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THE ATTRACTION AND LIMITS OF TEXTUALISM: THE SUPREME COURT DECISION IN PUD NO. 1 OF JEFFERSON COUNTY v. WASHINGTON DEPARTMENT OF ECOLOGY

MICHAEL P. HEALY*

INTRODUCTION

During its 1993 Term, the Supreme Court had the opportunity to consider the interaction between two federal statutory schemes: the Federal Power Act (FPA), which provides that the Federal Energy Regulatory Commission (FERC) has the authority to regulate and license hydropower projects, and the Clean Water Act (CWA), which provides that states have the authority to adopt water quality standards and that federal law will impose and enforce those standards in regulating emissions into, and the quality of, waters of the United States. The tension created by these two statutes lies not only between federal agencies, but more importantly, between federal energy regulators and state regulators of environmental and water quality. Differing views about the importance of the competing interests implicated by

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5 There have been other instances when federal and state actors have disagreed about the use of water resources. For example, in the 1970's, federal and state interests, particularly in the West, disagreed about the appropriate response to the energy crisis and the issue of water rights. See M. Curtis Whitaker, The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities, 10 HARV. ENVTL. L. REV. 135, 136-37 (1986).
the interaction of the FPA and the CWA reflect a confused\textsuperscript{6} and controversial\textsuperscript{7} area of the law, highlighting the significance of hydropower licensing law in the eyes of environmental lawyers.\textsuperscript{8}

The Supreme Court’s decision in \textit{PUD No. 1 of Jefferson County v. Washington Department of Ecology}\textsuperscript{9} resolves this controversy, holding that the state certification requirement allows states to impose significant conditions on FERC licenses to operate hydropower facilities. This Article uses the \textit{PUD No. 1} decision as an opportunity to examine how the textualist approach to statutory construction fares when two federal statutes are relevant to the issue being decided. As this Article demonstrates, the case is important because it illustrates the attraction as well as the limits of plain meaning as the basis for construing statutes when a conflict arises.

Part I of this Article provides an overview of the federal licensing process for hydropower projects\textsuperscript{10} and examines why such licensing decisions substantially affect the quality of the water in the rivers and streams that generate hydropower.\textsuperscript{11}

Part II of the Article examines the background of the Court’s decision in \textit{PUD No. 1}. Part II first describes FERC’s successes (and those of its predecessor agency) at the expense of state regulatory agencies in Supreme Court cases that have considered the scope of FERC authority under the FPA. Part II then briefly summarizes the broad continuum of results reached

\textsuperscript{6} See \textit{infra} part III (discussing three different judicial approaches to the interaction of the two statutes).

\textsuperscript{7} See \textit{Federal Energy Regulatory Comm’n Hydropower Licensing Program: Hearing Before the House Comm. on Env’t, Energy and Natural Resources of the House Comm. on Gov’t Operations}, 102d Cong., 2d Sess. 100 (1993)[\textit{Hearing}] (statement of Marc S. Gerstman, Deputy Commissioner and General Counsel, New York Dep’t of Envtl. Conservation) (“The scope of authority granted to a State under [section] 401 of the Clean Water Act has been one of the most hotly debated issues among hydropower developers, supporters, opponents and regulators over the last two decades.”).


\textsuperscript{9} 114 S. Ct. 1900 (1994).

\textsuperscript{10} See \textit{infra} notes 12-18 and accompanying text.

\textsuperscript{11} See \textit{infra} notes 19-30 and accompanying text.
by courts when deciding how the FPA should interact with the CWA.

Part III of the Article summarizes and critiques the decision in PUD No. 1, which had not been foreshadowed by the Court's prior decisions in the area of federal hydropower licensing. Finally, Part IV discusses how the Court's decision demonstrates the constraints of a textualist approach to statutory interpretation.

I
FERC HYDROPOWER LICENSING AND ITS ENVIRONMENTAL IMPLICATIONS

The FPA gives FERC the authority to license hydropower projects. A license is issued after a long process, including a pre-application consultation with FERC, and must be periodically renewed. The length of the process, which may last ten years or more, depends to a large degree on the size of the hydropower project and its expected environmental impact. Some observers claim that when relicensing is involved, FERC slows the process because projects have a right to operate under the old requirements during the time that the application for a new license is being considered.

12 Section 4(e) of the FPA authorizes FERC to license projects that are "necessary or convenient ... for the development, transmission, and utilization of power across, along, from, or in any of the streams ... over which Congress has jurisdiction." 16 U.S.C. § 797(e) (1994); see also United States Dep't of the Interior v. FERC, 952 F.2d 538, 543 (D.C. Cir. 1992).
13 See Hearing, supra note 7, at 132 (statement of Martin L. Allday, Chairman, FERC) ("[A three-stage consultation process] begins as long as 3 years prior to the actual filing of a license application.").
14 See Hearing, supra note 7, at 210 (statement of F. Lorraine Bodl, Co-Director, Northwest Regional Office, American Rivers, Inc.) ("In the Northwest, where some major licenses expired in the 1970's, relicensings have been taking ten years or more."). Other estimates indicate much shorter time frames for relicensing. See Hearing, supra note 7, at 195 (statement of Fred E. Springer, Director, Office of Hydropower Licensing, FERC) (stating that the timetable for completing applications for relicensing "will range between ... a little less than two years up to possibly 4 years.").
15 See Hearing, supra note 7, at 150 ("If an EIS is required [for a hydropower project], that typically adds about a year to the processing time.") (statement of Martin L. Allday, Chairman, FERC); Hearing, supra note 7, at 195 (statement of Fred E. Springer, Director, Office of Hydropower Licensing, FERC) (noting that the timetable for completing relicensings depends upon "what complicated EIS's might be involved").
16 See Hearing, supra note 7, at 62 (statement of John D. Echeverria, Counsel, National Audubon Society) (in processing applications for relicensing,
The term of a FERC license varies; initial licenses may be valid for up to fifty years, while licenses replacing expired licenses have terms ranging from thirty to fifty years. During the past three decades, FERC has acted to mitigate the environmental risks associated with licensing for such long periods. "Reopener" provisions, included in all licenses, may result in enhanced environmental protection following public notice and a hearing.

Hydropower licensing by FERC has an impact both on the electric power needs of the country and on the environmental quality and ecology of the streams and rivers that produce the power. Viewed from the perspective of the nation's total energy capacity, FERC is responsible for about five percent of capacity through hydropower licensing. This capacity is shared among the approximately 2,000 hydropower projects that FERC regulates.

"there is an incentive for delay, because ... if a new license is not issued and the application remains pending, then ... the licensees are entitled to continue operating under the terms of the old license, which in many cases is going to be more favorable to the owner than a new license would be"; see Hearing, supra note 7, at 193 (statement of Fred E. Springer, Director, Office of Hydropower Licensing, FERC) (confirming that "[w]hen [a] FERC license expires and FERC is processing the application for recent license [sic], in most cases the license is extended year to year until the relicensing is complete ... ").

17 Hearing, supra note 7, at 138.
18 See Hearing, supra note 7, at 159.
19 Hearing, supra note 7, at 53 (statement of John D. Echeverria, Counsel, National Audubon Society) ("In terms of total operating capacity, hydropower is less than 10 percent of the Nation's energy mix, and the Commission has jurisdiction over about half of that"); see also Hearing, supra note 7, at 138 (statement of Martin L. Allday, Chairman, FERC) ("Hydroelectric projects account for about ten percent of all electric power generated in the United States. As of January 1992, constructed projects under Commission authorization comprise about 54 percent of the nation's total developed hydroelectric power capacity.").

20 See Peter J. Kirsch & J. Barton Seitz, Environmental Protection Through Federal Preemption of State Water Laws, 20 Env'l. L. Rep. ( Env’t. L. Inst.) 10,438, 10,438 (1990) ("Today, approximately 2,000 hydroelectric projects operate under licenses issued by [FERC]."); Hearing, supra note 7, at 53 (statement of John D. Echeverria, Counsel, National Audubon Society) ("There are about 2,300 operating hydroelectric projects, and the Commission has jurisdiction over about 2,000."). But see Hearing, supra note 7, at 137-38 (statement of Martin L. Allday, Chairman, FERC) ("Currently, there are 1,050 licensed projects, 646 exempted projects, and 209 proposed projects being studied under preliminary permit.").
The environmental impact of these projects is also quite significant. Courts,21 interested parties,22 and scholars23 have all recognized that the damming, turbine use, and regulated release of water associated with hydropower projects can be expected to degrade water quality and harm the organisms that depend on a river's water quality and ecology.24 Several of these environmental harms associated with hydropower projects—increased sedimentation, reduced levels of dissolved oxygen, and ecologic modification25—were identified in a recent water quality inven-


The dissolved oxygen level of water determines the capacity of the river to support marine life and absorb waste. The dams in the Ohio River Basin increase the DO level by aerating water as it passes over the dam. Hydropower projects tend to reduce aeration because water passes over turbines instead of falling freely over the crest of the dam. Fish mortality from entrainment [in turbines] obviously lowers fish populations . . .

Id.

22 See, e.g., Hearing, supra note 7, at 94 (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, U.S. Environmental Protection Agency (EPA)). Here, Ms. Prothro stated:

The types of potential adverse impacts associated with hydropower projects include loss or degradation of aquatic habitat; impacts on wildlife, fisheries, and endangered species that are dependent upon the aquatic environment; accumulation of contaminated sediments; nonpoint source impacts; water chemistry problems such as low levels of dissolved oxygen; significant changes in temperature; and significant changes in water flow volumes and timing.

As well, Whittaker has noted:

The possible ecological and hydrological effects of damming or diverting moving water are numerous, and include silt deposition, concentration of pollutants, water deoxygenation, increased rates of evaporation (especially critical in the arid West), altered groundwater flows and drainage patterns, and disturbance of flora and fauna by altered water levels and moving turbines.

Whittaker, supra note 5, at 135 n.3 (footnote omitted).

23 See, e.g., Robert H. Abrams, Interbasin Transfer in a Riparian Jurisdiction, 24 WM. & MARY L. REV. 591, 596 (1983) (“Formerly free-flowing streams may lose their ability to support some types of sport fishing. If the transfer requires a reservoir, the reservoir waters will inundate a valley, thus prohibiting activities such as farming and forestry. Sedimentation behind the reservoir’s dam may result in accumulation of toxins.”).

24 See, e.g., Hearing, supra note 7, at 91 (footnote omitted) (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA) (“The Columbia River System . . . has the largest dam system for electric power in the world. Anadromous fish runs in the Columbia and Snake River Basins are now estimated to be less than 25% of levels that would have been expected without the dams.”).

25 See supra notes 21-23.
The severity of these adverse effects is one important explanation for environmentalists’ increased concern about the environmental impact of hydropower licensing. Another is that, since the terms of many FERC licenses have recently expired, there has been a surge of applications for relicensing in circumstances in which environmental impacts will be seriously considered for the first time. In addition, FERC is considering many cases in which multiple projects are located on individual rivers,

26 See Hearing, supra note 7, at 90-91 (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA) (The results of the 1990 water quality inventory indicate that “[t]he most extensive causes of impairment to our nation’s rivers . . . were siltation, nutrients, low dissolved oxygen, and pathogens. Agricultural runoff was the most extensive source of pollution; however, hydrologic and habitat modification was the third leading source of impairment to our nation’s rivers.”).

27 See Hearing, supra note 7, at 132 (statement of Martin L. Allday, Chairman, FERC) (“In 1991, the Commission received 157 relicense applications for projects originally licensed many decades ago.”); Blumm, supra note 8, at 114 (“During the 1990s, more than two hundred projects must be relicensed by [FERC]. Most of these were licensed fifty years ago, long before reserving streamflows for fish and wildlife or water quality protection became commonplace.”) (footnote omitted); Kirsch & Seitz, supra note 20, at 10,438 (“Many [FERC] licenses were issued in the 1930s for 50-year terms and are, or soon will be, eligible for relicensing.”).

The large number of relicensing applications is attributable to the agency’s decision fifty years ago to establish a uniform expiration date in response to a Supreme Court decision that otherwise would have granted an undue advantage to particular hydropower licensees. See Hearing, supra note 7, at 194 (statement of Fred E. Springer, Director, Office of Hydropower Licensing, FERC) (“In 1943 there was a Supreme Court decision which changed the Commission’s jurisdiction on navigation. . . . Because of the new form of jurisdiction subsequent to 1943 . . . they did not want to give an additional advantage to those companies for not having been licensed so they made the expiration date the same day 50 years after the Supreme Court decision.”).

This increase in applications for relicensing follows by about one decade a substantial increase in initial license applications. See Thomas B. Arnold, Emerging Possibilities for State Control of Hydroelectric Development, 13 ENVTL. L. REP. 10,135, 10,135 (May 1983). Arnold notes that “[t]he past four years have seen renewed, almost frenzied, interest in hydroelectric power development. Id. Applications for permits have jumped from a level of about 20 per year in the mid-1970s to 1,859 in 1981,” which Arnold attributes to a greater opportunity to earn profits by harnessing hydropower. Id. Arnold argues that “[t]he combination of . . . substantial subsidies and a guaranteed market at the utility’s full avoided cost encouraged a flood of proposals to develop hydro sites all over the country.” Id.
thus giving rise to troubling issues involving cumulative impacts and coherence in regulations.28

This tension between the desire to generate hydroelectricity and the apprehension that its generation will seriously degrade the environment has grown because of the perception that FERC will license any project that can be operated at a profit,29 and that FERC may therefore be unwilling to require the mitigation of adverse environmental effects because mitigation can often only be accomplished at the expense of reducing energy production or reducing its profitability to the point where the project loses its utility.30

II
A CONTEXT FOR PUD NO. 1: COMPETING FEDERAL STATUTES AND STATE INTERESTS, AND CONFLICTING JUDICIAL INTERPRETATIONS

A. The FPA Mandate of Broad Federal Preemption of the Licensing Process

1. The FPA’s Grant of Power to FERC Regarding Hydropower Licensing

The FPA grants FERC broad jurisdictional power to license hydropower projects31 and substantial discretion regarding

28 See Hearing, supra note 7, at 97 (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA) (“It is our understanding that by the year 1999, 335 FERC licenses for existing hydropower projects will expire; 167 of those projects are due for relicensing prior to 1993. The projects are located on 105 rivers in 24 states. Most of these projects are in northeastern and midwest states.”). As the Chairman of FERC testified:

Where multiple projects are situated on the same river, a single, cumulative EIS or EA could address them all. A very preliminary estimate is that, of the pending relicensure applications, about 48 projects could be covered in five cumulative EISs; 83 projects could be covered in 26 cumulative EAs; and 24 projects would have individual EAs.

Hearing, supra note 7, at 141 (statement of Martin L. Allday, Chairman, FERC).

29 See infra notes 88-104 and accompanying text.

30 See Hearing, supra note 7, at 196 (statement of Fred E. Springer, Director, Office of Hydropower Licensing, FERC) (“The largest loss of power potential is not necessarily from dams coming down, but from environmental mitigation and enhancement measures that might be imposed on these projects which would send more minimum flows down the stream bed.”).

31 16 U.S.C. § 797(e) (1994) (granting FERC authority to license 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”).
whether to grant licenses to applicants.32 This expansive federal role in hydropower licensing reflects the federal government's interest in the use of navigable waters. "The FPA was premised on the principle that the electric power potential of the nation's navigable waterways is a public resource that should be harnessed in a manner consistent with the public interest."33 These FPA provisions did not, however, foreclose other regulators—particularly the states—from playing important roles in the licensing process.34

2. The Limits on the Preemption of State Water Laws by the FPA

To determine whether Congress intended to give FERC paramount authority over hydropower licensing, one must consider the extent to which the FPA preempts state control over the streams and rivers that come within FERC's section 4(e) jurisdiction. The statute's text seems to provide only for limited preemption:

Nothing contained in this chapter 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.35

32 16 U.S.C. § 803(a) (1994) (granting FERC authority to issue licenses based on conditions that FERC determines to be best suited for power generation and other public uses of the waters).
33 Kirsch & Seitz, supra note 20, at 10,439.
34 The Supreme Court made this point in California v. FERC, 495 U.S. 490 (1990), stating:

In the Federal Power Act of 1935, 49 Stat. 803, 863, Congress clearly intended a broad federal role in the development and licensing of hydroelectric power. That broad delegation of power to the predecessor of FERC, however, hardly determines the extent to which Congress intended to have the Federal Government exercise exclusive powers, or intended to preempt concurrent state regulation of matters affecting federally licensed hydroelectric projects.

