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States' Powerful New Shield to Guard Water Resources: *PUD No. 1 of Jefferson County v. Washington Department of Ecology*

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*PUD No. 1 of Jefferson County v. Washington Department of Ecology*¹ allows a state, under authority of the Clean Water Act,² to require the minimum stream flow needed to support a body of water's designated use as a condition for granting certification for a hydroelectric plant.³ The Court interpreted section 401 of the Clean Water Act⁴ broadly, allowing the state to "condition certification upon any limitations necessary to ensure compliance with state water quality standards"⁵

The decision in *PUD No. 1* has far-reaching effects on state control of water quality. First is its obvious impact on development of new hydroelectric projects. Second is the decision's impact on relicensing of existing hydroelectric facilities because "[b]oth Congress and the courts have decreed that in relicensing proceedings [the licensing agency] must reconsider project operations according to today's values and regulatory requirements."⁶ Third, and perhaps most significant, is the impact on the various "federal licenses and

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¹ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S. Ct. 1900 (1994) [hereinafter *PUD No. 1*].

² The Federal Water Pollution Control (Clean Water) Act, 86 Stat. 816, as amended, 33 U.S.C. §§ 1251-1387 (1988 and Supp. V. 1993).

³ *PUD No. 1*, 114 S. Ct. at 1914.

⁴ 33 U.S.C. § 1341.

⁵ *PUD No. 1*, 114 S. Ct. at 1910.

⁶ Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Streamflows after California v. Federal Energy Regulatory Commission*, 21 ENVTL. L. 113, 114-15 (1991) [hereinafter *Blumm*] (citations omitted).

permits for activities which may result in a discharge into the Nation's navigable waters."⁷ This decision "gives states water quality control over a wide range of activities for which they otherwise might lack such authority."⁸

At issue in *PUD. No. 1* was a proposed hydroelectric plant on the Dosewallips River in Washington state.⁹ PUD No. 1 of Jefferson County and the City of Tacoma planned a new hydroelectric facility on the pristine and undeveloped Dosewallips River just outside Olympic National Park.¹⁰ "Washington's water quality standards classify the Dosewallips River as Class AA (extraordinary). The characteristic uses of Class AA waters include salmonid and other fish 'migration, rearing, [and] spawning.'"¹¹ The plan was to construct a dam on the river and channel about 75 percent of the water into a tunnel along the river.¹² The diverted water would be used to turn turbines to generate electricity and then would be returned to the river about 1.2 miles downstream.¹³ The parties sought to determine the minimum stream flow in the 1.2 mile section that would be necessary to preserve native fish populations.¹⁴ The Jefferson County Public Utility District 1 and the City of Tacoma challenged the condition but the Washington Supreme Court upheld the restriction and stated that "setting the streamflow requirement was within [the Washington Department of] Ecology's authority."¹⁵

The United States Supreme Court, affirming the Washington court's decision, relied on the state's right to establish water quality standards pursuant to section 303 of the Clean Water Act¹⁶ which may include section 303's "antidegradation policy."¹⁷ The Court then interpreted section 401 of the Clean Water Act¹⁸ to allow the state to require adherence to the broad water quality standards as a

⁷ *PUD No. 1*, 114 S. Ct. at 1914.

⁸ ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT: TWENTY YEARS LATER* 203 (1993).

⁹ *PUD No. 1*, 114 S. Ct. at 1907.

¹⁰ Respondents' Brief at 1, 1993 WL 632337, *PUD. No. 1*.

¹¹ *Id.* at 2, 3 (citations omitted).

¹² *Id.* at 3, 4.

¹³ *Id.* at 4.

¹⁴ *Id.* at 6.

¹⁵ *State Department of Ecology v. PUD No. 1 of Jefferson County*, 849 P.2d 646, 648 (Wash. 1993).

¹⁶ 33 U.S.C. § 1313.

¹⁷ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S. Ct. 1900, 1905-07 (1994) (citing 33 U.S.C. § 1313(d)(4)(B)).

¹⁸ 33 U.S.C. § 1341.

condition for granting a permit.¹⁹

The petitioners' claims of error can be organized into three categories: first, that water quality is properly determined only by specific numerical criteria;²⁰ second, that water quantity is not an appropriate standard on which to base regulation;²¹ and third, that allowing the state to impose minimum flow rates interferes with the powers of the Federal Energy Regulatory Commission under the Federal Power Act.²²

This comment looks first at the purposes of the Clean Water Act and how it established complementary roles for state and federal government. Part II discusses water quality limitations on certification of hydroelectric projects. Part III examines section 401 and section 303 of the Clean Water Act. Parts IV through VI analyze the Court's treatment of the petitioners' arguments.

