

# NOTE

## STATE CONTROL OVER THE DESTINY OF HYDROPOWER DEVELOPMENT: *PUD NO. 1 v. WASHINGTON DEPARTMENT OF ECOLOGY*

### I. INTRODUCTION

The debate over hydropower development exemplifies an apparent environmental unrest as proponents of hydroelectric power generation battle advancing arguments about the omnipresent potential such development has on watershed hydraulics and the environment.<sup>1</sup> However, most would agree that the debate over hydropower development revolves around jurisdictional distribution and the authority to regulate development. For all practical purposes, hydroelectric licensing has been the Federal Energy Regulatory Commission's (FERC's or Commission's) exclusive domain.<sup>2</sup> The prevailing assumption after the Supreme Court's interpretation of the Federal Power Act (FPA)<sup>3</sup> in *First Iowa Hydro-Elec-*

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1. Many ecological and hydrological effects are associated with damming or diverting a waterway including increased pollution concentrations, altered groundwater flows and drainage patterns, silt deposition, water deoxygenation, increased rates of evaporation, changes in temperature and turbidity, and the disturbance of flora and fauna by altered water levels and moving turbines. See, e.g., *California ex rel. State Water Resources Control Bd. v. FERC (Dynamo Pond)*, 966 F.2d 1541, 1545-46, 1549 (9th Cir. 1992) (discussing the impacts on fish of a proposed run-of-the-river hydroelectric project); See generally *HYDROPOWER: A NATIONAL ENERGY RESOURCE* (1979) (symposium sponsored by the Engineering Foundation and the U.S. Army Corps of Engineers, Institute for Water Resources, Fort Belvoir, Va.); Hagan & Roberts, *Ecological Impacts of Water Storage and Reservoir Projects*, ENVIRONMENTAL QUALITY AND WATER DEVELOPMENT 196-215 (1973). Moreover, the cumulative impact of numerous projects on the same waterway can exacerbate otherwise minor effects from a single hydropower project. See generally Schramm, *Integrated River Basin Planning in a Holistic Universe*, 20 NAT. RESOURCES J. 787 (1980). Many proponents of hydropower development consider the imposition of state water quality standards a chief obstacle to the nation's realization of its hydroelectric capacity. James E. Noris, *Hydro Update: Obstacles to Capacity Development*, 127 FORT. 11, 35 (1991).

2. Over the past several decades, however, environmental legislation has attempted to alter the federal/state balance in efforts to ensure consideration of environmental effects during the licensing process. Altering the balance through various environmental legislation including the National Environmental Policy Act (NEPA) and the Electric Consumers Protection Act of 1986, Congress has enhanced the role of state natural resource agencies in the decisionmaking process by forcing federal agencies to consider the effects their decisions have on the environment. See Elizabeth Bogley Roth, *Environmental Considerations in Hydroelectric Licensing: California v. FERC (Dynamo Pond)*, 23 ENVTL L. 1165-1167 (1993).

3. 16 U.S.C. §§ 791a-828c (Supp. II 1988). The FPA includes the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (1920) (codified as amended by the Public Utility Act of 1935, 16 U.S.C. §§ 791a-828 (1988)). This Note will refer to this particular body of laws regulating hydroelectric power as the FPA.

*tric Cooperative v. FPC*<sup>4</sup> was that the Federal Power Commission (FPC), now FERC, possessed ultimate authority over the regulation of hydro-power development.<sup>5</sup> This presumption was reaffirmed in *California v. FERC (Rock Creek)*,<sup>6</sup> decided almost forty years later.

Yet, with the Supreme Court's most recent decision impacting hydroelectric development, *PUD No. 1 v. Washington Department of Ecology (PUD-1)*,<sup>7</sup> the role of the states and the power they possess in the process of hydroelectric licensing is changing. During the 1990s, over 200 hydroelectric projects will face relicensing by the FERC.<sup>8</sup> Fifty years ago, when most of these projects were licensed, fish and wildlife concerns were not in the forefront of the decisionmaking process.<sup>9</sup> Thus, it is quite apparent that river and streamflows throughout the nation will likely undergo substantial restructuring as many operators face relicensing and state imposition of minimum stream flows in the wake of *PUD-1*. Once again, the river of jurisprudence will cut a new course.

This Note postulates that state imposition of minimum stream flows on a hydroelectric project under the guise of a section 401 certification pursuant to the Clean Water Act (CWA) is neither mandated nor supported by the text of that Act and will undoubtedly lead to a disruption of the delicate balance struck by Congress in the FPA. Because *PUD-1* embodies several fundamental concerns regarding the balance of administrative authority necessary to properly account for the various resource values of a river, including power development, any decision to shift the balance of power from the FERC to the states should have been made only after a careful consideration of the FPA's regulatory structure. Part II of this Note

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4. 328 U.S. 152 (1945).

5. M. Curtis Whittaker, *The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities*, 10 HARV. ENVTL. L. REV. 135, 136 (1986). The federal government has the constitutional authority to regulate the nation's waters. See U.S. CONST. art. VI, § 2 (Supremacy Clause); U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. art. IV, § 3, cl. 2 (Property Clause). However, Congress has never fully exercised its pervasive power and, in fact, has given deference to state water law. See *California v. United States*, 438 U.S. 645, 653 (1978); *California Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154-62 (1935).

6. 495 U.S. 490 (1990).

7. 114 S. Ct. 1900 (1994).

8. See 52 Fed. Reg. 4,648 (1987). In fact, the FERC "has licensed the construction of approximately two-thousand nonfederal hydroelectric projects in the sixty-year period between 1920 and 1980." Thomas J.P. McHenry & John D. Echeverria, *California v. FERC: State Regulation of Federal Hydropower*, 4 NAT. RESOURCES & ENV'T 26, 27 (1990). Each year since 1980, the FERC has licensed nearly two hundred projects nationwide and has received over seven thousand license applications for construction of hydroelectric projects. *Id.*

9. Commentators have argued that FERC's track record over the years has evidenced an insensitivity toward environmental concerns and the need to maintain minimum stream flows for fish and wildlife protection. Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Streamflows After California v. Federal Energy Regulatory Commission*, 21 ENVTL. L. 113, 115 n.8 (1991) (arguing that FERC's seventeen year delay in promulgating regulations implementing NEPA reflects FERC's environmental insensitivity). See also Bodi & Erdheim, *Swimming Upstream: FERC's Failure to Protect Anadromous Fish*, 13 ECOLOGY L.Q. 7, 11 (1986) (arguing that the FERC has favored hydropower development over conservation of fish and wildlife and has been reluctant to impose adequate license conditions for their protection).

begins with an overview of the CWA, the FPA and prior case law interpreting those acts as they relate to hydroelectric power licensing and development. Part III states the pertinent facts and traces the case history of *PUD-1*. Part IV gives the holding of this case, and Part V analyzes the Court's interpretation of the CWA and how that interpretation will impact FERC's powers under the FPA. Part V also discusses the future implications of the Court's ruling. Finally, this Note concludes that (1) state imposition of minimum stream flow requirements on hydroelectric projects through section 401 certification under the CWA runs contrary to Congressional intent and is not supported by the text of that Act; and (2) the Court, by failing to interpret the CWA as it relates to the FPA, fundamentally altered the balance of power Congress created in the FPA as amended by the Electric Consumers Protection Act of 1986 (ECPA).<sup>10</sup>

## II. BACKGROUND

### A. Clean Water Act

As the Supreme Court observed in *Arkansas v. Oklahoma*, "The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective; 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" <sup>11</sup> In pursuit of this objective, Congress declared it a national goal to achieve water quality standards that provide for the "protection and propagation of fish, shellfish, and wildlife," while expressly recognizing state authority to allocate quantities of water within its jurisdiction.<sup>12</sup>

The CWA establishes distinct roles for both state and federal governments. Specifically, the Administrator of the Environmental Protection Agency (EPA) is charged with, *inter alia*, establishing and enforcing technology-based effluent limitations on discharges from point sources<sup>13</sup> into the Nation's navigable waters.<sup>14</sup> Under section 303 of that Act, states must implement water quality standards for all intrastate waters.<sup>15</sup> These standards must consist of "the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses."<sup>16</sup> Upon approval by the Administrator, a state water quality standard

10. Pub. L. No. 99-495, 100 Stat. 1243 (codified in scattered sections of 16 U.S.C.).

11. 112 S. Ct. 1046, 1054 (1992) (quoting the CWA § 101(a), 33 U.S.C. § 1251(a) (1988)).