Id. at 496-97.
35 16 U.S.C. § 821(a) (1994). Section 9 of the FPA includes similar language: Each applicant for a license under this chapter shall submit to the commission . . . [s]atisfactory 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 with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.
"[A] quite natural reading of the statutory language" indicates a narrow range of federal preemption. This natural reading is strengthened by its conformity with Congress' intent that states retain authority as trustees over the waters flowing within their borders, even though shared authority between the federal regulator and the states could impede development of some hydropower projects.

A conclusion that the FPA only narrowly preempts states' regulation of their waters would be consistent with the general presumption that congressional action does not preempt state regulation, particularly in areas where states have traditionally exercised substantial regulatory authority through their police powers. As we shall see, however, the Supreme Court did not

36 California v. FERC, 495 U.S. at 505; see also Kirsch & Seitz, supra note 20, at 10,440 ("The interplay between §§ 9 and 27 has been the subject of much litigation and scholarly debate. On their face, these provisions appear to require FERC to respect all state water laws."); Blumm, supra note 8, at 117 ("One would not suspect from a reading of the FPA that federal preemption of state laws is one of its distinguishing characteristics. Two provisions of the Act seem to indicate that Congress intended to save, not preempt, state law.").

In California v. FERC, the Supreme Court stated:
Were this a case of first impression, petitioner's argument [in favor of narrow federal preemption] based on the statute's language could be said to present a close question. As petitioner argues, California's minimum stream flow requirement might plausibly be thought to "relat[e] to the control, appropriation, use, or distribution of water used... for... other uses," namely the generation of power or the protection of fish.
495 U.S. at 497 (quoting 16 U.S.C. § 821 (1994)).
37 See Blumm, supra note 8, at 117 ("Further, the FPA's legislative history indicates that Congress consciously sought to preserve state water laws.") (footnote omitted); Whittaker, supra note 5, at 153 ("The FWPA thus preserved a pre-existing balance, preserving states' rights while promoting the federal goal of hydroelectric development."). See generally Whittaker, supra note 5, at 150-53 (discussing legislative history of the FPA and Congress's intent that states "retain[ ] their trusteeship and regulatory responsibility over the corpus of their waters, navigable and otherwise.") (footnote omitted).

38 See Kirsch & Seitz, supra note 20, at 10,440 ("The facial language of... sections [9 and 27], however, is not entirely consistent with the intent of the FPA, which envisions comprehensive federal control over hydropower resources. As a result, the application of these provisions is far from straightforward.").

39 See California v. FERC, 495 U.S. at 497 (stating that a narrow interpretation of the scope of federal preemption "would accord with the presumption against finding pre-emption of state law in areas traditionally regulated by the States and with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress") (internal quotations and citation omitted). See also Whittaker, supra note 5, at 134 ("Although Congress could have asserted
construe the FPA in accordance with this "quite natural reading" of its terms.

3. The Supreme Court's Broad Construction of FPA

Preemption of State Law

The Supreme Court first addressed the issue of state involvement in hydropower licensing affecting navigable waters in First Iowa Hydro-Electric Cooperative v. Federal Power Commission.40 The Supreme Court recently stated that this early decision "provided the understanding of the FPA that has since guided the allocation of state and federal regulatory authority over hydroelectric projects."41 In First Iowa, the applicant sought a federal license to construct a hydropower project that would involve the "diversion of substantially all of the waters of the Cedar River near Moscow, to the Mississippi River near Muscatine."42 Iowa objected to this hydropower project and sought to prevent its development on the grounds that it did not comply with state laws.43 The state contended that, under section 9(b) of the FPA,44 First Iowa had to present evidence to the Federal Power Commission (FPC) demonstrating that the proposed project complied with state law.45 Iowa law required that before any dam could be

"control over the water power inherent in a navigable stream" by invoking the commerce power, it did not do so in the FWPA or any subsequent act.”) (citation omitted).

328 U.S. 152 (1946).

California v. FERC, 495 U.S. at 498. See also William L. Plouffe, Forty Years After First Iowa: A Call for Greater State Control of River Resources, 71 Cornell L. Rev. 833, 835 (1986) ("First Iowa is without question the seminal case on the federal government's role in approving hydropower projects and their associated dams.") (footnote omitted); Whittaker, supra note 5, at 159 (stating that First Iowa is "the most important case in shaping present perceptions of administrative authority over hydropower development").

First Iowa, 328 U.S. at 166. See also Whittaker, supra note 5, at 166. This diversion was seen as central to the plan to develop the hydropower project. Id. at 166 ("Such a diversion long has been recognized as an engineering possibility and as constituting the largest power development foreseeable on either the Cedar or Iowa Rivers.") (footnote omitted).

See First Iowa, 328 U.S. at 159, 164.


See First Iowa, 328 U.S. at 163-64. The First Iowa court stated: The question at issue is the need, if any, for the presentation of satisfactory evidence of the petitioner's compliance with the terms of Chapter 363 of the Code of Iowa. This question is put in issue by the petition for review of the order of the Commission which dismissed the application solely on the ground of the failure of the petitioner to present such evidence.
constructed, the potential operator had to obtain a state permit,\(^4\) receive approval of its plan for construction,\(^5\) and ensure that water diverted to generate power be returned to the stream at the nearest practical point.\(^6\) The Court viewed compliance with this last provision of state law as effectively inconsistent with the planned federal project.\(^7\)

Expressing concern about whether a state could exercise "a veto power over the federal project,"\(^8\) the Court examined the terms of the FPA relating to preemption and the powers that the states retain under the Act. The Court began its analysis by making two general observations about the effect of the FPA. First, the Court stated that "the Act establishes a dual system of control," with the federal government and the state each exercising final authority within the jurisdiction assigned by the FPA.\(^9\) Second, the Court summarized the general purpose of the FPA, which was to promote the development of the nation's dormant hydropower capacity, while protecting the proper jurisdiction of the states.\(^10\)

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\(^4\) Id. at 164.

\(^5\) Id. at 165-66.

\(^6\) Id.

\(^7\) Id. at 167. The Court discussed the conflict between state and federal requirements:

Compliance with State requirements that are in conflict with federal requirements may well block the federal license. For example, compliance with the State requirement... that the water of the Cedar River all be returned to it at the nearest practicable place would reduce the project to the small one which is classified by the Federal Power Commission as 'neither desirable nor adequate'.

\(^8\) Id.

\(^9\) Id. at 164. The Court stated that "[s]uch a veto power easily could destroy the effectiveness of the federal act." Id.

\(^10\) Id. at 167. The Court explained:

The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority.

\(^52\) Id. at 167-68.

\(^53\) Id. at 171. The Court stated:

We find that when that Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States.

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The Court then turned to the meaning of the provisions on which Iowa relied in asserting its authority over the project. The Court first concluded that sections 9(b) and 27 have different purposes, based on their terms and location in the statute: section 9(b) governs the information that an applicant must provide to the Commission and does not save from federal preemption any more state law than is otherwise saved by the terms of section 27.\textsuperscript{53} The Court then construed the savings clause (section 27) quite narrowly, holding that the provision is limited by its terms to state laws protecting property rights in the waters used or affected by the hydropower project.\textsuperscript{54}

\textit{Id. See also id.} at 174.

As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the States so as to sustain the validity of the Act.

\textit{Id.} The Court stated that:

The directness and clarity of § 27 as a 'saving' clause and its location near the end of the Act emphasizes [sic] the distinction between its purpose and that of § 9(b) which is included in § 9, in the early part of the Act, which deals with the marshalling of information for the consideration of a new federal license. In view of the use by Congress of such an adequate 'saving' clause in § 27, its failure to use similar language in § 9(b) is persuasive that § 9(b) should not be given the same effect as is given to § 27.

\textit{Id.} at 175.

\textit{Id.} The Court construed § 27 as follows:

The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.

\textit{Id.} at 175-76. The Court in \textit{California v. FERC} stated that this narrow construction of § 27 is not dicta, because the Court's analysis complemented and was necessary to the Court's holding regarding the scope of § 9(b). \textit{See California v. FERC}, 495 U.S. at 501-03.

To be sure, the Court's interpretation strongly protects state proprietary rights in water. \textit{See Whittaker, supra} note 5, at 162 (noting that in \textit{First Iowa}, "[t]he Court construed section 27 as an explicit protection of the states' water appropriation laws, and would not allow the FPC to be a 'substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights'" (footnotes omitted). Some commentators have argued, however, that the Court's decision was improperly narrow in defining the types of rights that may be considered state proprietary rights, including the right to control diversions of water. \textit{See Whittaker, supra}
The Court therefore read section 9(b) to require that applicants provide information only about compliance with state laws that are saved pursuant to the limited terms of section 27. "This makes § 9(b) a natural place in which to describe the evidence which the Commission shall require in order to pass upon applications for federal licenses. This makes it a correspondingly unnatural place to establish by implication such a substantive policy as that contained in § 27."\(^5\) Section 9(b) does not itself preserve the applicability of any state law to a federal hydropower project.\(^6\) The Court found that this narrow view of section 9(b) was confirmed by the fact that Congress had rejected a different version of this provision that would have expressly authorized states to decide whether to permit hydropower projects.

If it had been the wish of Congress to make the applicant obtain consent of state, as well as federal authorities to each project, the simple thing would have been to so provide. In the course of the long debate on the legislation it was proposed at one time to provide for some such a consent in § 9(b).\(^7\)

The Court also concluded that its narrow reading of the provision was consistent with the purpose of the FPA, which is to provide for a comprehensive, uniform regulatory system that will permit

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note 5, at 163-64 ("The Court would have been more conceptually consistent had it placed the 'diversion' law within the 'water usage' jurisdiction reserved to the states in section 27, rather than within the FPC's 'construction and operation' jurisdiction under section 9(b).") (footnote omitted); Kirsch & Seitz, supra note 20, at 10,441 ("The Court in First Iowa failed to recognize that states often issue water rights subject to conditions and regulatory controls, including the place, rate, and time of water diversion and return.").

\(^5\) First Iowa, 328 U.S. at 177.

\(^6\) Commentators have recognized that the Court's interpretation effectively gives the Commission the authority to decide whether it will require a showing of compliance with particular state requirements:

According to the Court, section 9(b) authorized, but did not require the FPC to demand of its applicants satisfactory evidence of compliance with state laws. Thus, First Iowa did not interpret the FPA to categorically preempt state laws; rather, it authorized selective preemption at the discretion of the FPC.

Blumm, supra note 8, at 119 (footnote omitted). Other authors reached a similar conclusion:

[T]he purpose of § 9 is best seen as largely informational: FERC licensing decisions should be based on knowledge of state regulatory requirements so that its decision to disregard or to require compliance with state law will be an informed one. FERC may decide to disregard state law, ... but § 9 requires that decision to be an informed one.

Kirsch & Seitz, supra note 20, at 10,440 (footnote omitted).

\(^7\) First Iowa, 328 U.S. at 178-79.
the orderly development of hydropower. In the Court's view, the construction of the Act argued by Iowa would have produced a disorderly, nonuniform system that was not intended by Congress.\textsuperscript{58}

In sum, notwithstanding that a natural reading of the FPA would result in narrow preemption of state laws, the Court concluded that the FPA gave the federal licensing agency paramount authority and allowed the states to continue to enforce only property laws.

4. The Amendment and Recent Supreme Court Reaffirmation of the Broad Preemptive Effect of the FPA

Congress amended the FPA when it enacted the Electric Consumers Protection Act of 1986 (ECPA) and gave FERC express authority to consider the impacts that a proposed dam will have on "fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project."\textsuperscript{59} Congress amended the FPA to modify the procedures for FERC review of hydropower license applica-

\textsuperscript{58} The Court concluded that:

[S]ection [9(b)] . . . provides for presentation of information to the federal commission and protects the constitutional rights of the States. This explanation does not support the contention of the State of Iowa that § 9(b) amounts to the subjection of the federal license to requirements of the state law on the same subject. The inappropriateness of such an interpretation is apparent in the light of the circumstances which culminated in the passage of the Federal Water Power Act in 1920. The purposes of the Act were then so generally known as to have made such a restrictive interpretation impossible and a denial of it unnecessary. It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

\textit{Id.} at 179-80. \textit{See also id.} at 181 ("The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.") (footnote omitted); Blumm, \textit{supra} note 8, at 119 ("There has never really been a satisfactory explanation for the First Iowa Court's willingness to find preemption despite statutory text and legislative history apparently saving state laws. The Iowa statute at issue seemed to the Court to threaten to veto a large public power project for minimal state gain.") (footnote omitted). Interestingly, a commentator noted that the broad federal role defined by the Court was "apparently even broader than the role with which members of the Federal Power Commission felt comfortable." Plouffe, \textit{supra} note 41, at 837.

tions and imposed new conditions on FERC licenses. The amended FPA provides that any hydropower project licensed by FERC must itself be judged by FERC to "be best adapted to a comprehensive plan for improving or developing a waterway" for several purposes, including "the adequate protection, mitigation, and enhancement of fish and wildlife" and "other beneficial uses, including . . . recreational" uses. Ensuring consistency with a comprehensive plan was intended to promote protection of water resources and quality.

The amended section 10 of the Act underscores this comprehensive planning requirement by mandating that FERC consult with expert state and federal officials having authority over fish and wildlife resources. This required consultation was intended to yield better-informed and thus more-balanced decisions regarding effects on natural resources. In addition to this consultation, the comprehensive planning requirement was further strengthened by the Act's mandate that FERC include in its issued licenses conditions that are necessary to protect a water-

60 16 U.S.C. § 803(a)(1) (1994). See also Kirsch & Seitz, supra note 20, at 10,439 ("FERC must impose conditions on every license for a hydropower project to ensure that its operations are consistent with a comprehensive plan for multiple use of federally regulated waterways.") (footnote omitted).

61 See Plouffe, supra note 41, at 845. Plouffe examines the balancing aspect of § 10(a):

The comprehensive plan requirement appears to be an expression of Congress's intent that the FERC balance claims on river resources. These claims often conflict in hydropower licensing decisions, and a comprehensive plan requirement prevents the FERC from simply licensing any project that will maximize the river's megawatt potential without considering the river's nonpower resources as well. If plans to mitigate environmental damage cannot protect especially significant nonpower resources, section 10(a) seems to contemplate denial of the license.

Plouffe, supra note 41, at 845 (footnote omitted).


63 At Congressional hearings, there was testimony as follows:

[T]he 10J process was created to require that the Commission give due deference to the expertise and knowledge of expert fish and wildlife agencies like the Fish and Wildlife Service and to generally base the terms and conditions relating to fish and wildlife on the recommendations it received from those agencies.

Hearing, supra note 7, at 58 (testimony of John D. Echeverria, Counsel, National Audubon Society).
way's fish and wildlife. In short, when Congress amended the FPA in 1986, it intended that FERC "pay more attention to environmental concerns in deciding whether to issue hydroelectric project licenses."

The Supreme Court had occasion to consider the meaning of this expanded FERC authority when it returned to the issue of the preemptive effect of the FPA in 1990. In *California v. FERC*, the California Water Resources Control Board had asserted its authority to require permanent minimum flow rates for a federally licensed hydropower project different than those prescribed by FERC. FERC contended that the state agency's action regarding minimum flow rates interfered with FERC's broad authority to license hydropower projects and was inconsistent with *First Iowa*.

Faced with this conflict between state and federal authority, the Court adhered to its decision in *First Iowa* and held that the FPA foreclosed state authority over minimum flow requirements because those requirements are unrelated to proprietary and related rights in water. The Court found no grounds for declining to adhere to the strong rule of stare decisis in statutory cases, and believed that reliance interests supported judicial adherence to a prior interpretation of the statute. The Court also rejected an argument that the scope of FPA preemption should be defined as narrowly as the Court defined the preemptive effect of the Reclamation Act in *California v. United States*.