I. THE CLEAN WATER ACT, FEDERAL GOVERNMENT, AND THE STATES

From its origin in 1972, the objective of the Clean Water Act was to "restore and maintain the chemical, physical and biological integrity of the Nation's Waters."²³ The inclusion of both "restore" and "maintain" is significant because the Clean Water Act requires "not only that we *repair* damaged waters, but that we *actively protect* those waters that so far have escaped the impacts of past pollution, that is, that we keep clean waters clean."²⁴ As stepping stones to its overall objective, Congress also proposed to eliminate the discharge of pollutants,²⁵ prohibit the discharge of toxic pollutants in toxic amounts,²⁶ and promote water quality that is conducive to fish and wildlife.²⁷

The federal and state governments have different roles in implementing the strategies to meet the goals of the Clean Water Act.

Under the Act, the Administrator of the Environmental Protection Agency is required, among other things, to establish and enforce

¹⁹ *PUD No. 1*, 114 S. Ct. at 1907.

²⁰ *PUD No. 1*, 114 S. Ct. at 1910-12.

²¹ *Id.* at 1912, 1913.

²² *Id.* at 1914.

²³ 33 U.S.C.A. § 1251(a).

²⁴ ADLER ET AL., *supra* note 8, at 7 (emphasis added).

²⁵ *Id.* at 8.

²⁶ *Id.*

²⁷ *Id.* (this goal is referred to as "fishable swimmable waters").

technology-based limitations on individual discharges into the country's navigable waters from point sources. Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters.²⁸

The complementary roles of the federal and state governments have come into conflict.²⁹ In resolving the conflict, the Court has decided that the federal Clean Water Act preempts state law.³⁰ Federal preemption is especially troublesome in the development of hydroelectric facilities, which are licensed by the Federal Energy Regulatory Commission, but are certified according to state standards of water quality.³¹

II. WATER QUALITY AND CERTIFICATION OF HYDROELECTRIC PROJECTS

"Section 4(e) of the [Federal Power Act] empowers [the Federal Energy Regulatory Commission (FERC)] to issue licenses for projects 'necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction.'"³² Projects that involve these federal licenses may also be required to secure state certification regarding effects on water quality.³³ Tests of the powers of states to limit certification of hydroelectric projects according to state-formulated standards of water quality have yielded mixed results.³⁴ The Supreme Court granted certiorari to *PUD No. 1* "to resolve [these conflicts] among the state courts of last resort."³⁵

In *Power Authority of New York* the New York Court of Appeals

²⁸ *PUD No. 1*, 114 S. Ct. at 1905 (citations omitted).

²⁹ See, e.g., *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (holding that the Environmental Protection Agency's interpretation of water quality standards takes precedence over a state's interpretation).

³⁰ WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* 287 (2d ed. 1994); Neil Fairweather, *Arkansas v. Oklahoma: Downstream States Left Without a Paddle* 9 J. NAT. RESOURCES & ENVTL. L. 189 (1993-94).

³¹ See generally Lisa M. Bogardus, *State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act*, 12 Va. ENVTL. L.J. 43 (1992) [hereinafter Bogardus] (discussing the issues of section 401 certification that are involved in *PUD No. 1*); Andrew H. Sawyer, *Rock Creek Revisited: State Water Quality Certification of Hydroelectric Projects in California*, 25 PAC. L.J. 973 (1994) (discussing the issues of section 401 certification that are involved in *PUD No. 1*).

³² *California v. Federal Energy Regulatory Commission*, 495 U.S. 494, *reh'g denied*, 110 S. Ct. 3304 (1990) (citations omitted) (hereinafter *California v. FERC*).

³³ See Part III, *infra*.

³⁴ *Power Authority of New York v. Williams*, 457 N.E.2d 726 (N.Y. 1983); State Department of Ecology v. *PUD No. 1 of Jefferson County*, 849 P.2d 646 (1993).