12. 33 U.S.C. § 1251(a)(2), (g) (1988).

13. The CWA distinguishes between point and non-point sources. Point sources include any "discernable, confined and discrete conveyance, including but not limited to any pipe [or] ditch . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1988). A non-point source is any pollution source that is not a point source. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 n.28 (D.C. Cir. 1982).

14. 33 U.S.C. §§ 1311, 1314 (1988).

15. 33 U.S.C. § 1311(b)(1)(C) (1988). The CWA also envisions that the states will take on a primary role in the establishment and implementation of water quality control requirements, including the implementation of an NPDES permit program and a permit program for the discharge of dredged or fill materials into navigable waters. *See* 33 U.S.C. §§ 1342, 1344 (1988).

16. 33 U.S.C. § 1313(c)(2)(A) (1988) (emphasis added). State standards must protect public health or welfare and in setting such standards states must consider "their use and value for public

becomes the "water quality standard for the applicable waters of that State."<sup>17</sup> In addition, the CWA also contains an antidegradation policy which requires states to ensure that water quality standards and levels protect existing instream water uses.<sup>18</sup>

According to section 401(a) of the CWA, applicants seeking a federal permit or license to construct or operate facilities that may result in a discharge<sup>19</sup> into navigable waters must receive state certification that the discharge will not violate applicable provisions of the CWA.<sup>20</sup> Further, section 401(d) provides:

Any certification provided under this section shall set forth any effluent limitations *and other limitations*, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations . . . *and with any other appropriate requirement of State law set forth in such certification . . .*<sup>21</sup>

The federal agency cannot issue the license or permit until the state has either issued a certification or waived such certification, and any conditions imposed by the state in its certification must be included as conditions of the federal license or permit.<sup>22</sup> Before the FERC can issue a hydroelectric license, section 401 certification must be received<sup>23</sup> because the FPA neither creates an implied exemption nor preempts the CWA.<sup>24</sup>

### B. Federal Power Act: Comprehensive Federal Regulation for Hydroelectric Licensing

Under the FPA, the FERC is vested with the power to govern the hydroelectric licensing process. Section 4(e) of the FPA explicitly delegates authority to the FERC to issue licenses for projects "necessary or convenient . . . for the utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction," and provides that the Commission must give "equal consideration to the purposes of energy con-

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water supplies, *propagation of fish and wildlife*, recreational [and other uses]." *Id.*; 33 U.S.C. § 1251(a) (1988) (emphasis added).

17. 33 U.S.C. § 1313(c)(3) (1988).

18. 33 U.S.C. § 1313(d)(4)(B) (1988); 40 C.F.R. § 131.12 (1992) (EPA regulations implementing the section 1313 antidegradation directive).

19. The term discharge when used without qualification in the Act includes "a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (1988). Likewise, the terms "discharge of a pollutant" and a "discharge of pollutants" each mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (1988). Pollution is broadly defined under the act to include any "man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." 33 U.S.C. § 1362(19) (1988).

20. 33 U.S.C. § 1341(a)(1) (1988). The applicable provisions include sections 1311 and 1312 (effluent limitations), section 1313 (implementation plans), section 1316 (national performance standards), and section 1317 (toxic and pretreatment effluent standards).

21. 33 U.S.C. § 1341(d) (1988) (emphasis added).

22. 33 U.S.C. §§ 1341(a)(1), 1341(d) (1988).

23. 18 C.F.R. § 4.38(e)(7) (1993) (FERC hydropower licensing regulation requiring water quality certification); *See, e.g., City of Fredricksburg v. FERC*, 876 F.2d 1109, 1111-13 (4th Cir. 1989) (requiring state certification of FERC hydropower license).

24. *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 46-53 (D.C. Cir.), *cert. denied*, 484 U.S. 816 (1987).

servation, the protection, mitigation of damages to, and enhancement of, fish and wildlife, the protection of recreational opportunities" as well as other preservation values.<sup>25</sup> Included in FERC's broad power is its authority to impose license conditions, including minimum stream flow requirements, on perspective licensees.<sup>26</sup>

The ECPA significantly amended the FPA and set new parameters for FERC's decisionmaking process. Specifically, section 10(j) of the FPA, as amended by the ECPA, provides that "in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife . . . affected by the development, operation, and management of the project, each license issued under [Part I of FPA] shall include conditions for such protection, mitigation, and enhancement."<sup>27</sup> The Commission is directed to base its conditions on the recommendations received from state and federal fish and wildlife agencies, and if the Commission decides not to follow the recommendations, it must publish an explanation of its finding that either (1) those conditions selected by the Commission adequately protect, mitigate, or enhance fish and wildlife; or (2) adoption of the recommendation would be contrary to the FPA or other applicable provisions of law.<sup>28</sup>

### C. *Prior Decisions*

#### 1. *First Iowa Hydro-Electric Cooperative v. FPC*

In *First Iowa Hydro-Electric Cooperative v. FPC*<sup>29</sup> (*First Iowa*), the Supreme Court considered, for the first time, whether a prospective licensee for a hydroelectric project had to comply with state regulatory water laws under the FPA. In 1941, First Iowa Hydro-Electric applied for a federal license for the construction of a hydroelectric power project on the Cedar River in Iowa. The project, as proposed, would have essentially dammed the Cedar River<sup>30</sup> and diverted water over an eight mile stretch to a power plant where it would be harnessed into electric energy. The water would then be returned to the Mississippi River, some 20 miles above the Cedar River's original point of entry at the mouth of the Iowa River. This

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25. 16 U.S.C. § 797(e) (1988). The Federal Water Power Act, predecessor of the FPA, consolidated authority once vested in three separate federal agencies into one Commission (the Federal Power Commission). The purpose of this consolidation was to create one federal body responsible for national policy formation regarding our nation's water power resources. See H. R. REP. No. 61, 66th Cong., 1st Sess. 5 (1919). See generally III BERNARD SCHWARTZ, *THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES 1821-2072* (1973) (compiling the legislative history on the creation of the FPC).

26. 16 U.S.C. § 803(a) (1988); *California v. FERC*, 495 U.S. 490 (1990). This section also requires that a project licensed by FERC be "best adapted to a comprehensive plan" for the waterway, taking into account such factors as power development, "the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)," irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e). 16 U.S.C. § 803(a)(1) (1988).

27. 16 U.S.C. § 803(j)(1) (1988).

28. 16 U.S.C. § 803(j)(1), (2)(A)-(B) (1988).

29. 328 U.S. 152, 163-64 (1946).

30. The proposed diversion would have taken all but 25 cubic feet per second of water from the original riverbed.

point of return would not only have a direct and substantial effect upon the flow and stage of the Iowa River, of which the Cedar River was a tributary, but also would cause extreme fluctuations in the flow of the Mississippi due to periods of shut-down and release at the power plant.<sup>31</sup>

The Commission, after granting the State of Iowa's petition to intervene, was confronted by a claim, advanced by the State, that the operator must not only comply with the requirements for the federal license under the FPA, but "should also present satisfactory evidence of its compliance with [state laws]."<sup>32</sup> Finding that First Iowa Hydro-Electric did not present satisfactory evidence of its compliance with state laws pursuant to § 9(b) of the FPA,<sup>33</sup> the Commission dismissed its pending application.<sup>34</sup> On appeal,<sup>35</sup> the Court was presented with a question of statutory interpretation, namely, whether section 9(b) of the FPA required federal licensees to comply with state laws.<sup>36</sup>

In reaching its decision that § 9(b) did not require an applicant to first obtain a state permit as a condition precedent to securing a federal license under the FPA, the Court reasoned that such an interpretation would "vest in the Executive Counsel of Iowa a veto power over the federal project."<sup>37</sup> This veto power could "easily destroy the effectiveness of the federal act," as it would "subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the [FPC] or other representatives of the federal government."<sup>38</sup> Therefore, the Court's holding made section 9(b) requirements discretionary with the FPC and also declared Iowa's laws preempted by the FPA.<sup>39</sup>

To justify this result, the Court examined the structure of the FPA and found that the Act established a system of "dual authority" that did not permit both a state and federal agency to share final decisionmaking authority on the same issue.<sup>40</sup> In the Court's words, "A dual final authority, with a duplicate system of state permits and federal licenses required

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31. *First Iowa*, 328 U.S. at 158.