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65 Kirsch & Seitz, *supra* note 20, at 10,443 (footnote omitted).
66 *California v. FERC*, 495 U.S. 490, 494-95.
67 *Id.* at 495-96.
68 *Id.* at 506. One commentator argued that the Court had, in the years before 1990, indicated that it was likely to adhere to *First Iowa* in a FPA case that raised the preemption issue. See Plouffe, *supra* note 41, at 842 n.61.
69 *California v. FERC*, 495 U.S. at 499 ("There has been no sufficient intervening change in the law, or indication that *First Iowa* has proved unworkable or has fostered confusion and inconsistency in the law, that warrants our departure from established precedent.") (citation omitted). For a discussion of the strong presumption against overruling statutory precedents, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 436-38 (2d ed. 1995).
70 See *California v. FERC*, 495 U.S. at 500.
71 *Id.* at 503-05.
72 438 U.S. 645 (1978). The Court stated in *California v. FERC* that "the FPA envisioned a considerably broader and more active federal oversight role in hydropower development than did the Reclamation Act." 495 U.S. at 504 (citation omitted). Commentators agree that, although the preemption lan-
deed, the Supreme Court inferred from the 1986 amendment to the FPA that Congress had reaffirmed the "paramount" role of FERC in the licensing process, including broad authority over wildlife issues.\textsuperscript{73}

The result, in the Court's view, was that the federal license requirements have preemptive effect: "[A] federal licensee under the FPA need not comply with state requirements that conflict with the federal license provisions established pursuant to the FPA's directives."\textsuperscript{74} The breadth of the Court's analysis in \textit{California v. FERC}, although surprising in view of the absence of any strong rationale by the Court,\textsuperscript{75} would have suggested that state water quality standards should not bind FERC's discretion about the need for and the conditions to be placed on a hydropower project.\textsuperscript{76} The Court reached its decision, however, in the absence of any competing federal interest defined by Congress, such as the requirements of the CWA.\textsuperscript{77}

5. \textit{The Impact of the Supreme Court's Broad Reading of FPA Preemption: The Scope of Retained State Authority Under the FPA}

The result of the Supreme Court's interpretations of the FPA is a "generally accepted [view] that the pervasive federal

\textsuperscript{73} California v. FERC, 495 U.S. at 499 ("Congress has amended the FPA to elaborate and reaffirm First Iowa's understanding that the FPA establishes a broad and paramount federal regulatory role.") (citation omitted). Commentators have concurred that a reasonable inference of Congress's amendment of the statute in 1986 is that Congress was "satisfied] with the current division of authority." Kirsch & Seitz, supra note 20, at 10,444.

\textsuperscript{74} California v. FERC, 495 U.S. at 505.

\textsuperscript{75} See Blumm, supra note 8, at 125 ("The result in California v. FERC clearly preempted the state's attempt to set minimum flows higher than those ordered by FERC. But the Court was not so clear as to the reasoning for and thus the scope of the preemption.").

\textsuperscript{76} See California v. FERC, 495 U.S. at 506 ("Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination.").

scheme has occupied the entire field of hydroelectric power regulation.\textsuperscript{78} This scheme necessarily grants broad authority to FERC, which has acted to exercise that authority to its full extent,\textsuperscript{79} despite the fact that states may be embittered by FERC's exercise of its powers.\textsuperscript{80}

The exception to this broad federal administrative power defined in the FPA and discussed by the Court in its decisions interpreting the Act is stated in section 27, which provides that the Act does not "affect or in any way . . . 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."\textsuperscript{81} Although the Court has interpreted this provision narrowly,\textsuperscript{82} thus limiting its effect,\textsuperscript{83} some commentators have suggested that states may rely on this savings provision to assert control over federal licensing.

\textsuperscript{78} Kirsch & Seitz, supra note 20, at 10,441 (footnote omitted). See also Plouffe, supra note 41, at 835 ("Today, unless the Court overrules First Iowa, state laws purporting to allocate river resources to nonpower uses have no legal force in the face of the Federal Power Act."). (footnote omitted).

\textsuperscript{79} See Kirsch & Seitz, supra note 20, at 10,442 ("In analyses that belie the clouded line between §§ 9 and 27, FERC frequently has overruled state attempts to exercise authority over water releases from hydroelectric projects by holding that the FPA creates an exclusively federal regulatory scheme.") (footnote omitted).

\textsuperscript{80} One example is the strained relationship between New York and FERC: The [New York] Department's relationship with [FERC] can best be described as extremely formal, convoluted and litigious. The relationship has degenerated during the past several years, primarily as a result of the Commission's increased reliance upon the preemptive nature of the Federal Power Act, as opposed to increased recognition and acceptance of the Department's expertise in managing New York's resources.

\textit{Hearing, supra note 7, at 104-05} (statement of Marc S. Gerstman, Deputy Commissioner and General Counsel, Dep't of Envtl. Conservation). One writer has summarized state complaints about FERC's licensing of small hydropower projects. See Whittaker, supra note 5, at 142-43. These complaints principally focus on FERC's lack of interest in comprehensive planning for and the cumulative impacts of hydropower projects, a lack of concern about state water law, and a failure to cooperate with states. See Whittaker, supra note 5, at 142-43; \textit{Hearing, supra note 7, at 101} ("[FERC] has not been according the States' expertise in managing its [sic] natural resources appropriate deference in the Federal licensing process.").


\textsuperscript{82} See supra notes 53-58 and accompanying text.

\textsuperscript{83} One commentator has noted: [W]hile the FPA does not occupy the field and void all state water laws, it does enable FERC to selectively preempt state requirements that it deems inconsistent with a particular licensing decision. \textit{California v. FERC}, in other words, interprets the FPA to delegate preemptive author-
authority by redefining proprietary rights in water so that a proposed project becomes infeasible.\textsuperscript{84} This strategy is unlikely to be appealing to states because courts may hold it unlawful under the FPA,\textsuperscript{85} or it may yield at best a right to compensation, rather than an unimpaired waterway.\textsuperscript{86}

In sum, as interpreted by the Supreme Court, the FPA broadly preempts state law and delegates to FERC extensive power to license a hydropower project, in spite of state concerns about local impacts.

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\textsuperscript{84} One suggestion to resolve states' complaints regarding FERC is as follows:

[T]he answer to state complaints that FERC sets illegal minimum in-stream flows for its projects is that states should enforce their own laws, allowing only such appropriation as is consistent with the desired level of instream flow. Likewise, the states can protect future upstream development by granting water rights of limited duration or only issuing hydropower developers subordinated water rights.

Whittaker, supra note 5, at 183. See also Blumm, supra note 8, at 126 ("Since states have the authority to define the nature of proprietary rights, nothing in the FPA would preclude a state from establishing minimum streamflows as proprietary rights. Thus, the 'proprietary rights' exception may enable states like Oregon to demand compensation from FERC licensees if their minimum flows are disturbed.") (footnotes omitted). Cf. Kirsch & Seitz, supra note 20, at 10,438 (in discussing California v. FERC, the authors state that "the Court's resolution of the [preemption] issue—largely if not entirely in FERC's favor—leaves open questions about FERC's authority over water allocation decisions").

\textsuperscript{85} See Blumm, supra note 8, at 125 ("Given the Court's concern over not allowing the states to veto FERC licenses, a state that denies a water right to a project is very likely to find its authority preempted if FERC decides to license the project without the state right.") (footnote omitted).

\textsuperscript{86} See Blumm, supra note 8, at 129. Blumm states that:

[B]ecause the FPA authorizes FERC licensees to condemn water rights, it may be that the effect of interfering with an Oregon-like streamflow is to enable the state to receive just compensation for the taking, rather than block an unwanted project. Apart from the difficulties of valuing the lost public property right, states may find monetary payments from licensees an inadequate surrogate for regulatory authority. In short, the "proprietary exception" to FERC preemptive authority under California v. FERC is not likely to make states less interested in amending the statute.

\textit{Id.} (footnote omitted).
B. FERC's Limited Accommodation of Environmental Interests When Exercising Its Powers Under the FPA

As one commentator has noted, the effect of the decision in *California v. FERC* was that, at least with regard to federal authority under the FPA, "[t]he prospects for environmental protection will depend almost entirely on how FERC accepts its environmental watchdog role under ECPA generally." 87 Indeed, the Supreme Court's decisions giving broad preemptive power to the FPA might not have been so disconcerting to environmentalists if FERC had itself used its statutory authority to protect the ecology and water quality of the rivers and streams used to generate hydropower.

FERC has not, however, exercised its authority in that way. Various concerned observers, including state officials, federal officials, members of Congress, environmentalists, and scholars, have concluded that FERC either uniformly or in par-

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88 See *Hearing, supra* note 7, at 99 (statement of Marc S. Gerstman, Deputy Commissioner and General Counsel, New York Dept. of Envt'l Conservation) ("In New York we perceive the Commission to be maximizing power generation at the expense of environmental protection measures. This shift away from a more equitable balanced approach to decisionmaking has become evident during the past several years.").
89 *Hearing, supra* note 7, at 119 (statement of Russell Earnest, Deputy Assistant Director for Fish and Wildlife Enhancement, Fish and Wildlife Service, U.S. Dept of the Interior) ("Overall there is a problem in terms of fish and wildlife values getting equal consideration [by FERC] with other project benefits.").
90 *Hearing, supra* note 7, at 199 (statement of Rep. Sam Gejdenson) ("In recent years... it has become increasingly clear that FERC favors the development of all hydroelectric projects regardless of their potential negative impacts on natural resources. More importantly, FERC seems to completely ignore the concerns of the state and local governments and the local community.").
91 See *Hearing, supra* note 7, at 35 (statement of John D. Echeverria, Counsel, National Audubon Society) ("[T]he Commission and its staff are biased in favor of development interests and indifferent to or flatly hostile to other values, particularly the wildlife and other concerns of greatest interest to National Audubon and other conservation groups."); *Hearing, supra* note 7, at 203 (statement of F. Lorraine Bodi, Co-Director, Northwest Regional Office, American Rivers, Inc.) (judging from her 13 years of experience with FERC, she "consider[s] FERC's handling of fish, wildlife, and recreation issues to be abysmal.").
92 See, e.g., Blumm, *supra* note 8, at 130 n.105 ("[A]lthough the FPA calls for balanced and multiple use of streamflows, the FERC licensing process can produce results that are heavily biased toward applicant visions of economic viability at the expense of fish and wildlife protection.") (citation omitted). See also Blumm, *supra* note 8, at 130 ("A number of recent studies confirm FERC's
ticular proceedings favors developing hydropower over preventing or minimizing adverse environmental impacts. Although FERC rejects such conclusions on the grounds that they reflect an undue concern with the environment and an insufficient recognition of the broader public interest that FERC must ultimately serve, the conclusions seem well founded when one considers the difference between the theory of FERC's review of fish and wildlife impacts and FERC's actual practice.

As noted above, when Congress amended the FPA in 1986 it intended that FERC would act to protect the ecosystem of rivers and streams used to produce power. The theory was that expert state and federal wildlife protection agencies would have an opportunity to recommend conditions that FERC should impose on its licensees in order to protect fish and wildlife on waterways. As amended, however, the FPA does not require that FERC accept all recommendations about the conditions needed to protect consistent willingness to favor maximizing hydroelectric revenues at the expense of fish and wildlife protection."

93 See Hearing, supra note 7, at 172-73 where the Chairman of FERC testified:

[The legislative mandates of resource agencies are often limited in scope, such as the protection of fish and wildlife or of anadromous fish. Such agencies have no responsibility to evaluate a project in light of the many public interest factors encompassed by the comprehensive development standard of Section 10(a) of the FPA.

Hearing, supra note 7, at 172-73 (statement of Martin Allday, Chairman, FERC). He further elaborated:

Because fish passage measures can be very expensive in terms of capital costs and reduction of power generation, they can determine the economic viability of a project. Thus, the Secretary would, in many cases, have de facto veto authority over the licensing decision, and ultimate control over project operations, but with no requirement to give equal consideration to developmental values, as the Commission is required to do by Section 4(e) of the FPA.

Hearing, supra note 7, at 177 (statement of Martin Allday, Chairman, FERC).

94 See Kirsch & Seitz, supra note 20, at 10,445 (footnotes omitted). These commentators have noted:

[Under ECPA, FERC has an affirmative statutory obligation to impose conditions on the operations of hydropower projects that are necessary for the 'protection, mitigation, and enhancement' of fish and wildlife habitat. Both the language of the statute and its legislative history leave no doubt that FERC must exercise its authority to require such conditions upon recommendation from state and federal wildlife agencies.

See also Blumm, supra note 8, at 128 ("[States] may submit recommended flows to FERC under section 10(j) of the FPA, and, based on these recommendations, FERC must include in its licenses conditions that will 'adequately and equitably protect, mitigate damages to, and enhance' fish, wildlife, and habitat.") (footnote omitted).
fish and wildlife resources; it is only required to explain why it has rejected any conditions that are not included in the license and how the license as issued will ensure sufficient protection for fish and wildlife.\footnote{16 U.S.C. § 803(j)(2) (1994). See also Kirsch & Seitz, supra note 20, at 10,444 ("FERC generally must adopt license conditions based on recommendations it receives from state and federal fish and wildlife agencies, but it has the discretion to reject recommendations under certain circumstances."); Hearing, supra note 7, at 151 (statement of Martin L. Allday, Chairman, FERC) ("If, after [section 10(j)] negotiations, the Commission does not adopt a recommendation, it must explain why the agency recommendation is inconsistent with the law, and why the Commission's alternative adequately addresses fish and wildlife issues.").}

FERC's practice in implementing these section 10(j) requirements has been the subject of considerable controversy. The provision includes one express and one implied requirement. The express requirement is, of course, that FERC licenses include conditions sufficient to protect fish and other wildlife. The implied requirement is that FERC demand that applicants submit sufficient information about the impacts of the proposed project on fish and wildlife to permit the state and federal wildlife agencies to decide the conditions that are needed to ensure protection of these resources. Federal and state actors involved with the section 10(j) consultation process believe that FERC has failed in complying with both of these requirements.

First, interested agencies claim that FERC has not required the submission of information needed to identify conditions for the protection of fish and wildlife.\footnote{See Hearing, supra note 7, at 77 (statement of Michael Tillman, Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, U.S. Dep't of Commerce) ("In our view, FERC has not always required applicants to provide the scientific data we consider necessary to evaluate project impacts on fishery resources and which we have requested be made available."); Hearing, supra note 7, at 123-25 (statement of Nicholas E. Iadanza, supervisory fish biologist, Chief, Habit Conservation Branch, U.S. Dep't of Commerce) (providing examples of hydropower licensing cases in which, in the view of FWS, FERC issued licenses without first having required and received sufficient information about ecological impacts).} Needed information often can be gained only by one or more studies undertaken by the applicant over a period of time,\footnote{For example:
Under the FWCA, the FPA, and the Northwest Power Act, for example, NMFS consults with FERC applicants prior to licensing in order to determine studies necessary to identify measures to protect, mitigate, enhance anadromous fishery resources and their habitat. After all necessary data} and the expertise of wildlife
agencies holds no value when they have no data, or insufficient data, to rely upon in defining needed conditions.98

Regarding section 10(j)'s express requirement that a license include necessary protective conditions, interested agencies also criticize FERC's decisions about whether to include recommended conditions in the licenses it issues. Indeed, the Fish and Wildlife Service has argued that FERC has improperly narrowed the range of recommendations that it is willing to consider from resource agencies.99 Although FERC maintains that it accepts resource agency recommendations in more than ninety percent of all cases,100 resource agencies contend that FERC improperly ignores some recommendations,101 and fails to protect resources are gathered, NMFS submits its recommended license conditions for fish protection, mitigation, and enhancement, pursuant to Section 10(j) of the FPA.

_Hearing, supra_ note 7, at 77 (statement of Michael Tillman, U.S. Dep't of Commerce).

98 See _Hearing, supra_ note 7, at 77 (statement of Michael Tillman, U.S. Dep't of Commerce) ("In ... cases [where FERC does not require needed scientific information, NMFS is] unable to provide scientifically based recommendations regarding the protection of [fishery] resources in connection with the hydropower projects involved in the licensing proceeding.").

99 For example, the Fish and Wildlife Service believes:

[The Commission incorrectly defined 'fish and wildlife recommendation,' subject to special consultation requirements of Section 10(j) of the Federal Power Act, to exclude requests that proposed projects not be constructed or operated. The Service also believes the final rule inappropriately precludes recommendations under section 10(j) for additional or amended license conditions to protect fishery resources in circumstances where post-licensing studies and consultations would be conducted.

_Hearing, supra_ note 7, at 72 (statement of Russell Earnest, Deputy Assistant Director for Fish and Wildlife Enhancement, U.S. Fish and Wildlife Service, Dep't of the Interior).

100 See _Hearing, supra_ note 7, at 133 (statement of Martin L. Allday, Chairman, FERC) ("Since section 10(j) was added to the FPA in 1986, the Commission has received over 1,900 fish and wildlife recommendations. The acceptance rate is between 90 and 95 percent."). _But see id._ at 188 (statement of Fred E. Springer, Director, Office of Hydropower Licensing, FERC) ("Of the 48 cases involving 10(j) negotiations, the Commission did not accept all the fish and wildlife recommendations in 19 cases.").

101 See _Hearing, supra_ note 7, at 214 (statement of F. Lorraine Bodi, Co-Director, Northwest Regional Office, American Rivers, Inc.) ("FERC considers section 10(j) recommendations to be inconsistent with applicable law if they differ from its own balancing of the public interest under section 10(a). This is such a broad reading of ECPA that it allows FERC to reject agency recommendations whenever it chooses.").
adequately in cases where the agency does consider the recommendations.\textsuperscript{102}

Because the resource agencies believe that the section 10(j) consultation process has not yielded sufficient protection of fish and wildlife, these agencies have sought to rely on the certification requirement of section 401 of the CWA.\textsuperscript{103} It is to this requirement, and the decisions of state courts interpreting it in the context of FERC licensing, that this Article now turns.