³⁵ *PUD No. 1*, 114 S. Ct. at 1908.

adopted a narrow interpretation of the section 401 certification process saying, “[the state] is limited to determining whether applicable water quality standards will be met and is not empowered to base [its] decision on a balancing of need for the project against adverse environmental impact.”³⁶ New York had adopted a state-wide energy policy distinct from any water quality standards.³⁷ All state agencies were supposed to take this energy policy into consideration in the discharge of their duties.³⁸ New York’s Commissioner of Environmental Conservation had denied section 401 certification for a hydroelectric project because the power authority “had failed to demonstrate that the relevant water quality standards would be met.”³⁹ The court below rejected the limitation of considering only water quality and found that this state energy law should be considered in granting the certification.⁴⁰ The *Power Authority of New York* court reversed the court below, stating that to allow the state to issue a section 401 certification “despite noncompliance with water quality standards on the basis of overriding energy needs” would run counter to the role assigned to the state by the Clean Water Act.⁴¹ Although the decision denied consideration of the energy policy in evaluating certification, in a footnote the court remarked that other factors related to the “classification of State waters” could be considered.⁴² This reference to the classification of waters is a prelude to the situation in *PUD No. 1*.

In contrast with the restrictive view of the *Power Authority* court, the Washington Supreme Court in *State Department of Ecology* adopted a broad interpretation of section 401 and permitted the state to consider other factors in addition to the state water quality standards when issuing certification.⁴³ The court noted that the phrase in section 401(d), “any other appropriate requirement of State law,” is “a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates.”⁴⁴ It is unclear from the Washington court’s analysis⁴⁵ whether it would have allowed consideration of a New York-like energy policy that is not specifically related to water quality. The Court’s next task in this area may be to establish the outer boundaries of what may be considered in section 401 certification.

³⁶ *Power Authority*, 457 N.E.2d at 727.

³⁷ *Id.* at 728.

³⁸ *Id.*

³⁹ *Id.* at 727.

⁴⁰ *Id.* at 728.

⁴¹ *Power Authority*, 457 N.E.2d at 730.

⁴² *Id.* at 730-31, n.3.

⁴³ *State Dept of Ecology v. PUD No. 1 of Jefferson County*, 849 P.2d 646, 653 (Wash. 1993).

⁴⁴ *Id.* at 653.

⁴⁵ *Id.* at 651-53.

III. SECTION 303 AND SECTION 401 OF THE CLEAN WATER ACT AND STATE WATER QUALITY STANDARDS

A. Section 303

Section 303 of the Clean Water Act⁴⁶ addresses state water quality standards and their formulation. New or revised standards must be presented to the federal government for approval and must include the designated uses of the water and the water quality criteria for the water.⁴⁷ Part IV discusses the significance of “designated uses” and “water quality criteria.”

B. Section 401

Section 401(a) of the Clean Water Act provides that under certain circumstances, applicants for a federal license or permit must obtain certification from the state.⁴⁸ This section “only applies to a project when that project results in a discharge.”⁴⁹ Section 401(d) lists the sources of limitations that may be placed on an applicant for a federal license or permit.⁵⁰ The petitioners in *PUD No. 1* conceded that there would be a discharge from the proposed plant and that a section 401 certification was necessary.⁵¹ At issue was whether the state “may only impose water quality limitations specifically tied to a ‘discharge.’”⁵² The Court interpreted

⁴⁶ 33 U.S.C. § 1313.

⁴⁷ 33 U.S.C. § 1313(c)(2)(A).

⁴⁸ This section provides:

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 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1).

⁴⁹ *Bogardus*, *supra* note 31, at 51.

⁵⁰ This section provides:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations under section 1311 or 1312 of this title . . . and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1341(d).

⁵¹ *PUD No. 1*, 114 S. Ct at 1908.

⁵² *Id.* at 1909.

section 401(a)(1) to identify which projects require certification -- those that produce a discharge.⁵³

Because section 401(d) contains the language "to assure that any applicant for a federal license," the Court held that compliance referred to the applicant and not just the discharge.⁵⁴ Section 401(d), then, "[authorizes] additional conditions and limitations on the activity as a whole."⁵⁵ The power of states to place these "additional conditions and limitations" is limited by section 401(d) to those allowed under Title 33, sections 1311 and 1312, other provisions of the Clean Water Act, and "any other appropriate requirement of State law."⁵⁶ The Court refrained from considering what "additional state laws" might apply.⁵⁷ It did, however, note that "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to section 303 are 'appropriate' requirements of state law."⁵⁸ Here the Court left unanswered the question noted in considering *Power Authority of New York*.⁵⁹

Thus, at a minimum, the state may use section 303 standards to determine conditions for granting a section 401 certification. The Court allowed this even though "section 303 is not one of the statutory provisions listed in section 401(d), [because] the statute allows states to impose limitations to ensure compliance with . . . Title 33, section 1311. [Which] in turn incorporates section 303 by reference."⁶⁰ This action by the Court gives states enormous latitude to develop water quality standards upon which they can condition granting certification.