32. *Id.* at 161. At the time, Iowa law provided that the construction, operation or maintenance of any dams must first be approved by the Executive Council. *Id.* at 165. Moreover, the Executive Council was prohibited from issuing a permit if the construction, operation or maintenance of the dam would interfere with the navigability of the waterways involved or materially injure public rights or fish life. *Id.* at 165-66.

33. Section 9(b) of the FPA provided that each applicant must submit "satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located . . ." 16 U.S.C. § 802(a) (1988).

34. 328 U.S. at 162.

35. The Court of Appeals affirmed the Commission's decision dismissing First Iowa Hydro-Electric's application, and the Supreme Court granted certiorari because of the importance of the case in applying the FPA. *Id.* at 162.

36. *Id.* The FPC would have approved the project absent such required compliance. *Id.* at 163-64.

37. *Id.* at 164. At that time, the laws of Iowa required a permit issued by the State Executive Council before any dam could be constructed, maintained or operated. *Id.* (citing 33 Code of Iowa § 7767 (1939)).

38. 328 U.S. at 164.

39. *Id.* at 167.

40. *Id.* at 167-68.

for each project, would be unworkable.”<sup>41</sup> The Court also held that Iowa’s statute in question was not “saved” by section 27 of the FPA<sup>42</sup> which gives primary, if not exclusive, reference to “proprietary rights.”<sup>43</sup> In sum, the Court in *First Iowa* prevented states from interfering in the hydroelectric licensing process by denying any opportunity to regulate outside their recognized proprietary interests.

Subsequent court decisions after *First Iowa* demonstrated a softening of the Supreme Court’s position on federal preemption.<sup>44</sup> However, in *Rock Creek*, the Supreme Court revisited the *First Iowa* decision and its interpretation of the FPA under that ruling, and reaffirmed the supremacy of FERC’s powers over the licensing of federal hydroelectric projects.

## 2. *California v. FERC (Rock Creek)*

In 1983, the FERC, pursuant to the FPA, issued a license authorizing the operation of a hydroelectric project on Rock Creek, a small tributary of the South Fork American River in California. After considering the project’s environmental consequences and economic feasibility, and in order to protect the trout in the stream, FERC required the licensee to meet interim minimum flow rates of 11 cubic feet per second (cfs) and 15 cfs,

41. 328 U.S. at 167.

42. See *infra* note 51.

43. *First Iowa*, 328 U.S. at 175-76. State laws were thus limited to laws regarding the control, appropriation, distribution or use of water in irrigation or for municipal or other uses of the same nature, not the regulation of water use. *Id.* For a more complete discussion of section 27 and its relationship to section 9(b), see Whittaker, *supra* note 5, at 162-64.

44. See Comment, *Small Hydroelectric Projects and State Water Rights*, 18 PAC. L.J. 1225, 1236 (1987). See generally Plouffe, *Forty Years After First Iowa: A Call for Greater State Control of River Resources*, 71 CORNELL L. REV. 833 (1986). Specifically, in *California v. United States*, the Supreme Court held that section 8 of the Reclamation Act of 1902 required the Secretary of the Interior to comply with state law in the “control, appropriation, use or distribution of water” because “Congress intended to defer to the substance, as well as the form, of state water law.” 438 U.S. 645, 675 (1978). Thus, states were given the power to condition reclamation project operations despite federal preemption arguments. Because section 27 of the FPA and section 8 of the Reclamation Act are nearly identical, some predicted that the broad interpretation placed on section 8 in *California v. United States* would lead the Supreme Court to reject its earlier narrow interpretation of section 27 in *First Iowa* thereby giving states authority to regulate “appropriation, control, and distribution of water in virtually every area of usage that affected federally licensed hydropower projects.” Note, *California v. Ferc: Federal Preemption of State Water Laws*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 261, 271 (1992).

Additionally, the Supreme Court addressed federal preemption of state law in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190 (1983). Interpreting provisions of the Atomic Energy Act of 1954, the Court held that Congress intended a dual system of nuclear energy regulation with the federal government responsible for overseeing the safety aspects involved in nuclear plant licensing while states had authority to determine questions of need, cost, and reliability. *Id.* at 205. These two decisions prompted many to believe that the Court would look more favorably on concurrent powers of state and federal government. See Comment, *The Federal Power Act and Western Water Law—Can States Maintain Their Own Water Use Priorities*, 27 NAT. RESOURCES J. 213, 231 (1987). For a discussion of additional cases decided after *First Iowa* including various state court cases, see Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Streamflows After California v. Federal Regulatory Commission*, 21 ENVTL. L. 113, 120 (1991).

depending on the time of year.<sup>45</sup> After applying for state water permits, the State Water Resources Control Board (WRCB) issued a permit conforming to FERC's interim flow requirements but the WRCB reserved the right to set different permanent minimum flow rates.<sup>46</sup> This reservation was challenged, and in March, 1987, the FERC issued an order directing the licensee to comply with the minimum stream flows previously set in the federal license.<sup>47</sup> The FERC maintained that setting minimum flow requirements "rested within its exclusive jurisdiction" and was "integral to its planning and licensing process" governed by the FPA.<sup>48</sup> The FERC also argued that allowing states to interfere with its balancing of considerations would "vest in states a veto power over federal projects inconsistent with the FPA as interpreted by [*First Iowa*]."<sup>49</sup> Ultimately, the U.S. Supreme Court was called on to decide whether a state could preserve a right to regulate minimum flow rates or was preempted from doing so by the FPA.

In its decision, the Court first recognized the broad federal role Congress gave the FPC in the development and licensing of hydropower projects.<sup>50</sup> It then turned to section 27 of the FPA which evidenced Congress' allocation of regulatory authority between the states and federal government. The Court, adhering to *stare decisis*, refused to disturb *First Iowa's* interpretation of section 27 which limited state authority to laws regarding "control, appropriation, use, and distribution of water in irrigation, or for municipal or other uses of the same nature."<sup>51</sup> Section 27 only saved state laws allocating proprietary rights. Because California admitted that its minimum stream flow requirements neither established nor reflected proprietary rights or rights of the same nature as those relating to the use of water in irrigation or for municipal purposes, the minimum stream flow requirements were not "saved" by section 27 of the FPA.<sup>52</sup> The Court held that California's minimum stream flow requirements could not be given effect because such requirements were preempted by those

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45. 23 F.E.R.C. ¶ 62,137, at 63,204 (1983). In addition, the licensee was also required to complete and submit studies after consultation with state and federal wildlife agencies recommending a permanent minimum flow rate. *Id.*

46. The WRCB considered a draft order in 1987 that would have required permanent minimum flow rates of 60 cfs and 30 cfs. *Rock Creek*, 495 U.S. 490, 495. In response, the licensee petitioned the FERC for declaration that exclusive jurisdiction to determine minimum flow requirements rested entirely with the FERC. *Rock Creek Ltd. Partnership*, 38 F.E.R.C. ¶ 61,240, at 61,772 (1987).

47. *Rock Creek Ltd. Partnership*, 38 F.E.R.C. ¶ 61,240, at 61,774 (1987).

48. *Rock Creek*, 495 U.S. at 495-96.

49. *Id.* at 496.

50. *Id.*

51. *Id.* at 498 (emphasis in original). Specifically, section 27 of the FPA provides:

Nothing [contained in the FPA] shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821 (1988).

52. *Rock Creek*, 495 U.S. at 498.



established by the FERC under the FPA and any holding to the contrary would disrupt the careful balance struck in FERC's determination.<sup>53</sup>

In support of its decision, the Court noted that *stare decisis* has a special force in statutory interpretation because when a court interprets statutory provisions as opposed to the Constitution, Congress remains free to alter the court's decision.<sup>54</sup> In fact, the Court was convinced that Congress acquiesced in the *First Iowa* result<sup>55</sup> and even implicitly affirmed that result.<sup>56</sup> Moreover, the court deemed significant the reliance interests of licensees and others in the regulatory process that would be implicated upon any court imposed modification of the highly complex and long-enduring regulatory regime.<sup>57</sup> Thus, under the Court's view, "it is more important that the applicable rule of law be settled than that it be settled right . . . even where the error is a matter of serious concern, provided correction can be had by legislation."<sup>58</sup>

This decision came as a blow to many who believed the Court was becoming more sympathetic to state preemption after the *First Iowa* decision. However, commentators, in response to the Supreme Court's decision in *Rock Creek*, provided a foreshadowing of events by suggesting that section 401 of the CWA was the key for state placement of minimum stream flow requirements on hydroelectric projects.