\section*{C. The CWA and the Role of States and Their Water Quality Standards Under the CWA}

\subsection*{1. The Function of Water Quality Standards (WQSs) Under the CWA}\textsuperscript{104}

The basic regulatory structure now established by the CWA was first enacted by Congress in the Federal Water Pollution Control Amendments (FWPCA) of 1972.\textsuperscript{105} In that 1972 Act, Congress substantially revised the nation's approach to water pollution control, which had previously been defined by the Water Quality Act of 1965.\textsuperscript{106} The 1965 Act had relied principally

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{102} See \textit{Hearing}, supra note 7, at 58-59 (statement of John D. Echeverria, Counsel, National Audubon Society). Regarding the impact of Section 10(j) recommendations:
\begin{quote}
[T]he 10 percent [FERC] ha[s] rejected are very important. And the 90 percent they say they have accepted, they haven't accepted. What they have done is covered it... Basically what the 10J process has been reduced to is a paper exercise. You go through a process of getting recommendations from the agency, the Commission reads them, if it doesn't agree with them it has to document why it doesn't agree.
\end{quote}
\textit{Id.}
\item \textsuperscript{103} See \textit{Hearing}, supra note 7, at 100 (statement of Marc S. Gerstman, Deputy Commissioner and General Counsel, New York Dep't of Envtl. Conservation) (in the case of three operating, but unlicensed projects, "[t]he Commission found that [Department of Environmental Conservation] and U.S. Fish and Wildlife Service recommendations were unreasonable and based its conclusion upon lost power that could be attributed to implementing these measures. Again, fortunately only through the [section 401] water quality certificate was DEC able to assure the resource protection.").
\item \textsuperscript{104} A much more detailed discussion of the role that state water quality standards play under the CWA is presented in Jeffrey M. Gaba, \textit{Federal Supervision of State Water Quality Standards Under the Clean Water Act}, 36 \textit{VAND. L. REV.} 1167 (1983).
\item \textsuperscript{105} 33 U.S.C. § 1251 et seq.
\item \textsuperscript{106} 33 U.S.C. §§ 1151-1165 \textit{omitted as superseded} by Pub. L. No. 92-500, § 2 (1972).
\end{itemize}
\end{footnotesize}
on state-established WQSs to define the clean water goals and standards for waters regulated under the Act.107

When the 1965 Act proved to be ineffective in controlling water pollution,108 Congress decided to shift from the WQS-based system for regulating the nation's waters to a system based on required effluent limits on sources of pollution.109 The regulatory scheme adopted in 1972 sought to improve water quality primarily by limiting discharges into regulated waters and setting a goal of zero discharge of pollutants.110 Congress decided, however, that it did not wish to abandon entirely WQS-based regulation in the 1972 Act. Congress accordingly included a provision for the defining of WQSs by states (followed by federal review and approval)111 and provided that WQSs would serve as a supplementary limit on the pollution of a waterway.112 That is, discharges would have to remain below the applicable emissions limit, unless a more stringent limit were needed to ensure compliance with an applicable WQS.113 This additional impact of WQSs has great potential significance because the quality of many of the nation's waters fails to meet the applicable WQSs.114

107 FREDERICK ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 354 (2d ed. 1990) ("The heart of the 1965 Act's regulatory program was water quality standards.").
108 See id. at 354-55.
109 See S. REP. No. 92-414 at 1236 (1971), 92d Cong., reprinted in 1972 U.S.C.C.A.N. 3668, 3675 (accompanying the 1972 FWPCA) ("The legislation recommended by the Committee proposes a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits.").
110 See ANDERSON ET AL., supra note 107, at 355-56.
111 See 33 U.S.C. § 1313(c)(2)(A) (1995). For each standard, either revised or adopted by a state:
[WQSs] shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.
Id.
113 See Keating v. Federal Energy Regulatory Comm'n, 927 F.2d 616, 622 (D.C. Cir. 1991) ("The states remain, under the Clean Water Act, the 'prime bulwark in the effort to abate water pollution,' and Congress expressly empowered them to impose and enforce water quality standards that are more stringent than those required by federal law.") (citations omitted).
114 See H.R. REP. No. 1095, 102d Cong., 2d Sess. 213 (1992). The CWA set lofty goals but they have not all been met:
In the years since the shift to an effluent-control based system of regulation, Congress has reaffirmed that WQSs nevertheless play an important and enhanced role in controlling water pollution. Thus, the Water Quality Act of 1987 sought to improve the control of toxic water pollution by requiring compliance with more specific, numerical water quality criteria, and by requiring that states develop "individual control strategies" for waters that fail to comply with those numerical criteria for toxic pollutants. Congress also codified in the 1987 Act the policy that EPA had developed to prevent degradation of water quality. That policy is intended to ensure the maintenance of water quality sufficient to support existing uses. In sum, although the CWA has focused on requiring effluent limits on

At the time of its enactment in 1972, the Clean Water Act set a goal of assuring fishable and swimmable waters throughout the Nation by 1984 and eliminating the discharge of pollutants by 1985. Today, approximately 30 percent of all assessed river miles fail to attain fully designated water quality standards. Twenty-five percent of lakes are impaired and 29 percent of estuaries similarly do not meet designated water quality standards. A Senate Committee reported similarly poor results: About 30 percent of the Nation's rivers and streams did not meet water quality standards. Twenty percent of lakes were impaired and 25 percent identified as threatened. Fully 92 percent of the shoreline miles of the Great Lakes were not meeting water quality standards. The scientific community identified significant impairments to the ecological integrity of waterbodies, mostly as a result of nonpoint sources of pollution.


Subsection (d) requires that during State review, revision, or adoption of water quality standards, the State must adopt criteria for all priority toxic pollutants for which water quality criteria have been published under section 304(a). The State's criteria are to be based on specific numerical criteria. Where numerical criteria are not available, the State shall use biological monitoring or assessment methods.

See also H.R. REP. No. 839, 102d Cong., 2d Sess. 72 (1992):

It is also the Committee's intent that groundwater should be protected to ensure that groundwater that is closely hydrologically connected to surface waters does not interfere with the attainment of surface water quality standards, which is necessary to protect the integrity of associated ecosystems. The beneficial uses will be determined under applicable state law, and may include, but are not limited to, agricultural, industrial, commercial, and drinking water uses.

Congress also amended the CWA in 1977. Those amendments modified significantly the technology-based regulatory scheme but "left the water quality standards program unchanged." See Gaba, supra note 104, at 1186.

See Gaba, supra note 104, at 1186.
sources of pollution as the most important means for protecting the nation's waters, the Act continues to recognize that state WQSs play an important supplementary role in protecting and enhancing the quality of those waters.

2. The Content of State WQSs

EPA regulations provide that state WQSs must include three core elements to comply with the CWA. The standards must include "[u]se designations" for waters subject to the Act, "[w]ater quality criteria sufficient to protect the designated uses," and an acceptable "antidegradation policy." EPA regulations relating to the states' designation of uses give the states the authority to define those uses within certain constraints. For example, the regulations foreclose uses that would allow plainly unhealthy levels and discharges of pollutants into waters. The regulations also ensure that designated uses are at least as protective of water quality as existing uses. A state's designated uses are relevant to hydropower projects because of the modifications in waterways that may result from those projects.

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119 40 C.F.R. § 131.6 (1995). See also Hearing, supra note 7, at 92, where an EPA official stated that:

EPA regulations ... require States to adopt standards with three basic components. First, the States are to designate the uses it wishes [sic] to protect for each of its waters. ... Second, the State is to adopt criteria to protect those uses. Criteria may be numeric or narrative and may relate to chemical, biological or physical characteristics of the water. Finally, the State must adopt an antidegradation policy to protect its high quality waters. EPA regulations direct that wherever the goal is attainable, States must strive to achieve fishable/swimmable water quality .... See Hearing, supra note 7, at 92 (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA).

120 40 C.F.R. § 131.6(a) (1995).

121 40 C.F.R. § 131.6(c) (1995).

122 40 C.F.R. § 131.6(d) (1995).


124 40 C.F.R. § 131.10(a) (1995) ("In no case shall a State adopt waste transport or waste assimilation as a designated use.").

125 See 40 C.F.R. §§ 131.10(g)-(h) (1995).

126 See Hearing, supra note 7, at 93 (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA) ("Water quality standards are usually designed to protect biological resources. Hydromodification may result in standards violations, if for example, a flowing stream turns into a reservoir changing the biological community that previously existed, thereby in manner inconsistent with the designated use.").
Water quality criteria are defined by the state and reviewed by EPA on the basis of the uses designated by the state. The criteria are required to "represent a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use." The criteria may be "expressed as constituent concentrations, levels, or narrative statements." In recent years, EPA has shown an increased interest in strengthening the water quality criteria adopted by states to promote greater protection of water resources and the biologic resources that depend on those waters. For example, following the lead of certain states, EPA has encouraged other states to develop new water quality criteria that will ensure protection of the ecosystems that depend on the regulated waterway. Water quality criteria may, of course, be implicated by a proposed hydropower project.

The third core element, an antidegradation policy, must meet minimum requirements established by EPA regulations, including the full protection of existing uses and "high quality waters constituting an outstanding National resource," and the more limited protection of other waters whose quality exceeds the level needed to protect existing uses. The antidegradation element of the WQSs may also be very important in considering the effects of hydropower projects, because WQSs designed to prevent antidegradation may foreclose the modifications to a water's existing ecosystem that would result from construction of a dam.

127 40 C.F.R. § 131.11(a)(1) (1995) ("States must adopt those water quality criteria that protect the designated use.").
128 40 C.F.R. § 131.3(b) (1995).
129 40 C.F.R. § 131.3(b) (1995).
130 For example, Martha G. Prothro testified that:
EPA has recently begun to emphasize that States should also include more specific criteria for habitat protection, criteria to help prevent contamination of sediments and criteria for the protection of wildlife. Some States are way ahead of us on this and we are using them as examples for other States to move forward.
Hearing, supra note 7, at 88 (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA).
135 For example, an EPA official offered the following testimony:
State antidegradation policies are an integral part of water quality standards and are therefore an integral part of State section 401 certifications.
In sum, as applied by EPA at present, state WQSs include a range of elements that may broadly protect the quality of a state's waters.\textsuperscript{136}

3. The CWA Section 401 Certification Requirement

In addition to retaining WQS-based regulation, the 1972 FWPCA made federal licensing dependent on compliance with a state's WQSs. Section 401(a) of the Act provides that, before a federal license may be issued, a state must certify that the license applicant will not cause a violation of the state's WQSs.\textsuperscript{137} These antidegradation policies could give States the ability to prevent, for example, the changing of a trout stream into a reservoir that would support different uses, such as habitat for carp and catfish. \textit{Hearing, supra} note 7, at 93-94 (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA).

\textsuperscript{136} See \textit{Hearing, supra} note 7, at 95. Ms. Prothro testified: Protecting water quality means protecting the entire aquatic system including aquatic life, wildlife, wetlands and other habitats, vegetation and hydrologic conditions. Toxicity and bioaccumulation of pollutants, the diversity and composition of aquatic species, entrapment of pollutants in sediment, significant changes in temperature, stormwater and other nonpoint source impacts, habitat loss and degradation, and hydrologic changes are all relevant water quality issues. \textit{Hearing, supra} note 7, at 95. Ms. Prothro further stated:

[It is our position that the Clean Water Act is clearly designed to protect biological, chemical and physical integrity of the Nation's waters. Even though EPA and the States have focused in recent years on many water chemistry kinds of issues, the Act is not restricted to these, and, in fact, \textit{state water quality standards are inadequate if they address only water chemistry.}

\textit{Hearing, supra} note 7, at 128 (emphasis added).

\textsuperscript{137} Section 401(a), 33 U.S.C. § 1341(a) (1994), states that:

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301 and 302, and there is not an applicable standard under sections 306 and 307, the State shall so certify. . . . In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certifi-
tion 401(d) reinforces this state certification authority by providing that a state may add conditions to a federal license that are needed to ensure compliance with its WQSs. Consistent with the CWA's emphasis on state authority to establish requirements that are more stringent than the requirements imposed under federal law, section 401(d) conditions may be framed so as to ensure that WQSs more rigorous than federal standards will not be violated. Federal agencies may not overrule these condi-

See also Keating v. Federal Energy Regulatory Comm'n, 927 F.2d 616, 622 (D.C. Cir. 1991) ("Through this [certification] requirement, Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.") (citations omitted).

A state certifying agency may place conditions on a section 401 certification when necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification.

Id. See also Keating, 927 F.2d at 623 ("When states make compliance with specified conditions a prerequisite to the effectiveness of a certification, the federal Government has been prepared to enforce those conditions.") (citations omitted). One commentator has stated:

Under this decision, if a state legislature or a state agency prohibits or sets conditions on a proposed hydro project, and if the state's water quality agency includes those requirements in its § 401 water quality certification, those conditions are binding on FERC and must become part of the FERC license. These conditions need not be directly related to maintenance of water quality standards, although the state's case will be even stronger if they are.

Arnold, supra note 167, at 10,141 (discussing Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982)).


See S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3735, in which the Committee stated that Section 401 makes clear that any water quality requirements established under State law, more stringent that those requirements established under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.

Id.
tions, even though the licensee could comply with less rigorous federal standards without a need for the conditions.\textsuperscript{141}

Congress’ view of the significance of the certification requirement can also be inferred from actions that Congress took when it amended the CWA in 1977. At that time, Congress amended the text of section 401(a) to include a reference to section 303 of the CWA.\textsuperscript{142} In the report by the Committee recommending this amendment, the Committee stated that the amendment was made necessary not because Congress had changed its view of the scope of section 401, but because federal agencies had construed and applied the provision too narrowly—these agencies had not yielded sufficient authority to states, which had been granted the certification power.\textsuperscript{143} Congress also

\textsuperscript{141} This has been further elaborated by EPA:

While EPA approves State water quality standards and, if necessary, promulgates Federal water quality standards, we do not have the authority to countermand State Section 401 certification decisions. The only exception is that EPA regulations (40 CFR Section 124.55(c)) provide for EPA to disregard State certification conditions or certification denials when the grounds for the decision is [sic] that State law allows a less stringent permit condition.

\textit{Hearing, supra} note 7, at 224 (letter from LaJuana S. Wilcher, Assistant Administrator, Office of Water, EPA). \textit{See also} S. Rep. No. 414, 92d Cong., 1st Sess. (1971), \textit{reprinted in} 1972 U.S.C.C.A.N. 3668, 3735 (Section 401 “continues the authority of the State... to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State... Should such an affirmative denial occur no [federal] license or permit could be issued... unless the State action was overturned in the appropriate courts of jurisdiction.”).


\textsuperscript{143} \textit{See} S. Rep. No. 370, 95th Cong., 1st Sess. 72-73 (1977), \textit{reprinted in} 1977 U.S.C.C.A.N. 4326. The section was amended for clarification purposes:

Existing law requires that States certify that discharges resulting from activities for which an applicant has applied for a Federal license or permit will be in compliance with the provisions of the act. Currently the list of provisions for which certification is necessary does not include section 303 of the act. The Congress intended in 1972 that State water quality standards would be imposed through section 301, and thus certification by the State would include consideration of water quality standards. The failure to explicitly include reference to section 303 has led to confusion, however, as to whether certification of compliance with water quality standards was required. This amendment follows the original congressional intent and clarifies that.

\textit{Id.} \textit{See also} H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), \textit{reprinted in} 1977 U.S.C.C.A.N. 4424, 4471. The purpose of § 303 was discussed further:

The inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with
clarified the expansive scope of the certification requirement by explicitly providing that dredge and fill permits issued by the Army Corps of Engineers under section 404 are subject to the certification requirement. 144

In sum, under the CWA as enacted in 1972 and amended in 1977, Congress gave states significant authority when it required that applicants for federal licenses and permits receive a certification from any affected state that the applicant would not violate state WQSs if the license or permit were granted. Federal agencies did not have the power to overrule certification decisions, which were permitted to be based on more rigorous state standards. Indeed, the only recourse available to a licensee objecting to a state’s action on a section 401 certification request is an action in state court seeking judicial review—and in some states the certification decision is unreviewable. 145

The discussion now turns to how state courts and federal agencies have viewed the interaction between the section 401 certification requirement of the CWA and the authority of FERC to license hydropower facilities under the FPA.

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State water quality standards adopted under section 303. The inclusion of section 303 is intended to clarify the requirements of section 401.