IV. WATER QUALITY STANDARDS ARE MORE THAN MERE SPECIFIC WATER QUALITY CRITERIA

If states can include section 303 criteria in a section 401 certification, what may be considered under section 303? The petitioners argued:

[T]hat § 303 requires the State to protect designated uses solely through implementation of specific [numerical] 'criteria' . . . , that use requirements are too open-ended, and that the Act only contemplates enforcement of the more specific and objective 'criteria' . . . , [and] that enforcement of water quality standards through use designations renders the water quality criteria component of the standards irrelevant.⁶¹

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *PUD No. 1*, 114 S. Ct at 1909.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1910.

⁵⁹ See *supra* notes 36-42 and accompanying text.

⁶⁰ *PUD No. 1*, 114 S. Ct. at 1909.

⁶¹ *Id.* at 1910-11.

These three arguments focus on the petitioners' desire to be bound by numerical water quality criteria instead of the broader requirements that stem from supporting a water's designated use.

Section 303(c)(2)(A) states:

Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.⁶²

The Court, focusing on the second sentence of this statute, held that both the designated use and the water quality criteria make up the water quality standard.⁶³ To bolster this interpretation, the Court referred to EPA regulations that "recognize that in some circumstances, criteria alone are insufficient to protect a designated use."⁶⁴ The limited ability of mere chemical water quality criteria to protect bodies of water has also been noted by commentators.⁶⁵ Water quality criteria, although they arguably do not provide adequate protection for all bodies of water, are generally objectively measurable.⁶⁶ Armed with numerical criteria, a project designer could predict possible problem areas and anticipate solutions. However, how can a project designer consider the expansive requirements of a designated use?

The petitioners' next challenge concerned this "open-ended" nature of the designated use.⁶⁷ The Court countered this argument, noting that only for "toxic pollutants listed pursuant to section 1317(a)(1)" must numerical criteria be given⁶⁸ and concluded that

⁶² 33 U.S.C. § 1313(c)(2)(A).

⁶³ *PUD No. 1*, 114 S. Ct at 1910.

⁶⁴ *Id.* at 1911.

⁶⁵ See, e.g., ADLER ET AL., *supra* note 8, at 205; Sawyer, *supra* note 31, at 1001.

⁶⁶ Rogers, *supra* note 30, at 345-46.

⁶⁷ *PUD No. 1*, 114 S. Ct. at 1911.

⁶⁸ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S. Ct. 1900, 1911 (1994) (citing 33 U.S.C. § 1313(c)(2)(B)); 40 C.F.R. § 131.11(b)(2) (1992)).

“the Act permits enforcement of broad, narrative criteria. . . .”⁶⁹ This treatment is consistent with the EPA’s regulations.⁷⁰

The final challenge along this line was the assertion that “enforcement of water quality standards through use designations renders the water quality criteria component of the standards irrelevant.”⁷¹ In its answer to this challenge the Court gave a telling description of its view of the relationship of criteria and uses:

While enforcement of criteria will in general protect the uses of these diverse waters, a complementary requirement that activities also comport with designated uses enables the States to ensure that each activity - even if not foreseen by the criteria - will be consistent with the specific uses and attributes of a particular body of water.⁷²

Thus, the Court has given states a flexible and powerful shield for its water resources. This flexibility is especially important in situations in which it may be difficult to predict or monitor specific criteria but where management to support a designated use is practicable.⁷³ It is not necessary for a state to formulate “criteria . . . sufficiently detailed and individualized to fully protect the water’s designated uses.”⁷⁴ The Court’s position suggests that when a state has developed water quality standards which include both criteria and designated uses, pursuant to section 303(c)(2)(A),⁷⁵ the state may evaluate a proposed activity according to its impact on the designated use of the water, even though specific numerical criteria have not been formulated to address the particular impact.

Almost parenthetically the Court addressed the question of water quality standards and the “antidegradation policy” required by

⁶⁹ *Id.*

⁷⁰

EPA’s regulations reflect Congress’ definition of water quality standards in 33 U.S.C. § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). They provide that “[a] water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.” 40 C.F.R. § 131.2 (1994). EPA defines “criteria” as “elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.” 40 C.F.R. § 131.3(b) (1994).

Petitioner’s Brief at 9, 1993 WL 632338, *PUD No. 1*.

⁷¹ *PUD No. 1*, 114 S. Ct at 1911.

⁷² *Id.*

⁷³ See, e.g., Sawyer, *supra* note 31, at 1006.