### III. STATEMENT OF THE CASE

PUD No. 1 and the City of Tacoma, Washington,<sup>59</sup> proposed to construct the Elkhorn Hydroelectric Project (Elkhorn Project or Project) on the Dosewallips River in the State of Washington.<sup>60</sup> This river originates in the glaciers of the eastern Olympic Mountains and flows east to the Hood Canal in western Puget Sound. The upper half of the river is located in

53. *Id.* at 506-07.

54. *Id.* (citing *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)). California also argued that the Court's decision in *California v. United States* construing section 8 of the Reclamation Act required an abandonment of *First Iowa's* interpretation of section 27 and the FPA, but this argument was rejected. 495 U.S. at 503-04.

55. It can be argued that by not amending section 27 of the FPA, Congress, by its inaction acquiesced in the Court's interpretation of that section in *First Iowa*. Acquiescence through Congressional inaction has been a cardinal tenet of public land law. See, e.g., *United States v. Midwest Oil*, 236 U.S. 459 (1915); *Portland Gen. Elec. Co. v. Kleppe*, 441 F. Supp. 859 (D. Wyo. 1977).

56. Congress enacted the ECPA in 1986 which amended the FPA without changing sections 9 or 27. "By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with final authority to establish license conditions, Congress has [reaffirmed] *First Iowa's* understanding that the FPA establishes a broad and paramount federal regulatory role." *Rock Creek*, 495 U.S. at 499.

57. *Id.* at 500.

58. *Id.* (quoting *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (Brandeis, J., dissenting)).

59. References to PUD No. 1 throughout this note, unless otherwise indicated, include both PUD No. 1 and the City of Tacoma.

60. PUD No. 1 is a public utility district organized under WASH. REV. CODE § 4.04.020 (1990). The City of Tacoma operates a municipal electric system under WASH. REV. CODE § 35.92.050 (1990). Both are authorized to jointly construct, own and operate electric utility properties under Washington statute. Petitioner's Brief at 3, *PUD No. 1 v. Washington Dep't of Ecology* (No. 92-1911).

Olympic National Park, and the river is currently undeveloped and undiminished by appropriation.<sup>61</sup> The portion of the Dosewallips River where the Elkhorn Project would be constructed supports populations of Coho and Chinook salmon and also Steelhead trout.<sup>62</sup>

If constructed as planned, the Project would border the Olympic National Park on federal land within the Olympic National Forest.<sup>63</sup> The project would consist of a diversion dam that would completely block the river and operate in a run-of-the-river mode.<sup>64</sup> Nearly seventy-five percent of the water would be diverted from the river, channeled through a 1.2 mile penstock, and directed into a powerhouse where it would pass through turbines, generate electricity, and finally be returned to the river via the tailrace.<sup>65</sup> The other twenty-five percent of the water would return to the original riverbed by fish ladder or sluice gates.<sup>66</sup> The present configuration of the project would therefore disrupt a 1.2 mile stretch of the river, referred to as the bypass reach, between the diversion dam and the tailrace.

Water flow in the bypass reach ranges between 149 cfs and 738 cfs, depending on the season.<sup>67</sup> If the Elkhorn Project was constructed, a residual minimum flow of between 65 and 155 cfs would remain in the bypass reach.<sup>68</sup> To determine the minimum flows necessary to protect the salmon and trout, Washington fish and wildlife agencies<sup>69</sup> completed a study which led to the formulation and imposition of minimum stream flow requirements in Washington's certification under section 401 of the CWA.<sup>70</sup> Specifically, the section 401 water quality certification contained minimum stream flow requirements of 100 and 200 cfs, depending on the

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61. *Pud. No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1907 (1994). The Dosewallips river is primarily fed by snowmelt and glacial run-off.

62. The Respondents, Washington Department of Ecology, Department of Fisheries, and Department of Wildlife maintained that salmon and trout populations in the Dosewallips River were at serious risk. Respondent's Brief at 2, *PUD-1* (No. 92-1991) (citing Willa Nehlsen et al., *Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho, and Washington*, 16 *FISHERIES* Vol. 2, at 10 (March-April 1991); Washington Department of Fisheries et al., 1992 Washington State Salmon and Steelhead Stock Inventory, at 122 (March 1993)).

63. *PUD-1*, 114 S. Ct. at 1907.

64. *Id.* A project operates in a run-of-river mode when all water entering the impoundment is passed through the turbines without changing the rate of flow of the waterway. Thomas E. Mark, *Hydroelectric Power*, 2 *ENERGY LAW AND TRANSACTIONS* § 53.01 (David J. Muchow & William A. Mogel eds., 1994).

65. *PUD No. 1*, 114 S. Ct. at 1907-08.

66. *Id.* at 1908.

67. *Id.*

68. *Id.*

69. Various state agencies and the Point No Point Treaty Council, a consortium of Indian tribes that historically fished in the Dosewallips River and Hood Canal, worked in conjunction with PUD No. 1 and the city of Tacoma to identify the minimum flow requirements necessary to protect salmon and trout in the bypass reach. Respondent's Brief at 5, *PUD-1* (No. 92-1991). All parties agreed to use a method known as instream flow incremental methodology for identifying appropriate minimum flows. For a discussion on this methodology, see Cavendish & Duncan, *Use of the Instream Flow Incremental Methodology: A Tool for Negotiation*, 6 *ENVTL. IMPACT ASSESSMENT REV.* 347, 349 (1986).

70. In addition to obtaining a FERC license to build or operate a hydroelectric project, PUD No. 1 is also required to obtain state certification under section 401 of the CWA because the Project may result in a discharge into a navigable river.

season.<sup>71</sup> PUD No. 1 maintained that these minimum flow requirements would severely threaten the economic feasibility of the Elkhorn Project, and neither the CWA nor the FPA warranted their imposition.<sup>72</sup> The Department of Ecology issued a water quality certificate for the Elkhorn Project imposing the 100 and 200 cfs conditions.<sup>73</sup> Accordingly, PUD No. 1 appealed to the State of Washington Pollution Control Hearings Board (PCHB).<sup>74</sup>

Partly siding with PUD No. 1, the PCHB determined that the section 401 water quality certification, imposing minimum flow requirements of 100 and 200 cfs, was intended to “enhance, not merely maintain, the fishery;” therefore, the Department of Ecology had exceeded its authority under state law.<sup>75</sup> This ruling was appealed to the state Superior Court which reinstated the Department of Ecology’s flow rates holding: (1) the Department of Ecology could require compliance with the minimum flow conditions; (2) the minimum flow conditions did not “enhance” but rather served to protect and preserve the fishery; and (3) the minimum flow conditions were authorized by state law.<sup>76</sup>

The Washington Supreme Court affirmed the decision of the Superior Court because the minimum flow conditions included in the 401 certification issued to PUD No. 1 were “appropriate measures to assure compliance with Washington’s water quality standards.”<sup>77</sup> The court further held that section 401 of the CWA allowed states to “enforce all state water quality-related statutes and rules, including, but not limited to, state water quality standards.”<sup>78</sup> In addition, the court found section 401(d), which allows states to place conditions on certification based upon several enumerated provisions of the CWA and “any other appropriate requirement of State law,” permitted the imposition of the minimum stream flow condition.<sup>79</sup> Finally, the court held that the Department of Ecology was not preempted by the FPA because the threshold requirement of state action was not

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71. *PUD-1*, 114 S. Ct. at 1908.

72. Petitioner’s Brief at 12, *PUD-1* (No. 92-1991).

73. Respondent’s Brief at 6, *PUD-1* (No. 92-1991).

74. The Pollution Control Hearings Board is a quasi-judicial administrative board with jurisdiction to hear appeals from final decisions of the Washington Department of Ecology. WASH. REV. CODE § 43.21B.110 (1992).

75. *PUD-1*, 114 S. Ct. at 1908. Initially, the PCHB ruled that the Department of Ecology acted pursuant to its statutorily granted authority when it placed base flow conditions in the section 401 certification to preserve the fishery. *State Dep’t of Ecology v. PUD No. 1*, 849 P.2d 646, 649 (Wash.), *cert. granted*, 114 S. Ct. 55 (1993). However, a subsequent hearing was held to determine if Ecology exceeded its authority because PUD No. 1 contended that the flow regime actually was designed to enhance the fishery. The PCHB agreed and reversed the minimum flow requirements set by Ecology. 849 P.2d at 649.

76. *PUD-1*, 114 S. Ct. at 1908.