Id. 144 See S. REP. No. 370, 95th Cong., 1st Sess. 68 (1977), reprinted in 1977 U.S.C.C.A.N. 4393:
The amendment to section 404 clarifies the intent of Congress relative to the dredging activities of the U.S. Army Corps of Engineers. To maintain navigation on the Nation’s waterways is in the national interest. However, corps dredging activities, like any municipal or industrial discharge to the Nation’s waters, or any private dredging activities, should be conducted in compliance with applicable State water quality standards. The corps, like other Federal agencies, should be bound by the same requirements as any other discharger into public waters... The intention of the 1972 act was not to exempt the corps or any other public or private agency from State water quality standards and the interpretation of section 404 by the courts is at variance with the intent of Congress.

Id. 145 See Summit Hydropower Partnership v. Comm’r of Envtl. Protection, 629 A.2d 367 (1993) (holding that because a hearing regarding certification is not required by law, denial of certification does not involve a “contested case” under the State’s applicable statute, and there is accordingly no right of judicial review); Triska v. Dep’t of Health & Envtl. Control, 355 S.E.2d 531 (1987) (holding that because a hearing regarding certification is not required by law, denial of certification does not involve a “contested case” under S.C. CODE ANN. § 1-23-310(2) (Law. Co-op. 1976) and there is accordingly no right of judicial review.).
D. The Conflicting Interpretations of the Interaction of Section 401 Certification and Hydropower Licensing Under the FPA

Prior to the Supreme Court decision in *PUD No. 1*, state courts, as well as federal agencies, had interpreted the CWA and FPA interaction in several different ways. These varying interpretations reflected a broad continuum. On one end is a view that the CWA did little to displace FERC authority with respect to the licensing of hydropower facilities. A centrist view holds that FERC’s licensing authority is abridged to the extent that states must ensure conformance with their EPA-approved WQSs (with some differences in opinion about the requirements that states may impose through their WQSs). At the other end is a view that states may condition FERC hydropower licenses not only on conformance with WQSs, but with other state and local requirements, such as land-use controls, as long as those requirements are at all related to water quality. This Article will now briefly describe this continuum, identifying the principal legal arguments urged by the proponents of each of the views along this continuum.

Unsurprisingly, FERC views its own power to license facilities under the FPA quite broadly, with the CWA establishing a narrow exception to that authority. FERC’s position has been that section 401 gives states only the authority to ensure proper “water column chemistry,” but not to exert control over conditions independent of that chemistry, such as conditions to ensure

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146 See supra notes 20-27 and accompanying text. See also Blumm, supra note 8, at 116 (“FERC has always maintained that it may license projects over the objections of states, relying on forty-year old Supreme Court precedent.”) (footnote omitted).

147 Often, there are a number of conditions attached to 401 certifications: FERC still receives copies of 401 certifications that include a myriad of conditions that appear to have no direct or indirect nexus to water quality. For example, we commonly see conditions relative to access, recreation, fish screens and ladders, and fish and wildlife mitigative measures unrelated to water quality in state section 401 certificates. 

Hearing, supra note 7, at 233 (letter from Fred E. Springer, Director, Office of Hydropower Licensing, FERC).

148 This conflict has arisen between FERC and some states: In separate letters to EPA, the States of Maine and Vermont raised concerns about FERC’s challenge to State authority under Section 401 to consider the full range of water quality impacts, other than water column chemistry. In a . . . letter to EPA, the State of West Virginia raised a related concern that FERC has been reluctant to accept water quality recommendations for license conditions and in some cases issued project licenses inconsistent with the State’s recommendations.
protection of wildlife or aquatic habitat or recreational resources. FERC's position, which limits states to a concern about how a water's chemistry will be affected by the discharge of pollutants, received recent congressional support from the Senate Committee on Energy and Natural Resources.

See Hearing, supra note 7, at 94 (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA). See also id. at 32 (statement of John D. Echeverria, Counsel, National Audubon Society) ("The Commission has mounted an aggressive and unseemly attack on the authority of the States to review the water quality effects of hydropower projects under section 401 of the Clean Water Act."). See generally infra note 160 and accompanying text (stating EPA's view that WQSs must properly address more than only water column chemistry).

See Hearing, supra note 7, at 95 (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA) ("In a July 25, 1990 letter to EPA, FERC indicated that conditions on Section 401 certificates that would protect existing uses such as fisheries were unrelated to water quality."); Niagara Mohawk Power Corp. v. New York Dep't of Envtl. Conservation, 187 A.D.2d 7, 10-11, 592 N.Y.S.2d 141, 144 (1993) ("[E]nvironmental and conservation factors of concern to a state are to be weighed at the Federal level; to allow them to serve as a predicate for a state 'veto' of the project is indefensible for it would effectively undermine the intent of Congress.") (citation omitted), aff'd, 624 N.E.2d 146 (1993), cert. denied, 114 S. Ct. 2162 (1994).

The Committee devoted considerable discussion to proposals to address difficulties in the hydroelectric licensing process which have arisen under the Clean Water Act. Under Section 401 of the Clean Water Act, any applicant for a Federal license to conduct any activity which may result in the discharge of pollutants into navigable waters must generally provide State certification that any such discharge will meet applicable water quality standards under the Clean Water Act. Section 401 applies to hydroelectric licensing under the Federal Power Act because of the possibility that a hydroelectric project can affect water quality with respect to various considerations such as dissolved oxygen, turbidity, and temperature.

The Committee has been advised that some States have sought to employ the section 401 process to condition hydroelectric projects with respect to environmental or recreational matters that have nothing to do with water pollution or section 401. Such actions are objectionable for two reasons.

First, section 401 by its terms links the need for a permit to the possibility of 'discharge' resulting from the permitted activity. While States may have conditioning power associated with the certification process, this power appears is bounded by the potential harm at issue (i.e., discharge of pollutants).

Second, all impacts of hydroelectric development other than 'discharge of pollutants', including impacts on fish and wildlife habitat, beneficial uses, navigation, flood control and water supply, are already considered under the rigorous and comprehensive licensing process en-
FERC's position would grant it the greatest amount of licensing power, notwithstanding the CWA certification requirement. In a series of cases, beginning with one decided before the 1977 amendments to the CWA\(^{151}\) and continuing after those amendments,\(^{152}\) the New York Court of Appeals came to the same basic conclusion that FERC retained considerable licensing power even after accounting for state CWA certification.\(^{153}\) The

acted by the Electric Consumers Protection Act of 1986. States are given full input into this licensing process. In the case of fish and wildlife impacts, their recommendations are given special deference. Given these facts, the use of the section 401 certification process to condition hydroelectric projects with respect to matters unrelated to water quality amounts to nothing more than an attempt to achieve 'a second bite at the apple' which is not authorized under the Clean Water Act.

Such actions are not without cost licensing under the changes made to the Federal Power Act by ECPA is already both costly and time consuming. The imposition of additional, redundant and possibly conflicting layers of regulation under section 401 simply renders hydropower non-viable as an energy resource.

The scope of State conditioning power under section 401 has been litigated at least three times. In each instance, State courts have rejected the notion that States may impose conditions unrelated to water quality. The Committee agrees that these cases correctly interpret the statute. In light of the consistent result reached in litigation so far, the Committee finds it unnecessary at this time to take any action in this bill regarding section 401 of the Clean Water Act and hydroelectric licensing.

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\(^{152}\) Power Auth. of N.Y. v. Williams, 457 N.E.2d 726, 729 (1983). The Williams court held that:

[T]he outcome of this appeal has been preordained by our decision in de Rham v. Diamond, a case which involved the very issue on which the Appellate Division annulled the commissioner's action in the present case—i.e., the scope and breadth of the commissioner's inquiry in passing on an application for the water quality certification required by FWPCA as a prerequisite to Federal licensing of certain hydroelectric power projects.

\(^{153}\) See de Rham, 295 N.E.2d at 767. The de Rham court stated:

Congress, by the [FPA], has vested the Federal Power Commission with broad responsibility for the development of national policies in the area of electric power, granting it sweeping powers and a specific planning responsibility with respect to the regulation and licensing of hydroelectric facilities affecting the navigable waters of the United States. The Commission's jurisdiction with respect to such projects pre-empts all State licensing and permit functions.

\(^{153}\) See also Niagara Mohawk Power Corp., v. New York Dep't of Envtl. Conservation, 187 A.D.2d 7, 9, 592 N.Y.S.2d 141, 143 (1993) ("[T]he Clean Water Act contains a narrow exception to FERC's exclusive jurisdiction, insofar as it empowers states to certify whether a project com-
New York Courts concluded, however, that the CWA certification authority did allow a state to ensure that a hydropower project will not cause a violation of state-approved water quality criteria. In the view of the New York courts, such criteria may

plies with its water quality requirements and makes such a state certification necessary before a license may be granted.”) (citation omitted); Long Lake Energy Corp. v. New York Dep't of Envtl. Conservation, 164 A.D.2d 356, 402, 563 N.Y.S.2d 871, 875 (1990) (“The issue in this case thus distills to whether respondent's considerations of water quality standards disregarded the very limited nature of the activity left by 33 U.S.C. § 1341 to state action in the certification process.”).

A Pennsylvania court reached a similar decision in Commonwealth Dep't of Envtl. Resources v. Harrisburg, 578 A.2d 563 (Pa. Commw. 1990). There, the Department of Environmental Resources (DER) had identified the following nine reasons for denying certification of a hydropower license under § 401:

- [loss of wetlands, impact from increased groundwater levels, impact of increased dissolved oxygen levels, impact on nutrient problems in the Conodoguinet Creek, impact of combining existing sewer overflows, impact upon the 150 acre area between the proposed dam and the existing Dock Street Dam, impact upon aquatic resources upstream of the impoundment, impact upon migration of migratory fish, and impact of increased sedimentation within the pool area.

Id. at 565 n.4. The court concluded that DER exceeded its authority when it acted to deny certification for these reasons, stating that:

[A]uthority to review the environmental effects of the project encompassed by the term ‘pollution’ is vested in the Corps of Engineers and in the EPA by Section 404 of the CWA.... DER exceeded its authority by examining the impact of physical changes in the river on aquatic resources and the effect of the project on wetlands and fish migration, which we hold are not within DER's authority under Section 401 of the CWA.

Id. at 567.

154 In de Rham, the court stated:

Section 21 (subd. [b]) of the Federal Water Pollution Control Act relinquishes only one element of the otherwise exclusive jurisdiction granted the Power Commission by the Federal Power Act. It authorizes States to determine and certify only the narrow question whether there is 'reasonable assurance' that the construction and operation of a proposed project 'will not violate applicable water quality standards' of the State. That is all that section 21 (subd. [b]) did, and all that it was designed to do.

295 N.E.2d at 768. Courts applying de Rham have understood the reference to water quality standards to mean the water quality criteria defined in state law as required to ensure the state's intended uses for its waters. See Fourth Branch Assocs. v. Dep't of Envtl. Conservation, 146 Misc. 2d 334, 347, 550 N.Y.S.2d 769, 777 (N.Y. Sup. Ct. 1989):

Thus it is clear that the Federal Power Act preempts NYSDEC from conducting a full SEQRA review of AHDC's 401 water quality certification. The Commissioner is entitled only to review AHDC's application to the extent necessary to ascertain whether or not the State Dam Project would offend against the applicable regulations (6 NYCRR Part 701) governing "Class 'C'" waters, the classification of the Mohawk River at the State Dam site. (6 NYCRR Section 876.4).
regulate more than merely water column chemistry,\textsuperscript{155} but they may not interfere with the broad weighing of costs and benefits, including environmental costs and benefits, that is delegated to FERC,\textsuperscript{156} and they may not subject license applicants to environmental requirements and procedures that are independent of the water quality criteria.\textsuperscript{157} The focus on properly-approved water

\textit{Id.} (footnote omitted).

\textsuperscript{155} Such criteria might, for example, establish minimum flow requirements. Even this somewhat limited requirement that a FERC licensee comply only with state water quality criteria may, however, significantly constrain a licensee's operations. \textit{See, e.g., Long Lake Energy}, 164 A.D.2d at 403, 563 N.Y.S.2d at 875 ("Since 'such things as turbidity and temperature change' are clearly factors affecting water quality, respondent neither exceeded the scope of its authority nor was irrational in requesting additional information from petitioner which would require those elements to be considered.") (footnote omitted).

\textsuperscript{156} \textit{See de Rham}, 265 N.E.2d at 768. The court commented:

[T]he Commissioner has neither the authority nor the duty to delve into the many other issues—which had been investigated and decided by the Federal Power Commission in the course of the extensive proceedings it had conducted—such as, for instance, (1) the safety of the Catskill Aqueduct, (2) the appearance of the Hudson River shoreline or (3) the protection of the River's fish life, apart from the effect that destruction of, or injury to, fish may have, by introduction of waste or pollutants, on the water quality standards required by the applicable regulations.

\textit{Id.} \textit{See also Niagara Mohawk Power}, 187 A.D.2d at 11, 592 N.Y.S.2d at 144. In \textit{Niagara Mohawk Power}, the court held:

When the actual provisions of the ECL which DEC seeks to invoke are examined, it is clear that they address the very matters that have been reserved by the FPA for determination at the Federal level—dam safety, general balancing of economic and other concerns, the effect on wildlife, recreational opportunities and the like. The 1986 amendments to the FPA, which require FERC to consider fish and wildlife habitats, recreational opportunities and environmental quality in general as part of the licensing process, indicate that Congress intended such matters to remain within the Federal domain, as factors to be balanced against other concerns.

\textit{Id.} \textit{See also Fourth Branch Assocs.}, 146 Misc. 2d at 348 n.11, 550 N.Y.S.2d at 778 n.14 ("Broad scope environmental review having been reserved exclusively to FERC, NYSDEC has no authority to require AHDC to furnish information concerning the effect of the proposed project on anything other than water quality.") (citation omitted).

\textsuperscript{157} \textit{See Williams}, 457 N.E.2d at 729 ("We reverse the order of the Appellate Division and remit the case to it for consideration of issues raised by PASNY in this proceeding, other than its contention that the commissioner erred in not considering energy and general environmental factors as well as conformity to water quality standards in making his decision on PASNY's application."). \textit{See also Fourth Branch Assocs.}, 146 Misc. 2d at 346, 550 N.Y.S.2d at 777 ("[T]here can be no doubt that the State can not impose SEQRA review upon a section 401 water quality certification, for to do so would allow the ... State of New York to duplicate and possibly contravene the final decision-making authority of the Federal Government with respect to these projects, when exclusive au-
quality criteria partly reflects the understanding of the reviewing courts that these environmental requirements will have been subject to thoughtful debate and review within the state.\textsuperscript{158}

Next along the continuum of interpretations of section 401 certification is the view that, in order to receive a federal license, the applicant must demonstrate that the hydropower project will comply with all components of the state’s WQSs, including not only the water quality criteria, but also the state’s defined uses and nondegradation policy.\textsuperscript{159} This appears to describe the posi-

\textsuperscript{158} See Williams, 457 N.E.2d at 730, n.3, in which the court comments on the interests that may be considered as part of the process of setting WQSs. The court states that:

\textit{It does not follow, however, from the inability of the commissioner to consider more than compliance with water quality standards in acting on an application for section 401 certification that all other factors are necessarily disregarded or beyond reach at the State level. To the contrary, public interests of broad scope are implicated both in the classification of State waters, which is required to be done ‘in accordance with considerations of best usage in the interest of the public’ (ECL 17-0301, subd. 2), and in the fixing of standards of purity within classifications, which are to be established consistent with a variety of interests.}

\textsuperscript{159} See Bangor Hydro-Elec. Co. v. Board of Envtl. Protection, 595 A.2d 438 (Me. 1991). There, the court emphasized that WQSs include more than only water quality criteria: “The water standards for each class of Maine waters contain three parts: a list of designated uses, a set of numerical criteria for water chemistry (dissolved oxygen and bacteria counts), and a set of narrative criteria on the permissible level of pollutant discharges.” Id. at 442 (citation omitted). The court concluded that, when considering whether to certify a proposed project under § 401, the state agency has authority to consider whether the proposed project is inconsistent with a designated use:

\textit{We cannot conclude that the designated uses ... are mere surplusage. The level of detail bespeaks a considered determination of the public interest. This legislative determination would be rendered a nullity if the...}
tion of EPA, which believes that WQSs must do more than protect water column chemistry, must include more than only water quality criteria, and should define more than numerical limits for pollution levels.

agency responsible for reviewing compliance could consider only the numerical criteria and not whether the designated uses actually were achieved in a particular river.