⁷⁴ *PUD No. 1*, 114 S. Ct. at 1912.

⁷⁵ 33 U.S.C. § 1313(c)(2)(A).

section 303.⁷⁶ The Supreme Court of Washington had noted that Washington had formulated its water quality standards with the condition that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed."⁷⁷ The Court acknowledged the legitimacy of the antidegradation policy, cited Environmental Protection Agency regulations, and concluded that Washington's policy "ensures that an 'existing water us[e]' will be 'maintained and protected.'"⁷⁸

Perhaps the Court in this decision is manifesting evolutive considerations in statutory interpretation.⁷⁹ The goals of the Clean Water Act were ambitious and aimed at broad ecosystem integrity.⁸⁰ The meager success that the Act has achieved is often "with respect to the conventional pollution indicators (dissolved oxygen, bacteria, suspended solids, dissolved solids and phosphorus)"⁸¹ However, these indicators of water quality "are only surrogate indicators of ecosystem health."⁸² The "disturbing reality is that we have not succeeded in maintaining the biological productivity of our surface waters"⁸³ The Court may be responding to the changing thoughts about water quality management. It noted that its interpretation of these statutes is consistent with the relevant regulations of Environmental Protection Agency.⁸⁴ Sensing the limited success of criteria-dependent controls, the Court may be willing to interpret the statutes in a broader manner to achieve Congress' goals.

⁷⁶ *PUD No. 1*, 114 S. Ct. at 1912 (citing 33 U.S.C. § 1313(d)(4)(b)).

⁷⁷ *State, Department of Ecology v. PUD No. 1 of Jefferson County*, 849 P.2d 646, 650 (citing WAC 173-201-035(8)(a)).

⁷⁸ *PUD No. 1*, 114 S.Ct. at 1912 (citing 40 CFR § 131.12(a)(1) (1992)).

⁷⁹ William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 359 (1990) ("The enactment of a statute is often the beginning of a significant process of implementation by courts or agencies. Implementation changes the statute, because the statute must be applied - and often subtly redirected - to meet variations of the problem not originally anticipated.").

⁸⁰ See *supra* notes 23-27 and accompanying text.

⁸¹ Rodgers, *supra* note 30, at 264.

⁸² ADLER ET AL., *supra* note 8, at 28.

⁸³ Rodgers, *supra* note 30, at 270.

⁸⁴ *PUD No. 1*, 114 S. Ct. at 1909.

V. WATER QUANTITY IS AN APPROPRIATE STANDARD ON WHICH TO BASE REGULATION

The petitioners claimed “that the Clean Water Act is only concerned with water ‘quality,’ and does not allow the regulation of water ‘quantity.’”⁸⁵ In response, the Court noted that “[i]n many cases, water quantity is closely related to water quality. . . .”⁸⁶ The Court supported its position with three lines of evidence: the Clean Water Act’s definition of pollution,⁸⁷ Environmental Protection Agency regulations,⁸⁸ and other provisions of the Clean Water Act.⁸⁹ The Court’s interpretation of “pollution” is particularly important.

The Clean Water Act defines pollution as “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.”⁹⁰ This definition “suggest[s] impacts far broader than the release of chemical pollutants from sewers and factories.”⁹¹ Instead, it focuses on almost any alteration of the water that results in “bad effects.”⁹² In adopting a broad interpretation of pollution so as to include man-made changes such as reduced water flow, the Court noted “Congress’ concern with the physical and biological integrity of water”⁹³ Lower courts have held that “states may use section 401 only to address chemical impairment”⁹⁴ With the decision in *PUD No. 1 of Jefferson County*, the United States Supreme Court has declared that narrow approach incorrect.

⁸⁵ *Id.* at 1912.

⁸⁶ *Id.*

⁸⁷ Pollution is “the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water.” *Id.* at 1913 (citing 33 U.S.C. § 1362(19)).

⁸⁸ *Id.* at 1913 (citing EPA regulations 40 CFR § 131.10(g)(4)).

⁸⁹ *Id.* at 1913 (citing 33 U.S.C. § 1251(g) and 33 U.S.C. § 1370(2)).

⁹⁰ 33 U.S.C. § 1362(19).

⁹¹ ADLER ET AL., *supra* note 8, at 9.

⁹² Rodgers, *supra* note 30, at 301.

⁹³ *PUD No. 1*, 114 S. Ct at 1913.

⁹⁴ ADLER ET AL., *supra* note 8, at 205.