77. *State Dep’t of Ecology v. PUD No. 1*, 849 P.2d 646, 653 (Wash.), *cert. granted*, 114 S. Ct. 55 (1993).

78. 849 P.2d at 653. Presumably, this would include conditions imposed for the purpose of enforcing state antidegradation policies.

79. *Id.*

met.<sup>80</sup> Further, even if it was met, PUD No. 1 did not carry its burden of proof of establishing federal preemption.<sup>81</sup> Certiorari was granted by the U.S. Supreme Court to resolve a conflict among the state courts of last resort.<sup>82</sup>

#### IV. THE *PUD-1* DECISION

In *PUD No. 1 v. Washington Department of Ecology*, the Supreme Court<sup>83</sup> addressed whether a state could place a minimum flow requirement on a hydroelectric project pursuant to section 401 certification under the CWA.<sup>84</sup> To support its finding that the imposition of a minimum flow requirement fell within a state's authority under section 401, the Court focused on section 401(d) which, in its view, expanded state's authority to place conditions on the certification of a hydroelectric project even if those conditions were unrelated to discharges.<sup>85</sup> In fact, the court broadly interpreted section 401(d) to allow states to impose other limitations on the project in general to assure compliance with various provisions of the CWA and with "*any other appropriate requirement of state law.*"<sup>86</sup> Moreover, the Court held that water quality standards adopted pursuant to section 303 of the CWA were among the "other limitations" with which states could ensure water quality compliance, or at a minimum, were "appropriate" requirements of state law.<sup>87</sup>

After concluding that states could condition 401 certification upon any limitations necessary to ensure compliance with state water quality stan-

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80. *Id.* at 653-54. There are two ways in which federal law may preempt state law: conflict preemption or field preemption. Conflict preemption arises when compliance with both state and federal laws is impossible, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Field preemption may arise from an express or implied manifestation of Congressional intent. In the absence of express preemptive language, Congress's intent to supersede state law may be found where:

- (1) a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; (2) if the federal act touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject; or (3) if the goals sought to be obtained or the obligations imposed reveal a purpose to preclude state regulatory authority.

State Dep't of Ecology v. PUD No. 1, 849 P.2d at 654-55 (Wash.), *cert. granted*, 114 S. Ct. 55 (1993) (citation omitted).

81. State Dep't of Ecology v. PUD No. 1, 849 P.2d at 654-67.

82. *PUD-1*, 114 S. Ct. at 1908.

83. Justice O'Connor delivered the opinion of the Court, and Justice Scalia joined Justice Thomas, dissenting.

84. PUD No. 1 did not dispute that the Elkhorn Project would result in a discharge of water at the end of the tailrace and also a discharge of dredged and fill material during construction, thereby invoking section 401 of the CWA. However, PUD No. 1 maintained that the *minimum flow condition* placed in the 401 certification did not relate to a "discharge," and therefore, Department of Ecology could not impose such a condition under the authority of section 401. *PUD-1*, 114 S. Ct. at 1908 (emphasis supplied).

85. *Id.*

86. *Id.* at 1909 (emphasis added). However, the Court refused to speculate what state laws would be incorporated by this language.

87. *PUD-1*, 114 S. Ct. at 1909.

dards or any other appropriate requirement of state law, the Court went on to hold that the minimum stream flow condition was such a limitation.<sup>88</sup> To support its holding, the Court noted that water quality standards under the CWA consist of designated uses and criteria based upon such uses.<sup>89</sup> Because the Elkhorn Project, as proposed, did not comply with the designated use of the Dosewallips River as a fishery, it did not comply with Washington's applicable water quality standards.<sup>90</sup> Therefore, the Department of Ecology could condition 401 certification on the imposition of minimum stream flows to protect the designated use of the river, because states can set forth any limitations necessary to assure that their water quality standards are met, and such limitations are "appropriate" requirements of state law.<sup>91</sup>

The court then focused on section 303 of the CWA as well as EPA regulations implementing that Act which require states to develop and adopt antidegradation policies.<sup>92</sup> The state of Washington has an antidegradation policy which provides that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed."<sup>93</sup> Because the minimum stream flow requirement ensures existing instream uses will be maintained and protected,<sup>94</sup> the Court reasoned that it was a proper application of the antidegradation policy and thus consistent with section 401(d) of the CWA.<sup>95</sup> The Court also addressed a water *quality* versus a water *quantity* distinction under the CWA and found that the CWA is not only concerned with the regulation of water *quality*, but also encompasses the regulation of water *quantities*.<sup>96</sup> Because a minimum flow condition in section 401 certifications regulates water quantity, and because each state has the authority to regulate water quantities within its jurisdiction,<sup>97</sup> the Court reasoned that water quantity issues are not excluded from direct regulation "under the federally controlled water quality standards authorized in section 303 [of the CWA]."<sup>98</sup>

Finally, the Court addressed PUD No. 1's argument that upholding the minimum flow condition would interfere with FERC's comprehensive authority to license hydroelectric projects pursuant to the FPA.<sup>99</sup> However, this argument was quickly diffused. The FERC had not taken any action on PUD No. 1's license application, so any conflict with FERC's

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88. *Id.* at 1910-14.

89. 114 S. Ct. at 1910.

90. *Id.*

91. *Id.* at 1910.

92. See 33 U.S.C. § 1313(d)(4)(B) (1988); 40 C.F.R. § 131.12 (1993) (EPA regulations implementing that section).

93. WASH. REV. CODE § 173-201-035(8)(a) (1993) (implementing 40 C.F.R. § 131.12(a) (1991)).

94. The State concluded that reduced streamflows resulting from the Elkhorn Project would have the exact effect prohibited by its antidegradation policy. *PUD-I*, 114 S. Ct. at 1912.

95. *Id.* at 1912.

96. *Id.* at 1913.

97. 33 U.S.C. §§ 1251(g), 510(2) (1988).

98. *PUD-I*, 114 S. Ct. at 1913.

99. *Id.* at 1914.

authority under the FPA was deemed "hypothetical."<sup>100</sup> In sum, the Court's expansive interpretation of the CWA permitted the imposition of minimum stream flow conditions in 401 certification, but this result was reached without reconciling its effect on the hydroelectric licensing process crafted by Congress in the FPA.

## V. ANALYSIS

### A. *Expansive Interpretation of the CWA*

In *PUD-1*, the Court was faced with a question of statutory interpretation of the CWA.<sup>101</sup> Although the Court held that section 401 of the CWA gave states the authority to impose minimum stream flow conditions on hydroelectric projects pursuant to 401 certification, the Court's expansive interpretation of that section must be critically examined due to the far reaching effects such an interpretation will have on the current hydroelectric licensing process. As the following discussion demonstrates, the Court's interpretation of the CWA gives states unprecedented power to impact FERC's decisionmaking process related to hydroelectric licensing. This intrusion into FERC's regulatory sphere is not mandated nor supported by the text and structure of the CWA.

Crucial to the first part of the Court's analysis was the finding that states could impose water quality limitations on "any activity" for 401 certification purposes, even if such activity was wholly unrelated to a discharge.<sup>102</sup> Under this reasoning, a state would be allowed to scrutinize the proposed activity as a whole, not just potential discharges.<sup>103</sup> Inherently, states would have the power to deny certification contrary to the specific

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100. *Id.*

101. The FPA neither preempts nor creates any implied exemption from the CWA. *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 46-53 (D.C. Cir.), *cert. denied*, 484 U.S. 816 (1987). In fact, "the scope of state water quality certification authority over FERC licensed hydroelectric projects is essentially a question of interpretation under the CWA." Andrew H. Sawyer, *Rock Creek Revisited: State Water Quality Certification of Hydroelectric Projects in California*, 25 PAC. L.J. 973 (1994). Therefore, the ultimate question in this case was who Congress intended to determine appropriate streamflow quantities for hydroelectric projects: the FERC with its responsibility to balance a full range of public interests including power development, or state environmental officials who undertake a more limited balancing approach.

102. *PUD-1*, 114 S. Ct. at 1909-10. The Court reached this conclusion based, in part, on the fact that section 401(a) contains numerous references to "discharges," but section 401(d) refers to the compliance by "any applicant" with various provisions of the CWA. The Court also believed its view was consistent with EPA regulations implementing section 401 to require states to find "reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." *Id.* (citing 40 C.F.R. § 121.2(a)(3) (1992) (emphasis in original)). However, a close inspection of EPA regulations indicates that its position on whether 401 certification applies to more than just discharges is "far from clear." 114 S. Ct. at 1919 (Thomas, J., dissenting). Specifically, the only EPA regulation addressing the contents of a 401 certification provides that such certification must contain "a statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity." 40 C.F.R. § 121.2(a)(4) (1993) (emphasis supplied). For a recent review of cases interpreting "discharge" as that term relates to hydroelectric projects, see Lisa M. Bogardus, *State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act*, 12 VA. ENVTL. L.J. 43, 51-62 (1992).

