management Plans¹²² for all USFS grazing allotments. These plans are needed to control the violations of state water quality standards documented on USFS grazing allotments.¹²³ A Regional Water Quality Control Board (RWQCB) memorandum illustrates the ineffectiveness of the BMPs. The memorandum states that BMPs have not been proven to prevent nonpoint source pollution, and the USFS should make an effort to “dispel this myth.”¹²⁴ Therefore, by relying too heavily on BMPs and refusing to self monitor, the USFS has failed to adequately prevent nonpoint source pollution.

Like the USFS, the BLM is incapable of managing nonpoint source pollution on its rangeland. The BLM entered into a Memorandum of Understanding (MOU) with the CSWRCB in

¹¹⁹ The BMPEP is an ongoing study conducted by the USFS assessing the level of implementation and effectiveness of the chosen BMPs on Forest Service land. The USFS uses the BMPEP to satisfy the self-monitoring requirements in the 208 Report. Pacific Southwest Region Forest Service Best Management Practices Evaluation Program, On-Site Component Report Analysis Completed (1997) (on file with author).

¹²⁰ See *id.* at 6. “G24 Range Management 56 percent Implementation.” *Id.*

¹²¹ See *id.* at 3. “Table 1 Results of Analysis, shown by implementation /effectiveness outcome.” *Id.* Author arrived at the 83 percent effectiveness figure by dividing the total number of BMPs that were implemented and considered effective (52) by the total number of BMPs that were implemented (63) BMPs.

¹²² Allotment Management Plans are specific plans designed by the USFS to administer proper grazing practices on Forest Service land.

¹²³ Letter from Harold J. Singer, Executive Officer, California Regional Water Quality Control Board (Lahontan Region), to G. Lynn Sprague, Regional Forester, USDA Forest Service, p. 6 (Oct. 13, 1998) (on file with author). “17 years have now passed since the MAA was signed. AMPs have not been implemented for many grazing allotments. Violations of State water quality standards have been documented at USFS grazing allotments.” *Id.*

¹²⁴ Memorandum from Anonymous Source (source requested anonymity, hereinafter: Anonymous Source) to State Water Resources Control Board- Department of Water Quality (Sept. 17, 1996) (on file with author).

124 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

1993, which laid the groundwork for a future MAA between the two agencies.¹²⁵ Similar to the USFS, the BLM is responsible for regulating and monitoring nonpoint source pollution within its jurisdiction.¹²⁶ Every year the BLM publishes "Public Land Statistics" (PLS), the BLM's yearly statistical report.¹²⁷ In 1997, the BLM authorized grazing for 284,000 Animal Unit Months (AUMs) on BLM land in California.¹²⁸ In addition to recording grazing data, the PLS classified BLM California land holdings by ecological status.¹²⁹ The PLS revealed that 72 percent of BLM land assessed in California had less than 50 percent of its potential natural vegetation.¹³⁰ Further, only 3 percent of the BLM land assessed in California had over 76 percent of its potential natural vegetation.¹³¹ In addition, only 50 percent of the 3,500 riparian miles (areas heavily impacted by grazing) of BLM's California land were in proper functioning condition.¹³² Therefore, by the BLM's own accounting, the BLM

¹²⁵ See *supra*, note 111.

¹²⁶ See *id.* at 3. BLM agrees to: IV (A)(4) "Incorporate Best Management Practices/Management Measures/Nonpoint Source Measures into BLM land uses and BLM permitted land uses, when necessary to protect or maintain water quality." See *id.*

¹²⁷ The Public Land Statistics publication presents in textual and tabular form, the annual summary of the BLM's land holdings, commercial uses of BLM land, recreational activity on BLM land, and preservation and public health statistics. United States Department of the Interior, Bureau of Land Management, *Public Land Statistics 1997*, Vol. 182 (March 1998).

¹²⁸ See *id.* at 62-63. Tables 3-5, 3-6, Summary of authorized use of grazing district (section 3) lands, Summary of authorized use of grazing lease (second 15) lands, fiscal year 1997. Author calculated 284,000 AUMs by adding the total number of AUMs from grazing district lands with the total number of AUMs from grazing lease lands.

¹²⁹ See *id.* at 35. Table 2-1, Percent of acreage by ecological status by state, fiscal year 1997.

¹³⁰ See *id.* The PLS defines Mid Seral state as present vegetative conditions being between 26 to 50 percent similar to potential natural, or climax, plant community. It defines Early Seral as present vegetative conditions being between 0 and 25 percent similar to potential natural, or climax, plant community. The BLM has identified California BLM land as being 42 percent Mid Seral state and 30 percent Early Seral. Thus, 72 percent of the BLM assessed has less than 50 percent of its potential natural vegetation. See *id.*

¹³¹ See *id.*

¹³² See United States Department of the Interior, Bureau of Land Management: *Public Land Statistics 1997*, Vol. 182 (March 1998) at 36. Table 2-2, Condition of riparian-wetland areas, fiscal year 1997. The BLM defines proper functioning condi-

has not adequately implemented BMPs and has failed to adhere to California the MOU, and hence, to state water quality standards.