Id. at 443 (footnote omitted). The court further stated: "[T]he Board's information requirements were based upon designated uses that we hold are an integral part of the state water quality standards. The Board was within its jurisdiction in reviewing Bangor Hydro's measures for future compliance with those standards under section 401(a)." Id. At a legislative hearing regarding § 401, the Maine Supreme Court was discussed approvingly:

I think the correct view of section 401 is that reached by the Maine Supreme Court, which held that the section 401 authority, as it applies to water quality, impacts the project as a whole and not just the pipe that comes out of the bottom of the dam and the authority is not limited to water chemistry, but the State has authority in carrying out its responsibilities under the Clean Water Act to protect the uses of water that the Clean Water Act is designed to protect.

Hearing, supra note 7, at 61 (statement of John D. Echeverria, Counsel, National Audubon Society).

See Hearing, supra note 7, at 128 (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA) (emphasis added) ("it is our position that the Clean Water Act is clearly designed to protect biological, chemical and physical integrity of the Nation's waters. Even though EPA and the States have focused in recent years on many water chemistry kinds of issues, the Act is not restricted to these, and in fact, State water quality standards are inadequate if they address only water chemistry."). See also Hearing, supra note 7, at 127-28. Here, this EPA official made the following comments:

States that have water quality standards addressing the biological integrity of their waters or the physical integrity, in other words the protection of habitat, the protection of biological resources, would not necessarily be protected strictly by water chemistry. And we had several complaints from States that they were concerned that FERC wasn't recognizing their authority in these areas, and that FERC was reading water quality standards very, very narrowly, contrary to Clean Water Act provisions that have long existed.

See Hearing, supra note 7, at 127-28 (same); See generally supra notes 148-149 and accompanying text.

See 40 C.F.R. § 131.6 (when submitting WQSs for EPA approval, the state must include along with water quality criteria use designations that will be adequately supported by the criteria and a sufficient antidegradation policy).

See Niagara Mohawk Power, 187 A.D.2d at 10, 592 N.Y.S.2d at 143 (EPA "note[s] that these water quality standards are not limited to "chemical-specific criteria," but rather that states are encouraged to adopt both narrative and numerical criteria, and will shortly be required to include biological criteria."); see also 187 A.D. 2d at 10-11, 592 N.Y.S. at 143 ("[E]ven the EPA recognizes that the proper mechanism by which a state may apply water quality provisions to a project licensed under the FPA is by adopting standards under section 303,
This portion of the continuum in fact includes two different views of the extent of the certification requirement—views that depend on the requirements that a state decides may be included properly in its WQSs. The narrower view was taken by a Connecticut state court, which declared in dicta that the CWA did not authorize a state to include in its WQSs purely aesthetic standards.\textsuperscript{163} In the court's view, WQSs must regulate water quality, and pure aesthetics do not directly relate to the quality of the waters, particularly when the CWA certification requirement is considered in the context of FERC licensing.\textsuperscript{164} The broader which, if Federally approved, may then be enforced as part of the certification procedure.") (citation omitted).

\textsuperscript{163} In Summit Hydropower Partnership v. Comm'r of Envtl. Protection, No. CV 910502643, 1992 Conn. Super. LEXIS 2177, at *1 (July 20, 1992), rev'd on other grounds, 629 A.2d 367 (Conn. 1993), the court reviewed a decision to deny state section 401 certification for a proposed hydropower project. Evidence demonstrated that, if the project were licensed, all requirements identified in state water quality criteria, antidegradation policy, and designated uses would be met. \textit{Id.} at *21. The Commissioner of Environmental Protection nevertheless denied section 401 certification based on the conclusion “that the viewing of Cargill Falls is a recreational use and that the project would have a detrimental effect on the aesthetic quality of viewing the falls by reducing the water level of the natural river flow.” \textit{Id.} at *24. The court held that this action was improper because “the aesthetics of viewing the falls, is not a WQS.” \textit{Id.} at *29. The court then stated its opinion that the state would not have authority to identify preservation of the aesthetics of viewing the falls as a component of the state's WQSs:

The problem with the defendants' argument is that the aesthetics of viewing the water is not a standard in the DEP's existing regulations, not authorized by the enabling statutes as a proper WQS and, in any event, cannot objectively be considered a factor in evaluating water quality. While the federal statutes defer to a limited extent to state WQS in approving a hydroelectric project, at some point the federal preemption doctrine prevents state rejection for reasons having at best a marginal relationship to water quality.

\textit{Id.} at *30.

\textsuperscript{164} \textit{See supra} note 148: \textit{See also Summit Hydropower Partnership}, 1992 Conn. Super. LEXIS 2177, at *29-30. The court stated:

The FWPCA relinquishes only one element of the otherwise exclusive production under the Federal Power Act, by allowing the state agency to determine only the narrow question whether there is reasonable assurance that the construction and operation of the proposed project will not violate applicable state WQS. The state agency cannot engage in a broader environmental impact review of the project or reject it for any reasons except noncompliance with existing WQS.

\textit{Id.} (citations omitted). The court further stated that:

To the extent the federal statutes defer to stricter standards in state water quality regulations and recreational use of water in particular, it is apparent from several federal statutes and regulations that the recreational ac-
view of the certification requirement was taken by the Vermont Supreme Court, which held that the state had authority to include purely aesthetic requirements in its WQSs and consequently to deny section 401 certification or condition certification based on whether the aesthetic standard would be met if the proposed facility were licensed. In the Vermont court's view, the CWA was intended to protect the aesthetics of waters, as well as their quality.165

The final view along the continuum marks the point of greatest state authority to impose conditions on federal licensees under section 401 of the CWA. The Oregon Supreme Court has focused on the language of section 401(d), which refers to "any other appropriate requirement of State law" in defining when a state may impose conditions on a federal licensee.166 Based on

165 See Georgia-Pacific Corp. v. Vermont Dep't of Envtl. Conservation, 35 Env't Rep. (BNA) 2046 (Vt. Super. Ct. 1991), aff'd, 628 A.2d 944 (Vt. 1992), in which the operators of a dam originally built in 1900 sought § 401 certification as part of relicensing. Id. at 2047. The state agency issued the required certification, but imposed as a condition of that certification a minimum continuous flow requirement. Id. at 2050. The superior court upheld that condition, approving of the agency's view that the condition was necessary to ensure the proper aesthetics of the waterway. Id. at 2051. The court held:

In addition to the express finding that a continuous flow of 210 cfs is required to restore and improve the Connecticut River as a fish habitat, the DEC also concluded that the specified continuous flow was required to safeguard the aesthetic appeal of the river to the numerous persons who use the river for recreation during the specified time period. The aesthetic determination forms a strong independent basis upon which to uphold the 210 cfs continuous spill requirement during the specified time period.

Id. The Vermont Supreme Court affirmed that decision, reasoning that the state's WQSs required that the river's aesthetics were to be protected. Id. at 2053-54. Thus, the court held that:

Vermont's water quality standards promulgated in accordance with the Clean Water Act require that the Connecticut River be managed for 'water of a quality which consistently exhibits good aesthetic value... and recreation.' Vermont Water Quality Standards § 3-03. The DEC spillage requirement was amply supported by the evidence. Not only were aesthetics and recreation considered relevant, ease of administration and monitoring were fostered by the requirement.

Id. (citation omitted).

166 33 U.S.C. § 1341(d) (1994) provides that a state may include in a section 401 certification conditions that are

necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations,
this text, the court decided that the state may impose conditions on federal licensees that are needed to ensure compliance with state and local land-use regulations, provided that those regulations

under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification .

Id. (emphasis added).

167 In Arnold Irrigation Dist. v. Dep't of Envt. Quality, 717 P.2d 1274 (Or. 1986), the court considered whether compliance with land-use regulations could be considered by the state agency in deciding whether to certify a hydropower project under § 401. The court first held that the failure to comply with land-use regulations cannot be the basis for a decision to deny § 401 certification:

Violation of one of those [water quality standard] sections or regulations is the only basis on which the state has authority under the CWA to deny the certificate . . . . They may not consider other factors than compliance with the provisions listed in 33 USCS 1341(a)(1) and with the state regulations in deciding whether to issue a certificate. EQC therefore erred when it affirmed DEQ's denial on the basis of a failure to show compliance with state and county land use requirements.

See id. at 1278. The court, however, then held that the state agency did have authority to consider compliance with those land-use regulations in defining under § 401(d) the conditions that had to be included in the § 401 certification. Id. ("Although [§ 1341(d)] does not allow DEQ to consider land use and other issues outside the CWA in deciding whether to approve certification applications, it may be able to consider those factors in deciding what limitations to place on the certificate."). The court concluded that, when it enacted § 401(d), Congress

allowed the states to enforce all water quality-related statutes and rules through the state's authority to place limitations on section 1341 certificates. Congress thereby required federal licensing authorities to respect all state water quality laws in licensing projects involving discharges to navigable streams. "[A]ny other appropriate requirement of State law" is thus a Congressional recognition of all state action related to water quality and Congressional authorization to the states to consider those actions in imposing limitations on CWA certificates. It does not, however, allow limitations which are not related to water quality.

Id. at 1279.

The New York State Department of Environmental Quality views the scope of the § 401 certification requirement in similarly broad terms. See Hearing, supra note 7, at 112 (statement of Marc S. Gerstman, Deputy Commissioner and General Counsel, New York Dep't of Envtl. Conservation) ("Through our certification process, we ensure that each hydropower facility complies with: water quality standards; effluent limitations; stream-bed disturbance and excavation and fill requirements; dam construction and safety provisions; freshwater wetland requirements; fish and wildlife requirements; and the State's Environmental Quality Review Act."). New York courts have, however, rejected the broad construction of § 401(d) adopted by the Oregon court. See Fourth Branch Assocs., 146 Misc. 2d at 340, 550 N.Y.S.2d at 773 (interpreting the § 401(d) language referring to "any other appropriate requirement of State law" narrowly, stating that "[i]t is apparent, when viewed in the context of both Section 401 and the entire [CWA], that this language only refers to the author-
lations are in any way related to water quality. The court decided that conditions based on such land-use regulations may be imposed even though EPA has not approved the land-use regulations as WQSs under the CWA.

In sum, state courts and the two most interested federal agencies—FERC and EPA—have reached varied conclusions about the extent of authority that section 401 of the CWA grants to state agencies when deciding upon requests for certifications for FERC hydropower licensees.

III

THE SUPREME COURT'S INTERPRETATION OF THE INTERACTION OF THE CWA AND THE FPA

The case that the Supreme Court heard on the merits, *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, involved an application to construct a hydropower project on the Dosewallips River in Washington State. As required by section 401 of the CWA, the applicants for the FERC license sought certification from Washington's Department of Ecology. The Department of Ecology issued the certification with a number of conditions, including the condition that the project conform to "a minimum stream-flow requirement of between 100 and 200 cfs [cubic feet per second] depending on the season."

The applicants sought review before the Pollution Control Hearings Board, contending that the state agency was not au-

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168 See *Arnold Irrigation Dist.*, 717 P.2d at 1279 ("Only if a goal or plan provision has absolutely no relationship to water quality would it not be an 'other appropriate requirement of State law.' In that case, and only in that case, would the CWA override DEQ's obligations under ORS 197.180(1."); see also *id.* ("Many uses of land may affect water quality, even if they do not immediately result in direct discharges to the state's waters.").

169 See *id.* ("If it grants petitioners' request for a [§ 401] certificate, [the state agency] must require, as a condition of that certificate, that petitioners comply with the water-related portions of the Deschutes County land use regulations.") (citation omitted).


171 *Id.* at 1907. The Court stated that, "[i]f constructed as presently planned, the facility would be located just outside the Olympic National Park on federally owned land within the Olympic National Forest. The project would divert water from a 1.2-mile reach of the River (the bypass reach), run the water through turbines to generate electricity and then return the water to the River below the bypass reach." *Id.*

172 *Id.* at 1908.
authorized to impose the minimum stream flow requirement.\textsuperscript{173} The applicants won a partial victory before that board, which held that, although the state agency had the authority to impose minimum flow requirements as part of the section 401 certification, the minimum flow that the agency had mandated was improper because it was not needed to preserve the river's fishery, but instead was being used to enhance the fishery.\textsuperscript{174} Both sides appealed that decision in state court, where the state agency won before both the Superior Court and the Washington Supreme Court. The latter court rejected the applicants' contention that the section 401 certification should only involve consideration of how the discharge at the dam will affect pollution levels.\textsuperscript{175} This interpretation appears quite similar to the very narrow view of section 401 certification taken by FERC.\textsuperscript{176}

The Washington court then held that, when evaluating whether a proposed project can be certified under section 401, the agency should consider not only whether the project will cause violations of the WQS criteria, but also whether the project is consistent with the other components of the state's WQSs such as the state's designated uses and nondegradation policy.\textsuperscript{177} This portion of the court's decision is consistent with the cases in the middle of the continuum of interpretations of the section 401 certification requirement.\textsuperscript{178}

The Washington court also considered the state agency's argument that the minimum stream flow requirement could also be upheld as a condition needed to ensure compliance with "any other appropriate requirement of State law."\textsuperscript{179} The agency argued that the minimum stream flow requirement was appropriate

\textsuperscript{173} See PUD No. 1, 849 P.2d at 649.
\textsuperscript{174} See id.
\textsuperscript{175} See 849 P.2d at 651 (The applicants “argue[ ] that water quality standards are limited to pollution and discharges, as opposed to stream flow levels. . . . However, . . . the standards' explicitly-stated antidegradation policy and classification of specific bodies of water in terms of characteristic uses, as well as the standards' broad purpose, all demonstrate a broad concern for water quality, not just with pollution discharges.”) (citation omitted).
\textsuperscript{176} See supra notes 147-151 and accompanying text.
\textsuperscript{177} PUD No. 1, 849 P.2d at 650-51. See also id. at 650 ("[S]ection 401 requires states to certify compliance with state water quality standards. Washington's standards prohibit the degradation of the state's waters, and prohibit the degradation of fish habitat and spawning in the Dosewallips in particular.").
\textsuperscript{178} See supra notes 160-166 and accompanying text for a discussion of these cases.
\textsuperscript{179} 33 U.S.C. § 1341(d) (1994).
regardless of the state’s WQSs, because of a state law requirement that “[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.”\textsuperscript{180} The court held that this interpretation of the CWA was correct and thus joined Oregon in the same generously expansive reading of the CWA certification requirement, holding that a state may condition a section 401 certification on compliance with a provision of state law that is not a part of the state WQSs and that has been neither reviewed nor approved by EPA.\textsuperscript{181} The court decided, finally, that this broad reading of state CWA certification authority is not inconsistent with or narrowed by the licensing authority of FERC under the FPA.\textsuperscript{182}

When the United States Supreme Court granted certiorari, environmentalists and state environmental agencies had reason to be quite apprehensive. The case involved a state’s attempt to impose a minimum flow requirement on a hydropower project subject to FERC licensing, and the Court had only recently held

\textsuperscript{181} \textit{PUD No. 1}, 849 P.2d at 653. The Court concluded:

\[ \text{The phrase 'any other appropriate requirement of State law' in section 401(d) does not refer only to state water quality standards. We agree with the Arnold court that the phrase is a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates.} \]

\textit{Id.} (citation omitted). See also \textit{id.} at 651. The court held also that:

\[ \text{The Board ruled that the phrase ['any other appropriate requirement of State law'] refers to all state water quality-related statutes and rules, including, but not limited to, the water quality standards the state has adopted as required by section 303 of the Clean Water Act, 33 U.S.C. § 1313, and that Ecology's streamflow conditions were necessary to assure compliance with RCW 90.54.020(3)(a). We agree with the Board's interpretation.} \]

\textit{Id.} The interpretation adopted by the Oregon court in \textit{Arnold} is discussed \textit{supra} at notes 167-69 and accompanying text.
\textsuperscript{182} \textit{PUD No. 1}, 849 P.2d at 655. In considering the FPA and the CWA together

the comprehensive scheme that emerges is one in which Congress left room for the states to supplement the FPA through the section 401 certification process. Enforcement of state laws is part of the federal scheme inasmuch as section 401 of the Act requires states to assure compliance with appropriate state laws. The comprehensive scheme consisting of both the Clean Water Act and the FPA presupposes rather than precludes the exercise of state authority...
that a state had no such power under the authority that Congress had granted FERC in the FPA. Moreover, the Court had reaffirmed in that case its forty-four year old decision that the federal agency had paramount authority in the licensing of hydropower projects, based on a strong rule of stare decisis and recent congressional action, if not on a natural reading of the FPA text. Finally, in recent years the Court has been generally unwilling to grant states authority to act to protect their local environment, particularly when the Court believes that a state’s actions may interfere with interstate commerce, regardless of the environmental value of those actions. In short, a Supreme Court observer would have predicted that the CWA section 401 certification requirement most likely would not trump the paramount role of FERC defined by the Court in its interpretations of the FPA.