103. *PUD-1*, 114 S. Ct. at 1909.

scope and function of the certification process found in section 401(a) which only explicitly grants states the power to regulate discharges.<sup>104</sup> The Court arrived at this interpretation by relying on the text of section 401(d) which, in its view, expanded section 401 effluent limitations to include “any other limitations” and “any other appropriate requirement of state law” necessary to assure compliance with applicable provisions in the CWA.<sup>105</sup> Instead of reading section 401 as a whole,<sup>106</sup> the Court placed prime significance on section 401(d) and essentially allowed that subsection to swallow 401(a).<sup>107</sup>

The Court based its expansive interpretation of section 401(d) in part on EPA regulations implementing that section.<sup>108</sup> The Court found EPA’s conclusion that “activities—not merely discharges—must comply with state water quality standards” was a reasonable interpretation of section 401, entitling such interpretation to *Chevron*<sup>109</sup> deference. As the dissent pointed out, the Court resorted to deference under *Chevron* without first establishing whether the text of section 401 was ambiguous.<sup>110</sup> Even if sec-

104. *Id.* at 1916 ([A]llowing States to impose conditions unrelated to discharges “effectively eliminates the constraints of section 401(a)(1).”) (Thomas, J., dissenting).

105. *Id.* (emphasis added).

106. See *United Savings Ass’n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (holding statutory interpretation is a “holistic endeavor”).

107. Indeed, as Justice Thomas argued, “It is reasonable to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve.” *PUD-1*, 114 S. Ct. at 1916. Moreover, the text of 401(d) itself supports this interpretation because the “other limitations” that are the object of compliance all relate to discharge related activities and “one should logically turn to those provisions for guidance in determining the nature, scope and purpose of 401(d) conditions.” *Id.* See 33 U.S.C. § 1311 (making it unlawful to discharge any pollutant), 33 U.S.C. § 1312 (establishing point source discharge effluent limitations), 33 U.S.C. § 1316 (setting national standards of performance for the control of discharges), and 33 U.S.C. § 1317 (setting pretreatment effluent standards and prohibiting the discharge of certain toxic pollutants unless in compliance with applicable standards).

108. The Court focused on 40 C.F.R. § 121.2 (1993) (Contents of Certification) which provides:

(a) A certification made by a certifying agency shall include the following:

(3) A statement that there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards;

(4) A statement of any conditions which the certifying agency deems necessary or desirable with respect to the *discharge* of the activity

*Id.* (emphasis supplied). Notably, the text of 401 contains no references to water quality standard provisions in section 303 of the CWA. The Court found that Congress intended water quality standards to be included as “other limitations” or “appropriate requirements of state law” under section 401. This conclusion was reached because section 401 expressly includes section 301 “which in turn incorporates section 303 by reference.” *PUD-1*, 114 S. Ct. at 1909 (citing 33 U.S.C. § 1311(b)(1)(C); H.R. CONF. REP. NO. 95-830, 95th Cong., 1st Sess. 96 (1977), *reprinted in*, 1977 U.S.C.C.A.N. 4326, 4471 (“Section 303 is always included by reference where section 301 is listed”).

109. Under *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984), the threshold inquiry is whether Congress had spoken to the question at issue. If it did and its intent was clear, that is the end of the matter, because a court must give effect to the clear and unambiguous intent of Congress. *Id.* at 843 n.9. If, however, Congress did not address the issue or express a clear intent, a court must give way to a reasonable interpretation made by the agency. *Id.* at 843.

110. *PUD-1*, 114 S. Ct. at 1917. In fact, no party or amicus curiae raised the argument that section 401 was ambiguous.

tion 401 was found ambiguous, EPA's position on whether conditions must be related to discharges is "far from clear."<sup>111</sup> Given the contradictory interpretations that can be placed on EPA regulations, it appears that the EPA has not specifically interpreted the scope of section 401(d). Therefore, the Court's resort to *Chevron* deference in *PUD-1* to support its expansive interpretation of section 401 should be questioned.

Although the Court determined that water quality standards could be protected in the 401 certification process, its expansive interpretation of the CWA continued. The Court further held that states could establish conditions in the certification based on the "use" component of a water quality standard alone, without reference to the corresponding criteria as required by section 303.<sup>112</sup> Under this view, states acting under the guise of section 401 have no limits placed on their pursuit of water quality goals because "the conditions imposed on certifications need not relate to discharges, nor to water quality criteria, nor to any objective or quantifiable standard."<sup>113</sup> Thus, "Once a State is allowed to impose conditions on § 401 certifications to protect uses in the abstract, § 401(d) is limitless."<sup>114</sup> This result is far reaching because it is difficult to conceive of a condition that would fall outside a state's authority under 401(d).<sup>115</sup>

As the foregoing makes clear, the Supreme Court adopted a very broad interpretation of the CWA which failed to harmonize the subsections of 401. The Court's interpretation essentially removed any limitation Congress attempted to place on a state's authority to impose conditions in section 401 certifications. This result was reached with very little attention given to its possible effect on the licensing of hydroelectric projects. In fact, Congress' regulatory regime under the FPA and its attempt to solve future environmental conflicts in the hydroelectric licensing process by the passage of the ECPA, were virtually ignored in the Court's analysis, despite

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111. See *supra* note 102.

112. 114 S. Ct. at 1910-11. Water quality criteria are "elements of state water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use." 40 C.F.R. § 131.3(b) (1993). Because a state is free to consider environmental concerns in setting criteria, including what types of numerical criteria will support fisheries, it should be barred from revisiting such concerns under the guise of a certification review. *Accord* Lisa M. Bogardus, *State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act*, 12 V.A. ENVTL L.J. 43, 68 (1992). The Court did not subscribe to this reasoning, however, largely because some criteria can be broad and open-ended and have application to a wide range of diverse water bodies. Washington designated the Dosewallips as Class AA (extraordinary) which provided for designated uses in the areas of water supply, stock watering, fisheries, wildlife habitat, recreation, commerce and navigation. WASH. REV. CODE § 173-201-405(1)(b) (1991). It also had set criteria for Class AA waters which included numerical quantities for freshwater and marine fecal coliform organisms, dissolved oxygen, dissolved gas, pH levels, temperature and turbidity. WASH. REV. CODE § 173-201-405(1)(c) (1991). The Court's reasoning loses much of its force in view of the numerical criteria already set that could have protected salmon and trout populations if set in the proper amounts.

113. *PUD-1*, 114 S. Ct. at 1918-1919 (Thomas, J., dissenting).

114. *Id.* at 1919.

115. Justice Thomas used *Town of Summersville*, 60 F.E.R.C. ¶ 61,291, at 61,990 (1992), to illustrate that the conditions including the construction of walking paths and access roads, stepping stone bridges, and a boat launching facility would all be sustained under the Court's approach in *PUD-1*.



the connection between section 401 and federal hydroelectric licensing. In a statutory interpretation case like *PUD-1*, the Court, at a minimum, should have considered the entire regulatory framework governing hydroelectric licensing before arriving at a conclusion that would impact FERC's comprehensive regulatory role under the FPA.<sup>116</sup>

### B. *A Delicate Balance Disrupted*

According to *First Iowa* and *Rock Creek*, the FPA grants the FERC exclusive jurisdiction over regulation of hydroelectric facilities, but the Court's interpretation of section 401 in the *PUD-1* decision severely threatens FERC's jurisdiction in this area and will undoubtedly add a new dimension to FERC decisionmaking. In the licensing process, the FERC must strike a balance between a number of competing considerations in addition to the need for future power development. These considerations include "energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."<sup>117</sup> Moreover, the FPA, as amended by the ECPA, also requires the FERC to base these considerations on recommendations from state fish and wildlife agencies, or publish its reasons for not doing so.<sup>118</sup> In the ECPA, Congress also declared the FERC the proper institution to resolve any inconsistencies between competing views of the nation's power and environmental concerns in the hydroelectric licensing process.<sup>119</sup> Even though it was in Congress' power to force the FERC to abide by agency recommendations, Congress gave no such mandate and, in fact, wanted to avoid any such result.<sup>120</sup> Thus, the