The Government Accounting Office (GAO) has also documented the BLM's inability to manage the range.¹³³ The GAO Rangeland Management Report found that "BLM's current livestock grazing activity risks long term environmental damage...some damaged land may take decades to recover if it recovers at all."¹³⁴ Specifically, in California, twenty-one acres of BLM range are required on average for each AUM.¹³⁵ This average is the highest of any state in the west and is almost double the overall BLM average of twelve acres per AUM.¹³⁶ The refusal of the BLM to modify its grazing practices to mitigate environmental damage is evidence of the need for a more proactive state policy.

The extent to which the CSWRCB will force the USFS and the BLM to comply with state water quality standards is always dependent on the political inclinations of the prevailing state government.¹³⁷ Incorporating Section 401 certification into the regulatory process would help insulate state water quality managers from the effects of political mood swings and

tion as when "adequate vegetation, landform, or large woody debris is present to dissipate the energy associated with high water flows." *Id.* at 33.

¹³³ Government Accounting Office, GAO/T-RCED-92-60, *Rangeland Management: Results of Recent Work Addressing the Performance of Land Management Agencies* (1992).

¹³⁴ *Id.* at 5.

¹³⁵ Government Accounting Office, GAO/RCED-92-213FS, *Rangeland Management: Profile of the Bureau of Land Management's Grazing Allotments and Permits*, p. 12 (1992). Table 1.4, Average Stocking Rate, by BLM State Office. *See id.*

¹³⁶ Government Accounting Office, GAO/RCED-92-213FS, *Rangeland Management: Profile of the Bureau of Land Management's Grazing Allotments and Permits*, p. 12 (1992). In the ten western states the average acreage required for one AUM is 12.3 with the following range: 5.9 acres (Montana), and 20.9 acres (California). *See id.*

¹³⁷ State Water Resource Control Board (visited Dec. 12, 1999)

<<http://www.swrcb.ca.gov/general/swrcb.htm>>. The members of the CSWRCB are appointed officials. Thus, board actions are effected by the Governor's office. "The SWRCB consists of five full-time salaried Members, each filling a different specialty position. Board members are appointed to four-year terms by the Governor and confirmed by the Senate." *Id.*

126 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

powerful special interests. If California required Section 401 certification for all federal activities likely to have an effect on water quality as part of its normal operating procedure, post violation power struggles could be avoided. For instance, currently, the CSWRCB will not certify that the current practices under the MAA and MOU, with the USFS and the BLM respectively, comply with California's water quality standards.¹³⁸ Had the state required Section 401 certification before entering a binding agreement with the USFS and the BLM, the current power struggle and water quality impairment would have been largely avoided.

In addition, Section 401 certification has often been directly handled by the Regional Water Quality Control Boards (RWQCB) which are "less affected by the movers and the shakers than state officials."¹³⁹ Thus, if certification of a permit was based on compliance with state water standards and not on implementation of BMPs, the issue of the adequacy of BMPs and their level of implementation would become significantly less important. Putting certification power into the hands of regional technical staff would proactively avoid nonpoint source water pollution by requiring all permitted activities to conform to state water quality standards before certification is granted.¹⁴⁰

Thus, the *Dombeck* decision will heavily impact the ability of the state to comply with the Act's mandate of regulating nonpoint source pollution.

¹³⁸ Telephone Interview with Anonymous Source (April 25, 1999). A chief planner at a CRWQCB who wished to remain anonymous, said that "the current MAA with the USFS would not receive 401 certification without substantial changes to the current practices." *Id.*

¹³⁹ *Id.* Anonymous Source stated that the CSWRCB had never pressured this RWQCB officer to certify or not certify any particular activity. *See id.*

¹⁴⁰ If the permits were contingent upon a showing of compliance with state water quality standards, violations would be reduced.

VI. CONCLUSION: SECTION 401 CERTIFICATION INCLUDES CERTIFICATION OF NONPOINT SOURCE DISCHARGES

Under *Dombeck*, federal agencies are not required to obtain state certification for grazing permits, or any other federal licenses that may cause pollution exclusively from nonpoint sources.¹⁴¹ As noted above, the Ninth Circuit's language appears to go even further, and threaten existing Section 401 certifications. A contrary decision would require the court to either rule that Section 401 certification applies to all nonpoint source discharges, or to distinguish between nonpoint sources that are subject to Section 401 and those that are not. The first scenario obviously places a much less onerous burden on the court in terms of interpreting the statute. Both scenarios, however, create new challenges for the state and federal governments, as well as create new avenues of enforcement for the states.

State certification of federal activities resulting in nonpoint source water pollution would have substantially enhanced California's ability to regulate nonpoint source pollution. While the state may incur a minimal administrative burden by extending certification to include federal activities resulting in nonpoint source pollution, this burden would be outweighed by the benefits from Section 401 certification. The state would be better able to protect its water supply by having the power to stop nonpoint source pollution before it happens, as opposed to being restricted to filing after-the-fact appeals. While all states may not choose to utilize Section 401 certification aggressively as a tool in water quality management, certification does give states like California the ability to require federally permitted activities to comply with state water quality standards.

*Scott Smithline**

¹⁴¹ See *Oregon Natural Desert Ass'n*, 172 F.3d at 6.

* J.D. candidate Golden Gate University School of Law, 2000; B.S. University of California at Davis. The author thanks his professor Clifford Rechtschaffen for his

128 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1

encouragement and guidance, his editor, Scott Sanford, for endless edits, and his wife, Catherine Williams Smithline, for her enduring and loving support.