VI. ALLOWING THE STATE TO IMPOSE MINIMUM FLOW RATES IS CONSISTENT WITH FEDERAL POWERS UNDER FERC AND FPA

The petitioners maintained that Washington did not have the authority to impose minimum flow requirements because the Federal Energy Regulatory Commission (FERC) is vested with authority to license hydroelectric plants.⁹⁵ In *California v. FERC*,⁹⁶ the Court denied states the ability to impose stream flow restrictions on hydroelectric plants. "The Court . . . held that the Federal Power Act (FPA) preempts state regulatory water laws as applied to hydroelectric power projects licensed by the Federal Energy Regulatory Commission (FERC)."⁹⁷ The *California v. FERC* decision seems to support the petitioners' argument. Justice Thomas agreed, saying "[t]oday, the Court gives the States precisely the veto power over hydroelectric projects that we determined in *California v. FERC* and *First Iowa* they did not possess."⁹⁸

Commentators foreshadowed the Court's decision in *PUD No. 1*. One noted that the *California v. FERC* Court "rested its decision on the principle of *stare decisis* [T]he decision provides little guidance in predicting how the Court will decide future cases involving conflicts between federal and state regulatory authority."⁹⁹ Another cautioned that "states are not powerless to secure [minimum stream] flows from FERC-licensed projects. States may insist on flows necessary to meet water quality requirements [under section 303]."¹⁰⁰

The *PUD No. 1* Court found two reasons to support Washington's requirement in the face of FERC licensing. First, there was not yet, if ever, a conflict with FERC over stream flows. At the time of the suit FERC had not acted on the license application and there was federal agreement with the stream flow requirements.¹⁰¹ The Court gave no hint about what the result would be if there was a conflict. Nor did the Court address what the result would be in the

⁹⁵ *PUD No. 1*, 114 S. Ct. at 1914.

⁹⁶ *California v. Federal Energy Regulatory Commission*, 110 S. Ct. 2024, *reh'g denied*, 110 S.Ct. 3304 (1990). (This decision was guided by the Court's prior decision in *First Iowa Hydro-Electric Cooperative v. FPC*, 66 S. Ct. 906 (1946)).

⁹⁷ Roderick E. Walston, *California v. Federal Energy Regulatory Commission: New Roadblock to State Water Rights Administration*, 21 *Envtl. L.* 89, 90 (1991).

⁹⁸ *PUD No. 1*, 114 S. Ct. at 1920 (Thomas, J. dissenting).

⁹⁹ Walston, *supra* note 97, at 91.

¹⁰⁰ Blumm, *supra* note 6, at 128.

¹⁰¹ *PUD No. 1*, 114 S. Ct. at 1914.

case of a relicensing. This latter situation will likely present many such problems in the near future.¹⁰²

Second, the Court stated that "the requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters."¹⁰³ Thus, even if the broad water quality standards under section 303 and state certification under section 401 for hydroelectric projects eventually fall under federal preemption by FERC, the water quality standards would still be applicable under a variety of other federal projects that require licenses or permits.

CONCLUSION

Perhaps due to confusion about which criteria may be applied in a section 401 certification or because the water quality certification can be waived, states have made limited use of their power to restrict federal licensing or permitting projects that affect water quality.¹⁰⁴ This situation may soon change. The Court's acceptance of broad, ecosystem-oriented definitions of water quality standards; its willingness to allow states to use laws in addition to the federally accepted water quality standards; and its endorsement of the antidegradation policy all combine to give states a complex and flexible shield to protect their waters via section 401 certification of federal projects. However, because the Court stopped short of indicating which types of state guidelines outside of those promulgated according to section 303 would be acceptable, the shield will work best if the states formulate water quality standards based on appropriate designated uses. Furthermore, the states must exert their right to require certification of projects. A condition placed by the state on a certification pursuant to section 401(d) becomes a condition of the federal license or permit.¹⁰⁵ This power extends beyond the realm of hydroelectric plants to all projects for which section 401 certification is appropriate. Thus, states can exercise broad control over the impact that these projects have on state waters.

¹⁰² See generally Sawyer, *supra* note 31.

¹⁰³ *PUD No. 1*, 114 S. Ct. at 1914.

¹⁰⁴ ADLER ET AL., *supra* note 8, at 203.

¹⁰⁵ *PUD No. 1*, 114 S. Ct. at 1920 (dissent, citing 33 U.S.C.A. § 1341(d)); ADLER ET AL. *supra* note 8, at 203 (citing 33 U.S.C.A. § 1341(d)).