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116. This type of analysis frequently appears in federal preemption cases. See, e.g., *State Dep't of Ecology v. PUD No. 1*, 849 P.2d 646, 655 (considering the statutory schemes of both the FPA and CWA together to determine Congressional intent). However, it is equally applicable in other federal statutory interpretation cases as well. See 2B NORMAN J. STINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 53.01, at 229-30 (5th ed. 1992). Construing federal statutes by reference to other federal statutes advances harmony and consistency in the legal system, and courts are under a duty to construe statutes in this manner when it can be reasonably done. *Id.* (citing *Schor v. Commodity Futures Trading Comm'n*, 740 F.2d 1262 (D.C. Cir. 1984), *rev'd on other grounds*, 478 U.S. 833 (1986), *Hyrup v. Kleppe*, 406 F. Supp. 214 (D. Colo. 1976) (other citations omitted)). See also *Kokoszka v. Belford*, 417 U.S. 642 (1974) (construing the Bankruptcy Act and Consumer Credit Protection Act and holding that a court, engaged in statutory interpretation, should consider the entire statute, other statutes on the same subject and the broad policies of the relevant statutes to arrive at a construction Congress intended) (citing *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856)); *Negonsott v. Samuels*, 933 F.2d 818, 819 (10th Cir. 1991), *aff'd*, 113 S. Ct. 1119 (1993) (holding that federal statutes should be construed to harmonize their provisions); *Anderson v. FDIC*, 918 F.2d 1139, 1143 (4th Cir. 1990) (same); *Linguist v. Bowen*, 813 F.2d 884, 888-89 (8th Cir. 1987), *cert. denied*, 488 U.S. 908 (1988) (holding statutes *in pari materia* must be considered together in a court's comprehensive analysis of a statutory scheme to determine true Congressional intent underlying the entire statutory design).

117. Federal Power Act, 16 U.S.C. § 797(e) (1988).

118. 16 U.S.C. § 803(j) (1988). It should also be noted that the FERC must satisfy NEPA procedures in relicensing projects as well as other applicable environmental statutes. *Confederated Tribes of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 475-77 (9th Cir. 1984).

119. 16 U.S.C. § 803(j)(1) (1988).

120. H.R. REP. NO. 507, 99th Cong., 2d Sess. 32 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2519.

ECPA strengthened the role of the states in the licensing process, but "it did not make that authority paramount."<sup>121</sup>

When Congress amended the FPA in 1986, it apparently understood that state certification under section 401 was not the proper vehicle for state review of a proposed hydroelectric project's impact on fish and wildlife. "If Congress wanted to preserve state control over these areas, it would *not* have provided for double review by the FERC, pursuant to the FPA, and by the states, pursuant to CWA section 401."<sup>122</sup> In addition, if states had the authority to unilaterally impose certain requirements like minimum stream flow conditions on licensees for federal hydroelectric projects, it would be pointless for Congress to require the FERC to consider state agency recommendations on environmental matters.<sup>123</sup> Indeed, a limitation appearing in a 401 certification becomes a condition on any federal permit or license<sup>124</sup> which is binding on the FERC.<sup>125</sup> This gives the states a virtual "veto power" over a hydroelectric project, a power that the Supreme Court in *First Iowa* and *Rock Creek* determined states did not have.<sup>126</sup>

It is important to note that the Court in *PUD-1* did not entertain the federal preemption argument because, in its view, any conflict between federal and state authority was "hypothetical." The FERC had not yet acted on PUD No. 1's license application, and the Court maintained that the FERC would likely impose the same minimum stream flow conditions that appeared in the state 401 certification. However, the fact that the FERC would accept a state imposed minimum stream flow condition "will likely prove to be the exception, rather than the rule" because the FERC and state environmental agencies do not balance the same interests.<sup>127</sup> Additionally, the Court's rationale is problematic because the FERC is powerless to alter or review section 401 conditions.<sup>128</sup> Any inquiry into FERC's

121. 114 S. Ct. at 1921 (Thomas, J., dissenting).

122. Lisa M. Bogardus, *State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act*, 12 VA. ENVTL. L.J. 43, 88 (1992) (emphasis supplied).

123. *Sayles Hydro Assoc. v. Maughan*, 985 F.2d 451, 456 (1993) (rejecting a narrow reading of *Rock Creek*).

124. 33 U.S.C. § 401(d) (1988).

125. See, e.g., *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (holding that FERC cannot alter or reject conditions imposed by states through 401 certificates); *Department of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Proffitt v. Rohm & Hass*, 850 F.2d 1007, 1009 (3rd Cir. 1988)(same). The FERC takes the same position. See *Town of Summersville*, 60 F.E.R.C. ¶ 61,291, at 61,990 (1992); *Central Maine Power Co.*, 52 F.E.R.C. ¶ 61,033, at 61,172-3 (1990). But see *Turnbridge Mill Corp.*, 1994 WL 449226 (F.E.R.C. July 15, 1994) forthcoming at 68 F.E.R.C. ¶ 61,078.

126. In *Rock Creek*, the Supreme Court reaffirmed *First Iowa's* warning against vesting in states any veto power over hydroelectric projects because such power could destroy the FPA's effectiveness and turn over to the states the comprehensive planning with which the FERC was charged. *PUD-1*, 114 S. Ct. 1900, 1920 (1994).

127. *Id.*

128. *Id.* (citations omitted). Review of the appropriateness of conditions placed in 401 certifications is within the purview of state courts and not with the FERC. See *In Town of Summersville*, 60 F.E.R.C. ¶ 61,291 at 61,990 (1992); *Carex Hydro*, 52 F.E.R.C. ¶ 61,216 at 61,769 (1990); *Central Main Power Co.*, 52 F.E.R.C. ¶ 61,033 at 61,172 (1990).

anticipated action is thus misplaced. In essence, it seems highly probable that conflicts will arise in the future, especially if the FERC issues a license in direct conflict with a state condition in a 401 certification.<sup>129</sup> After *PUD-1*, the resolution of the preemption issue remains uncertain.<sup>130</sup>

### C. Future Implications

The major question to be answered after *PUD-1* is what limits remain on state authority to condition 401 certification. The Court characterized a state's authority to place restrictions on activities causing discharges as "not

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129. The FERC recently addressed the *PUD-1* decision and provided insight on its interpretation of that case. See *Turnbridge Mill Corp.*, 1994 WL 449226 (F.E.R.C. July 15, 1994) (*forthcoming at* 68 F.E.R.C. ¶ 61,078. Turnbridge Mill Corporation filed an application for an original hydroelectric license under Part I of the FPA and received CWA water quality certification from Vermont. The certification contained 18 conditions including a minimum flow condition. The Commission recognized that states including conditions unrelated to water quality in 401 certifications placed the Commission in a difficult position because the Commission must either issue an unlawful license or deny the license application altogether, thus depriving the public of the proposed project's benefits. *Id.* at \*3. This rationalization has led the Commission to abandon its position on the mandatory nature of conditions placed in 401 certifications. Because section 401 only authorizes states to impose conditions relating to water quality, any conditions unrelated to water quality "are beyond the scope of section 401 and are thus unlawful." *Id.* (citing *City of LeClaire*, 66 F.E.R.C. ¶ 61,270, at 61,662 (1994)). In *Turnbridge*, the FERC concluded that it has the authority to determine whether state imposed conditions unrelated to water quality become terms and conditions in the licenses it issues because Congress has given the FERC "the paramount role" in hydropower licensing, and unlawfully imposed state conditions pose a federal question that must be answered by the FERC. *Id.*

After setting out its new position, the FERC went on to rule that the minimum flow condition imposed by Vermont would become part of the federal license. *Id.* at \*5. However, the Commission refused to include a condition that would have required Turnbridge to get Vermont's approval for any significant changes in its proposed project after 401 certification was granted. *Id.* at \*6. The Commission also refused to include a "reopener" provision that would have allowed Vermont to reserve the right to alter the terms and conditions of its 401 certification as necessary to protect water quality. *Id.* at \*7.