The decision in PUD No. 1 was therefore unexpected, with the Court upholding the state’s authority to impose minimum flow requirements when exercising the section 401 certification authority. As examples of statutory interpretation by the Court, the majority and dissenting opinions were also unexpected. First, the majority opinion, written by Justice O’Connor for a seven-Justice majority, was a surprising example of the attraction of the textualist approach to statutory interpretation. Relying almost exclusively on the CWA’s text and including virtually no discussion of the paramount authority over hydropower licensing that, in the Court’s view, Congress had delegated to FERC in the FPA, the majority held that states could exercise

183 California v. FERC, 495 U.S. at 490 (discussed supra at notes 66-76 and accompanying text).
184 Id. at 499.
185 Id. at 498.
important control over federal hydropower projects through the use of their section 401 certification authority. The textualist approach yielded this alluring result because, as will be elaborated, it permitted the Court to avoid any discussion of the tension, or contextual ambiguity, created by the interaction of the two relevant federal statutes.

The dissenting opinion contained its own interpretive surprise. Written by Justice Thomas and joined by Justice Scalia, it reflected the views of the Court's two most outspoken supporters of the textualist approach to statutory interpretation. The surprise was the implicit recognition by these Justices of the limits of the textualist approach: the dissenters argued, based in part on the text of the CWA, but more determinedly on the grounds of policy and purpose, that the scheme of federal hydropower licensing would be upset if it were dependent on broad state authority to certify and condition the certification of federal hydropower licensing. The implied limits on textualism recognized by the dissent will be examined shortly.

The majority's effort to construe section 401 began with a rejoinder to the narrow reading of the text of section 401 urged by the dissent. The dissent contended that section 401 must be read to limit section 401 certifications to the consideration of the effects of the "discharge" that will result from the activity to be licensed, and that a minimum flow requirement has no such relationship to the discharge that will result from licensing the hydropower project. The majority rejected this reading of the text, concluding that section 401 gives states broader certification power; once the certification requirement is triggered by a discharge, states have authority to ensure through conditions or limitations that the activity to be licensed will not result in a violation of WQSs.

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188 PUD No. 1, 114 S. Ct. at 1919 (Thomas, J., dissenting).
189 Id. at 1915-16.
190 Id. at 1915. It is worth noting that no other court had construed § 401 to have such a narrow effect.
191 The Court reached this conclusion in two steps. First, it decided in light of the text of § 401(d) that the § 401 certification applies to the impact of the activity to be licensed. Id. at 1909 ("Section 401(a)(1) identifies the category of activities subject to certification—namely those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."). The Court then decided that the § 401 certification re-
In deciding that a state may properly ensure compliance with WQSs by use of the section 401 certification, the Court clarified to some extent the point along the continuum of interpretations of section 401 that properly identifies the scope of the certification requirement. The Court rejected the end of the continuum defined by the views of FERC and the New York courts: section 401 certification is not limited solely to ensuring compliance with defined water quality criteria aimed at protecting water column chemistry.

The Court then signalled that in its view the scope of section 401 certification extends at least as far as the middle of the continuum of interpretations of section 401. The Court held that a certification may be conditioned to ensure not only that water quality criteria are met, but also to ensure that the state's designated uses for a waterway are protected and that the state's nondegradation policy is not violated. The Court based this interpretation on the text of the CWA, its consistency with EPA requirement accordingly permits states to impose conditions that are needed to ensure compliance with WQSs. The Court stated that:

[E]nsuring compliance with § 303 [i.e., WQSs] is a proper function of the § 401 certification. Although § 303 is not one of the statutory provisions listed in § 401(d), the statute allows states to impose limitations to ensure compliance with § 301 of the Act .... Section 301 in turn incorporates § 303 by reference .... As a consequence, state water quality standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. This interpretation is consistent with EPA's view of the statute .... Moreover, limitations to assure compliance with state water quality standards are also permitted by § 401(d)'s reference to 'any other appropriate requirement of State law.' ... [L]imitations imposed pursuant to state water quality standards adopted pursuant to § 303 are "appropriate" requirements of state law.

Id. at 1909-10 (citations omitted). In Ransel, supra note 187, at 266, the author argues that the majority's broad reading of the text of § 401 is supported as well by a review of how the current text of the provision evolved.

See supra notes 152-59 and accompanying text.

PUD No. 1, 114 S. Ct. at 1910 (indicating that the Court "disagree[s]" with the applicants' position that "the State may only require that the project comply with specific numerical 'criteria'").

For a discussion of this part of the continuum, see supra notes 160-166 and accompanying text.

PUD No. 1, 114 S. Ct. at 1914.

Id. at 1912 ("The Solicitor General, representing EPA, asserts and we agree, that the State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an 'existing instream water use[s]' will be 'maintained and protected.'") (citations omitted).

Id. at 1910. The Court stated:
policy recognizing the independent significance of designated uses as a component of the WQSs, the fact that water quality criteria may themselves be quite subjective, and the interpretation's consistency with the protective policy of the CWA.

We think the language of § 303 is most naturally read to require that a project be consistent with both components, namely the designated use and the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.

198 Id. at 1911 ("[T]he EPA regulations implicitly recognize that in some circumstances, criteria alone are insufficient to protect a designated use.").

199 In the Court's view, common sense supported its reading of the statute because the CWA clearly allows enforcement of narrative criteria which, in the Court's view, are hard to distinguish from designated uses. Id. ("[P]etitioners' attempt to distinguish between uses and criteria loses much of its force in light of the fact that the Act permits enforcement of broad, narrative criteria based on, for example, 'aesthetics.'").

200 The Court decided that allowing for the protection of uses furthers the protective purpose of the CWA because such protection is a good supplement to enforcing compliance with only the criteria. The Court stated that:

The criteria components of state water quality standards attempt to identify, for all the water bodies in a given class, water quality requirements generally sufficient to protect designated uses. These criteria, however, cannot reasonably be expected to anticipate all the water quality issues arising from every activity which can affect the State's hundreds of individual water bodies. Requiring the States to enforce only the criteria component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the water's designated uses. Given that there is no textual support for imposing this requirement, we are loath to attribute to Congress an intent to impose this heavy regulatory burden on the States.

Id. at 1912. The Court further elaborated:

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.

Id. at 1911. Based on similar reasoning, the Court also rejected the applicants' efforts to distinguish between water quality and water quantity and to claim that the CWA is intended to protect only water quality. The Court stated that:

This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution.

Id. at 1912-13.
Having decided that the middle part of the continuum represents a permissible interpretation of the scope of the section 401 certification requirement, the Court saw no need to decide whether the broadest construction of section 401 is also correct.\textsuperscript{201} The minimum flow requirement at issue in \textit{PUD No. 1} was defensible because it had been found to be necessary to protect Washington's designated uses for the Dosewallips River.\textsuperscript{202} The Court accordingly did not need to decide whether a state could impose conditions on federal licenses under section 401(d) to ensure compliance with state or local water-quality-related laws that were not part of the state's approved WQSs.\textsuperscript{203}

The majority opinion ended with a brief explanation of why its interpretation of the CWA did not create a conflict with FERC's licensing authority under the FPA.\textsuperscript{204} The Court found such a conflict to be "hypothetical."\textsuperscript{205} Because section 401 also applied to other federal permits and licenses, the Court was "unwilling to read implied limitations into section 401."\textsuperscript{206} The Court stated that FERC might still decide to deny the application at issue,\textsuperscript{207} or, "it is quite possible, given that FERC is required to give equal consideration to the protection of fish habitat when deciding whether to issue a license, that any FERC license would

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\textsuperscript{201} This is the position adopted by the courts in Oregon and Washington. See \textit{supra} notes 167-170, 175-182 and accompanying text.
\textsuperscript{202} See \textit{supra} notes 180-183 and accompanying text.
\textsuperscript{203} \textit{PUD No. 1}, 114 S. Ct. at 1909-10. The Court left open the question of "what additional state laws, if any, might be incorporated" by the "any other appropriate requirement of State law" language in § 401(d): "We do not speculate on what additional state laws, if any, might be incorporated by this language. But at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law." \textit{Id.} (footnote omitted).
\textsuperscript{204} \textit{PUD No. 1}, 114 S. Ct. at 1914.
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.}
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contain the same conditions as the State section 401 certification.\textsuperscript{208}

The majority opinion in \textit{PUD No. 1} demonstrates the attraction of the textualist or plain meaning approach to statutory interpretation. Such an approach posits that interpretations are straightforward and without controversy when the meaning of the statutory text is plain.\textsuperscript{209} In the case of the CWA, the majority viewed the meaning of the CWA as clear on its face: states may condition their certification of a federal license or permit on compliance with any aspect of their WQSs. Indeed, Justice Stevens, in a brief concurrence, chided two of the Court's most

\textsuperscript{208} Id. The Court mentioned in this regard that, "at oral argument the Solicitor General stated that both EPA and FERC were represented in this proceeding, and that the Government has no objection to the stream flow condition contained in the \$ 401 certification." \textit{Id.} (citation omitted). It is worth noting that the Court is being quite naive in supposing that FERC, acting independently under the FPA, would include in its license the same measures protective of water quality and water uses, as those required by the state. \textit{See supra} notes 88-93 and accompanying text (describing how FERC has not exercised its authority under the FPA to protect the environment).

The Court also suggested that, "[i]f FERC issues a license containing a stream flow condition with which petitioners disagree, they may pursue judicial remedies at that time." \textit{PUD No. 1}, 114 S. Ct. at 1914 (citation omitted). This statement is difficult to interpret because FERC is required to include in its licenses the conditions mandated by states acting pursuant to their \$ 401(d) authority. \textit{Id.} at 1920 \& n.5 (Thomas, J., dissenting). \textit{But see} Ransel, \textit{supra} note 187, at 268 n.91 (citing a recent FERC decision in which FERC declined to include in its license state-mandated conditions that FERC believed were not water quality related).

\textsuperscript{209} \textit{See} Arthur W. Murphy, \textit{Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts}, 75 \textit{COLUM. L. REV.} 1299, 1299-1300 (1975); Thomas W. Merrill, \textit{Textualism and the Future of the Chevron Doctrine}, 72 \textit{WASH. U. L.Q.} 351, 352 (1994) ("The critical assumption [of textualism] is that interpretation should be objective rather than subjective; that is, the judge should ask what the ordinary reader of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislature were."); Peter L. Strauss, \textit{On Resegregating the Worlds of Statute and Common Law}, 1994 \textit{SUP. CT. REV.} 429, 444-47 (1994).
steadfast adherents of the textualist approach to statutory interpretation\textsuperscript{210} for their failure to follow their preferred method of interpretation and uphold the state agency's action.\textsuperscript{211} He stated that

\textit{f}or judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards.\textsuperscript{212}

Justice Stevens' effort to highlight the irony of the position taken by Justices Thomas and Scalia illustrates a key problem with the textualist approach to interpretation. Too often that approach is not sensitive to context. The context for understanding a statute is created by more than the text of the statute itself.\textsuperscript{213} By referring only to the CWA to explain the scope of a state's power to regulate its waters, Justice Stevens' rejoinder reflects the same narrow focus as the majority opinion; both are concerned only with the CWA. Context and meaning however, are also determined by the text of other statutes, which may define competing or conflicting policies or rules.\textsuperscript{214} In the arena of

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\item[\textsuperscript{210}] See Merrill, \textit{supra} note 209, at 351, 363. See also Pierce, \textit{supra} note 209, at 777 (Justices Scalia and Thomas are among those who "are so hostile [to legislative history] that any reference to legislative history in a majority opinion is virtually certain to draw a rebuke in a concurring or dissenting opinion") (footnote omitted). Justice Scalia has been characterized as "the most prominent textualist on the contemporary Supreme Court." William D. Popkin, \textit{MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS} 337 (1993). Justice Thomas very often joins with Justice Scalia in opinions that rely on plain meaning and reject reliance on other aids to interpretation. See, \textit{e.g.}, Holder v. Hall, 114 S. Ct. 2581, 2591 (1994) (Thomas, J., joined by Scalia, J., concurring).
\item[\textsuperscript{211}] It is worth reiterating that the dissent did attempt to explain the result it supported by reference to only the text of the CWA. See \textit{supra} notes 189-90 and accompanying text.
\item[\textsuperscript{212}] \textit{PUD} No. 1, 114 S. Ct. at 1915 (citation omitted).
\item[\textsuperscript{213}] See \textit{supra} note 209 (quoting Professor Pierce's description of the hypertextualist approach to interpretation); see also Pierce, \textit{supra} note 209, at 778 (suggesting that the Court's current hypertextualism "allows courts to ignore the context in which language is used, reliance interests created by decades of contrary interpretations, or strong evidence that Congress intended a contrary meaning").
\item[\textsuperscript{214}] Professor Dickerson has written that "[a]n internal contextual ambiguity may result, for example, from an internal inconsistency: When one provision plainly contradicts another, which is intended to prevail? Contextual ambigu-
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FERC hydropower licensing, the context is set not only by the text and structure of the CWA, but also by the FPA;\textsuperscript{215} the Court’s prior consistent interpretations of the FPA;\textsuperscript{216} and congressional action relating to the FPA;\textsuperscript{217} which appears to have accepted and built upon the Court’s interpretations.\textsuperscript{218}

Although its simplicity is no doubt attractive to judges, the textualist approach is in practice a dangerous interpretive method, particularly when a court must consider the interrelationship of two or more statutes.\textsuperscript{219} The Court’s narrow focus in

dies may also be external. Thus a statute may bear a similarly ambiguous relationship to another statute with which it is inconsistent.” Reed Dickerson, The Interpretation and Application of Statutes 47 (1975). Other commentators agree about the importance of the interstatute context in creating ambiguities. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 374-75 (1990) (Congress will often give orders that become inconsistent over time, thereby compelling the courts to alter one or more of the orders); Sidney A. Shapiro & Robert L. Glicksman, Congress, the Supreme Court, and the Quiet Revolution in Administrative Law, 1988 Duke L.J. 819, 868 (If courts fail to recognize “that statutory interpretation involves many different statutes and applications of those statutes to different substantive problems in different legal postures,” then courts “will reach counterproductive or senseless results.”) (footnotes omitted); Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 199 (1983) (“In the context of the statute, other related statutes, or the problems giving rise to the statute, words may be capable of many different meanings, and the literal meaning may be inapplicable or nonsensical.”). These problems with ambiguity and conflict arise because legislatures enact statutes at different times to address different public policy issues and are hardly omniscient. See, e.g., 1A Norman J. Singer, Sutherland on Statutory Construction § 23.09 (4th ed. 1985) (“The legislatures cannot be expected to have complete knowledge of the detail contained in the statute laws of a state, nor have they the time to extensively research the mass of statutory provisions in order to specify what statutes should be repealed.”); Wald, supra, at 213 (“The possibility that Congress, on occasion, does pass inconsistent statutes or does not know that what it is passing today is repealing, by implication, what it passed last month or last year is a real one.”).

\textsuperscript{215}See supra notes 31-34 and accompanying text.

\textsuperscript{216}See supra notes 40-104 and accompanying text.

\textsuperscript{217}See supra notes 59-65 and accompanying text.

\textsuperscript{218}See Kirsch & Seitz, supra note 20, at 10,444 (“Congress’ failure to address First Iowa and the virtually unbroken line of cases, striking down most mandatory state regulations affecting hydroelectric projects, suggests congressional satisfaction with the current [i.e. pre-PUD No. 1] division of authority.”).

\textsuperscript{219}See Harry H. Wellington & Lee A. Albert, Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson, 72 Yale L.J. 1547, 1551 (1963) who argue that:

Reliance on the plain meaning rule seems especially misplaced where two or more statutes, passed at different times and often the product of different political forces, bear upon an issue before the court. To assume that
PUD No. 1 on CWA text likely led to an overly broad construction of that statute. Consider, for example, the Court's reference to "aesthetics" as a permitted water quality criterion.\textsuperscript{220} The Court believed that allowing "aesthetics" to be applied as a water quality criterion was significant because it demonstrated that even such criteria can be quite subjective. Accordingly, there should be no reason why water quality criteria alone should be enforceable through the section 401 certification process, as opposed to designated uses or state nondegradation policy. This exclusive consideration of the CWA's text may prove too much, however, and result in an overinclusive interpretation.\textsuperscript{221}

Allowing a standard of "aesthetics" acceptable to the state to be used as a basis for imposing conditions on a hydropower license may mean that a state has the power to veto a project based on what that state views as undue degradation of the aesthetics of its own waters without consideration of, among other

accommodation or reconciliation of apparently conflicting statutes is work only for the legislature is to ignore the dynamics of the legislative process. 