130. For the federal preemption doctrine to apply, the threshold requirement of state action must be met. See *supra* note 80 and accompanying text. The Washington State Supreme Court, in addressing the preemption argument, held that this requirement was not met because Washington was merely complying with its federal mandate under the CWA and not acting independently of the federal government. *State Dep't of Ecology v. PUD No. 1*, 849 P.2d 646, 653 (Wash. 1993). Further, the court found that state water quality standards have a hybrid character. *Id.* at 654. States must initially promulgate their water quality standards, but the EPA regulates content and must provide formal approval. Also, any condition in the 401 certification will take on the status of a federal law. *Id.* Therefore, these factors collectively demonstrated that "Ecology's action cannot be fairly regarded as state action" for federal preemption purposes. *Id.*

Assuming *arguendo* that the threshold requirement of state action was met, the next step is to determine Congressional intent. See *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2481 (1991). The Washington Supreme Court held that field preemption did not exist because when the CWA and the FPA are considered together, the emerging scheme is "one in which Congress left room for the states to supplement the FPA through the section 401 certification process." 849 P.2d at 655. Likewise, no conflict preemption existed because there was "no actual conflict between Ecology's action and the FPA." *Id.* Thus, the court concluded that PUD No. 1 did not overcome the strong presumption against a finding of preemption in ambiguous cases. *Id.* at 657. Although a detailed analysis of federal preemption is beyond the scope of this Note, it appears that the threshold requirement of state action will be difficult to demonstrate considering the hybrid nature of state water quality standards.

unbounded," and explained that states could only ensure that a hydroelectric project complies with "any applicable effluent limitations" or "any other appropriate requirements of state law."<sup>131</sup> Under the Court's interpretation, water quality standards and antidegradation policies are appropriate requirements of state law, and states are permitted to protect their water resources in accordance with those standards under section 401 certifications. However, nothing prohibits states from modifying their water quality standards or antidegradation policies to broaden their powers and future influence on the hydroelectric licensing process.<sup>132</sup> Moreover, the Court's broad interpretation of water quality standards under the CWA would permit a state to condition 401 certification on a possible injury to a designated "use" with no quantifiable criteria impacting the state's decision.

The effect of this power shift will soon be realized as many hydroelectric projects come up for relicensing within the next several years. Likewise, state imposed minimum stream flow conditions could sound the death knell for the already wounded small hydro boom, especially if the FERC is forced to issue its licenses pursuant to more stringent conditions which jeopardize the economic feasibility of proposed projects.<sup>133</sup> New projects as well as those in need of relicensing will encounter another layer of administrative obstacles in the hydroelectric licensing process as attempts are made to persuade state fish and wildlife agencies to relax a heightened sensitivity to environmental concerns fed by a new-found power to protect those concerns through section 401 certification. Likely absent from state agency concerns will be the nation's interest in hydroelectric power development because state agencies need only consider parochial environmental interests.<sup>134</sup>

Moreover, the impact of *PUD-1* is not limited to hydroelectric projects. Section 401 of the CWA speaks to "any applicant for a Federal license or permit."<sup>135</sup> An interstate natural gas pipeline company regulated under FERC's jurisdiction, for example, could face stricter state environmental requirements on its proposed interstate expansion if the expansion triggers 401 certification under the CWA. *PUD-1* allows states to impose conditions in 401 certifications to protect "uses" of a navigable waterway which could include fish migration and spawning. States are essentially free to place any limitations in 401 certifications necessary to assure that their water quality standards are met. Thus, construction conditions could

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131. *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1909.

132. States are free to impose limitations on CWA compliance over and above those set by the federal government. See 33 U.S.C. § 1311(b)(1)(C) (1988).

133. See Andrew H. Sawyer, *Rock Creek Revisited: State Water Quality Certification of Hydroelectric Projects in California*, 25 PAC. L.J. 973, 1004 n.205 (1994) (noting that economic conditions are primarily responsible for the sharp decline in water right applications pending for small hydroelectric projects).

134. Cf., e.g., WASH. REV. CODE § 90.54.010(2) (1992) (providing that the goal of Washington's water policy is to "insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington").

135. 33 U.S.C. § 1341(d) (1988).

be placed on the pipeline's proposed activity to protect a state's broad designated uses.

The Courts ruling in *PUD-1* also has implications on a state's ability to discriminate against downstream out-of-state resources. For example, a state could impose minimum stream flows on a project during relicensing which would render the project economically unfeasible and force a shut-down. This forced shut-down could affect out-of-state markets served by the project, thus raising significant constitutional issues.<sup>136</sup> In addition, state exercised "vetoes" may not guarantee the best protection for fish and wildlife because upstream states could force the retention of water in project reservoirs and allow more consumptive uses, ultimately reducing out-of-state downstream flows.<sup>137</sup> This is precisely why the FERC should make the final decision regarding minimum stream flows in the hydroelectric licensing process.

The *PUD-1* decision in some respects can be viewed as a move away from prior case law, at least with respect to the Court's implicit interpretation of federal and state roles under the FPA. The decisions in both *First Iowa* and *Rock Creek* recognized FERC's pervasive regulatory authority in the hydroelectric licensing process. In fact, *Rock Creek*, decided just four years ago, explicitly upheld FERC's power to set minimum stream flow requirements under the FPA when state requirements were in conflict. This apparent diversion in interpretation of FERC's authority in the FPA will likely lead to uncertainty and changed expectations in the hydroelectric power marketplace.

## VI. CONCLUSION

In *PUD-1*, the court fundamentally altered the balance crafted by Congress in the FPA by undertaking an expansive interpretation of the CWA. In statutory interpretation cases like *PUD-1*, it is essential for a court to complete a full analysis of the various statutory provisions in question and how the interpretation imposed will affect other statutory schemes.<sup>138</sup> This is especially true when one considers the frequency in which these decisions are disturbed, even if the result reached was wrong.<sup>139</sup> However, the Court in *PUD-1* made no effort to interpret the certification process embodied in the CWA as that process relates to the FPA because, in its view, any conflict with FERC authority under the FPA

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136. A state policy discriminating among water resource uses on the basis of intrastate versus interstate values may violate the "dormant" commerce clause. See *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); See also *Sporhase v. Nebraska*, 458 U.S. 941 (1982) (striking down a Nebraska law barring export of groundwater to states that did not allow exports to Nebraska); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (striking down an Oklahoma law barring export of Oklahoma minnows); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (striking down a New Jersey law banning the import of out-of-state wastes to preserve space in New Jersey landfills).

137. See Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Stream Flows After California v. Federal Energy Regulatory Commission*, 21 ENVTL. L. 113, 127 (1991).

138. See *supra* note 116.

139. See *supra* note 58 and accompanying text.

was "hypothetical."<sup>140</sup> At a minimum, the Court should have considered the ramifications of its decision to ensure it was consistent with the statutory structure of both CWA and the FPA.<sup>141</sup>

The Supreme Court's holding in *PUD-1* makes clear that states have stumbled across the tools necessary to protect their parochial interests in the hydroelectric regulatory process. Specifically, by utilizing their antidegradation policies and water quality standards, states can condition section 401 certification on the maintenance of minimum stream flows. Under the Court's interpretation of the CWA, the conditions need not relate to "discharges" as defined under the Act, and states are further permitted to enforce water quality standards through "use" designations rather than objective, quantifiable criteria. Indeed, the flow levels imposed by the Department of Ecology in *PUD-1* were allowed despite the fact that such levels were "in excess of those required to maintain water quality in the bypass region."<sup>142</sup>

States utilizing the section 401 certification process now possess a virtually limitless authority to "veto" hydroelectric projects. This authority comes on the crest of numerous hydropower relicensing proceedings. Whether states will use this power to retract into a preservationist policy regarding in-state water resources is yet unknown.

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140. *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1914. It appears that the "hypothetical situation" will never arise under the Court's holding in *PUD-1* because FERC licenses must include state conditions in 401 certifications, and review concerning the appropriateness of those conditions is within the purview of state courts. See *supra* note 128 and accompanying text. If the FERC is mandated to incorporate conditions in 401 certifications, how can its authority under the FPA ever come in conflict with a state's action under 401(d)? This is precisely the predicament the FERC realized in *Turnbridge*. See *supra* note 129. Diluting the *PUD-1* decision, the FERC has taken a new course by announcing its authority to review state conditions in section 401 certifications *unrelated to water quality* that fall outside the scope of section 401(d). *Turnbridge Mill Corp.*, 1994 WL 449226 (F.E.R.C. July 15, 1994) at \*3-\*4. Thus, any future conflict will be under FERC's control.

141. As Justice Thomas stated, "The significant impact the Court's ruling is likely to have on the [federal hydroelectric licensing] process should compel the Court to undertake a closer examination of § 401 to ensure that the result it reaches was mandated by Congress." *PUD-1*, 114 S. Ct. at 1921.

142. *Id.* at 1919.