See also Eskridge & Frickey, supra note 214, at 337-38 (stating that because of the complex issues of statutory construction arising in this context, "one of the most challenging tasks of any court is to unpack interacting statutory policies").

Professor Sunstein has written that "overinclusiveness" is one of a number of "pervasive difficulties with textualist approaches to statutory construction." Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 418 (1989). In discussing how courts can address the problem of "overinclusiveness," he states that "language that would in many settings be entirely unambiguous should not be the only basis for interpretation in some cases; here, context is the central problem." \textit{Id.} at 420. He then argues that, when applying the text literally will result in overinclusiveness, a court plays its proper role in the legal system by narrowly construing the statute, notwithstanding the broad text: "[S]ometimes the best interpretation of a textual command runs counter to its apparent literal meaning .... [T]he exclusion of the absurd outcome should be seen not as amendment or usurpation, but as permissible, indeed conventional interpretation." \textit{Id.} at 421. See also Dickerson, supra note 214, at 111 ("The most useful, indeed almost indispensable, function of context is to narrow the range of reference of otherwise over-general words."); Popkin, supra note 210, at 602 ("The generality of statutory language is sometimes more than the court can accept in light of the statute's purpose, despite the apparent plain meaning of the words.") (footnote omitted). See generally United States v. Wells Fargo Bank, 108 S. Ct. 1179, 1183 (1988) (narrow reading of "all taxation" so that exemption applies only to direct taxation). Indeed, in Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 23-25 (1976), the Court relied on an interstatutory conflict between the CWA and the Atomic Energy Act to construe the term "radioactive materials" in the CWA to exclude "source, byproduct, and special nuclear materials," notwithstanding their radioactivity.
things, the out-of-state demand for energy. Thus, if one considers only a state's authority to use narrative water quality criteria, such as "aesthetics," to condition or deny section 401 certification, there may be circumstances where the state cannot exercise the power seemingly accorded to it by the PUD No. 1 decision without denying to FERC the power to balance the need for energy against other public values that the Court previously concluded Congress had delegated to FERC when it enacted the FPA.

It is curious indeed for the Court to decide a case that potentially, if not directly, affects the allocation of power between state environmental agencies and FERC in the licensing of hydro-power facilities without ever confronting the preeminent place of First Iowa in granting the federal agency paramount authority in licensing. This gap in the Court's decision is even more noteworthy given the Court's reaffirmation of First Iowa only four terms before the PUD No. 1 decision in a case that inferred recent congressional approval of the First Iowa allocation of power and denied a state authority to dictate a minimum stream flow requirement.

Because of this important omission in the analysis, the Court's opinion may be read as declining on prudential grounds to address a statutory conflict until it is directly presented to the Court. If, in actuality, the Court decided that the facts of PUD No. 1 and the position of FERC in the case provided convenient grounds on which to avoid the critical issue that is presented by the apparent conflict between these two important statutes, then this new decision stands for very little. The Court will have to resolve in some later case almost exactly the same.

222 Cf. Ransel, supra note 187, at 271 ("After [PUD No. 1], it appears that [when states consider certification requests during relicensing] the states may act to attain water quality goals reflected in designated uses, even though a federally licensed project may have eliminated the use.").
223 See supra notes 40-77 and accompanying text.
224 The First Iowa decision is discussed supra notes 40-58 and accompanying text. The PUD No. 1 majority's only reference to First Iowa is in a brief discussion of proprietary rights in which the Court rejects an argument made by the applicants. See PUD No. 1, 114 S. Ct. at 1913. First Iowa is cited by the Court as a case providing indirect support for its analysis. Id.
225 See supra notes 68-73 and accompanying text (discussing California v. FERC).
226 See supra note 68 and accompanying text (discussing California v. FERC).
227 FERC had not opposed the stream flow requirements dictated by the state. See supra note 209.
question of interstatutory conflict that was implicit in PUD No. 1.

Portions of the Court's decision, in fact, lend support to the view that this case will have little lasting impact. Although the majority had little to say about the relevance of First Iowa, it did include an explicit discussion of California v. FERC.228 In discussing FERC's role in hydropower licensing, the Court stated that

[t]he FPA empowers FERC to issue licenses for projects 'necessary or convenient ... for the development, transmission, and utilization of power across, along, from, or in any of the streams ... over which Congress has jurisdiction.' The FPA also requires FERC to consider a project's effect on fish and wildlife. In California v. FERC, we held that the California Water Resources Control Board, acting pursuant to state law, could not impose a minimum stream flow which conflicted with minimum stream flows contained in a FERC license. We concluded that the FPA did not 'save' to the States this authority.

No such conflict with any FERC licensing activity is presented here.229

This quite cryptic statement seems to suggest that, notwithstanding its decision to affirm the Washington Supreme Court decision, the Court recognizes that what it has read as the plain meaning of the CWA will have to be limited in either of two ways. The Court may be saying that, when a conflict between FERC and a state does arise regarding section 401 certification, FERC's power will trump the state's CWA certification authority. If this is the meaning of the Court's statement, then PUD No. 1 means little to state agencies and environmentalists.

Alternatively, the Court may be stating that, when a conflict between FERC and a state does arise, courts will have to inquire further into whether the state has the power to impose the condition on certification or deny certification altogether. The impact of this alternative reading is that Washington was able to prevail without a more searching analysis of its authority to impose the stream flow condition only because FERC had approved in this

228 PUD No. 1, 114 S. Ct. at 1913-14.
229 Id. at 1914 (citations omitted). In addition to this more extended analysis, the Court also cited to California v. FERC in discussing the relation between minimum flow requirements and proprietary rights. Id. at 1913.
instance the substance of Washington’s requirement.\textsuperscript{230} If this reading is correct, the Court may have to decide in some later case whether section 401 of the CWA gives states more limited authority in the context of certifying a hydropower license than it does when another federal license or permit is involved.\textsuperscript{231}

Another possible reading of the Court’s opinion is that the Court actually did decide that \textit{PUD No. 1} provided a convenient vehicle to limit \textit{sub silentio} the effect of \textit{First Iowa} which, as the Court had previously recognized, reflected an unnatural reading of the text of the FPA.\textsuperscript{232} If this is, in fact, the actual significance of \textit{PUD No. 1} and the power of FERC has been significantly curtailed in relation to state environmental agencies, then the case needs to be criticized on three grounds, despite any salutary effect that it may have on the environment. First, if the Court expects it to limit or overrule \textit{First Iowa}, its opinion displays a striking and corrosive lack of candor. This lack of candor in failing to articulate the actual reasons for its decision subverts the role of the judiciary in the process of lawmaking.\textsuperscript{233} Second, at a

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\textsuperscript{230} \textit{See supra} note 209 and accompanying text. As Justice Thomas stated, “Even if FERC might have no objection to the stream flow condition \ldots in this case, such a happy coincidence will likely prove to be the exception, rather than the rule.” \textit{PUD No. 1}, 114 S. Ct. at 1920 (Thomas, J., dissenting).

\textsuperscript{231} The Court is, of course, wary of interpreting the same statutory text in different ways. \textit{See} \textit{Andrus v. Sierra Club}, 442 U.S. 347, 356 (1979) (“[P]roposals for legislation” includes either all appropriations requests or none — the Court “will ordinarily decline to fracture the clear language of a statute”); \textit{see also} Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2596 (discussing the “basic canon of statutory construction that identical terms within an Act bear the same meaning”) (citations omitted), \textit{cert. denied}, 505 U.S. 1218 (1992). Such a result, however, may have some precedent. \textit{See} \textit{Mobil Oil Corp. v. EPA}, 871 F.2d 149, 153 (D.C. Cir. 1989) (upholding EPA’s decision to give the term “facility” in RCRA two different meanings in two different provisions of that statute based on EPA’s “belie[f] that the legislative purposes will best be satisfied by construing the term to mean different things in different contexts \ldots”).

\textsuperscript{232} \textit{See supra} notes 36-39 and accompanying text. Justice Thomas apparently took this view of the opinion: “Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in \textit{California v. FERC} and \textit{First Iowa} they did not possess.” \textit{PUD No. 1}, 114 S. Ct. at 1920 (Thomas, J., dissenting). \textit{See also} \textit{Ransel}, \textit{supra} note 187, at 256 (stating that in \textit{PUD No.1}, “the Court laid waste to its previous opinion in \textit{California v. FERC}”).

\textsuperscript{233} \textit{See} Alexander M. Bickel & Harry H. Wellington, \textit{Legislative Purpose and the Judicial Process: The Lincoln Mills Case}, 71 \textit{Harv. L. Rev.} 1, 14 (1957) (“A decision by assertion has greatly reduced significance as part of the next problem’s setting, and, given the value of articulation in the process of reasoning, is more likely to be ill-advised.”); \textit{Eskridge & Frickey}, \textit{supra} note 214, at 383.
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substantive level, the Court's broad view of the CWA withdraws from FERC the authority and discretion to balance, among other things, wildlife and recreational considerations that Congress had granted to FERC in the 1986 amendments to the FPA.\textsuperscript{234} To be sure, strong legal arguments may be available to defend such a decision,\textsuperscript{235} particularly if one prefers an evolutionary approach to statutory interpretation.\textsuperscript{236} The Court's opinion, however, neither made nor relied upon those arguments. Third, the Court's broad view of the CWA ignores entirely the federalism issues that are inherent when considering the development of interstate power: under the Court's apparent reading of CWA certification authority, a state has the power to ensure compliance with all aspects of its WQSs, without regard to any impact on interstate power or competing interests in water resources.\textsuperscript{237}

\textsuperscript{234} See \textit{PUD No. 1}, 114 S. Ct. at 1921 (Thomas, J., dissenting) (stating that the majority decision means that the § 401 certification process supersedes the § 10(j) process); Ransel, \textit{supra} note 187, at 273. As explained by Ransel:

Where the demands of the various uses of a waterbody conflict, \textit{[PUD No. 1]} says that the state water quality agency—not FERC—has the authority to determine the conditions necessary to comply with state water quality standards, including the many potentially conflicting use designations attributed to the same river or stream segment.

\textit{See} Ransel, \textit{supra} note 187, at 273. \textit{See generally supra} note 94 and accompanying text (describing the § 10(j) process).

\textsuperscript{235} For example, the \textit{PUD No. 1} Court did not account in the least for how FERC has responded to its broad role in considering the environmental impacts of proposed projects. FERC has not been at all protective of the environment and has rejected recommendations from state and federal agencies for projects that would have offered some environmental protection. \textit{See supra} notes 88-104 and accompanying text. \textit{See also Hearing, supra} note 7, at 217 ("All other project features are compared to hydropower production on an economic basis. If an environmental feature reduces hydropower benefits, the feature is dropped.").

\textsuperscript{236} For an example of the evolutive approach to interpreting statutes, see United Steelworkers of Am. v. Weber, 443 U.S. 193, 209-19 (1979) (Blackmun, J., concurring), in which Justice Blackmun concludes that Title VII of the Civil Rights Act of 1964 permits businesses to engage in voluntary affirmative action programs, because such programs are appropriate given the way that Title VII has been understood and implemented.

\textsuperscript{237} Commentators have recognized that a strong federal licensing power is needed to ensure that the parochial views of states do not foreclose either the appropriate development of hydropower or proper environmentally responsive conditions on operation. \textit{See Blumm, supra} note 8, at 127 (footnotes omitted). Blumm argues that:
If PUD No. 1 is illuminating in demonstrating the dangerous allure of textualism, the case also demonstrates that even those who forcefully promote that interpretive approach recognize its limits. Thus, Justices Thomas and Scalia, while attempting to explain their interpretation of section 401 by using their usual textualist approach, also base their decision on the view that, even if their reading of the text of the CWA is wrong, that statute cannot mean what the majority says it means because such an interpretation is inconsistent with "the larger statutory framework governing the licensing process." In effect, these Justices argue that the CWA can be interpreted properly only in the context of other law, both statutory and decisional.

The dissenters argue that the text of the CWA cannot bear the majority's interpretation, because allowing states to use the certification process to ensure the protection of designated uses, as well as water quality criteria, grants states "limitless" authority to impose conditions on hydropower projects. In the dissenters' view, granting such authority "significantly disrupts the careful balance between state and federal interests that Congress

[Amendments to the FPA should not give states an absolute veto over licenses. For one thing, relicenses under the Federal Power Act are functionally the equivalent of initial licenses. Thus, state veto authority could be used to shut down existing projects which serve out-of-state markets, a result Congress would not likely intend. Moreover, an absolute veto would not necessarily ensure greater downstream fish and wildlife protection. For example, if fish protection required out-of-state downstream flows, the upstream state might want to hold water in the project reservoir to encourage consumptive uses. Consequently, a "states' rights" amendment to the FPA should authorize the application of state laws to FERC licenses only where state requirements would not produce unconstitutional burdens on interstate commerce. This would enable both FERC and reviewing agencies to ensure that states do not use their authorities to discriminate against downstream, out-of-state resources or uses.

Blumm, supra note 8, at 127 (citations omitted). See also PUD No. 1, 114 S. Ct. at 1920 (Thomas, J., dissenting) (commenting that FERC considers and balances the nation's varied needs, while state environmental agencies "need only consider parochial environmental interests") (citation omitted). Plouffe makes a similar point:

The states have substantial knowledge and expertise in river planning, and Congress should recognize their rightful role in determining the future of their rivers. The challenge is to construct a statutory mechanism that accords the states their appropriate roles but continues to recognize the federal government's preeminent position in river resource allocation.

Plouffe, supra note 41, at 845.

238 See supra notes 189-90 and accompanying text.
239 PUD No. 1, 114 S. Ct. at 1921 (Thomas, J., dissenting).
240 Id. at 1918-19 (Thomas, J., dissenting).
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struck in the [FPA]. This recognition of the significance of context in interpreting language is tantalizing, coming as it does from jurists who on other occasions have tried to force isolated statutory text to bear meanings entirely out of step with the context established by statutory and decisional law. Their implicit concession regarding the limits of textualism would, of course, be more significant if they recognized that context must also be informed by legislative history and the manner in which a law has been implemented.

In sum, PUD No. 1 provides essential insights into textualism as an approach to statutory construction, showing it to be an approach that can lead to short sighted and questionable results.

CONCLUSION

After reflecting about the Supreme Court decision in PUD No. 1, I recalled my high school chemistry teacher who, after observing my inelegant experimental techniques, stated that the Jesuits used an old Latin expression in such circumstances—non disputandum resultatem [sic]. He roughly translated this to mean you don’t argue with good results. Notwithstanding the experimental techniques discussed here, the fact remains that the 1993 Supreme Court term yielded two results that are pro-environment—PUD No. 1 and City of Chicago v. Environmental De-

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241 Id. at 1919 (Thomas, J., dissenting).
243 See Eskridge & Frickey, supra note 214, at 322 (describing “‘practical reason’” as a preferred method of judicial interpretation of statutes). Eskridge & Frickey describe practical reason as “an approach that eschews objectivist theories in favor of a mixture of inductive and deductive reasoning (similar to the practice of the common law), seeking contextual justification for the best legal answer among the potential alternatives.” Eskridge & Frickey, supra note 214, at 322 n.3. Under this approach, a judge would begin with the “Most Concrete Inquiry,” which is the “Statutory Text.” Eskridge & Frickey, supra note 214, at 353. The inquiry then extends out to include “Specific & General Legislative History,” “Legislative Purpose,” “Evolution of the Statute,” and ends with “Current Policy,” which is also the “Most Abstract Inquiry.” Eskridge & Frickey, supra note 214, at 353. The authors present the order of inquiry in this way because it reflects the “hierarchy of sources,” with the text of the statute being most persuasive to a court's interpretation. Eskridge & Frickey, supra note 214, at 353. In short, they believe that a court should look widely to evaluate the context in which it is interpreting a statute, before determining the statute's meaning.
Both of these "good results" followed from the application of the textualist interpretive technique.

In the area of statutory interpretation, unlike high-school chemistry experiments however, good technique is at least as important as good results. A good interpretive approach requires that courts consider more than mere text; they must carefully consider context as well. In the legal dispute at the heart of PUD No. 1, that context is defined not only by the CWA, but also by the FPA, the Court's interpretations of that statute, and how FERC and the state agencies have exercised the powers that they believe have been delegated to them. In enacting the FPA, Congress gave FERC the power to balance a variety of interests, including aesthetic, wildlife protection, recreation, preservation, and economic interests, against the need for energy. Congress also carved out an exception to FERC's authority and gave states the power to ensure that projects do not violate WQSs. Because, in conducting its balancing, FERC's concerns about the economic, development, and electric power factors have largely overwhelmed all other factors, courts, when they consider the interaction of the CWA and FPA, need to safeguard the single consideration that Congress has identified as beyond FERC's ability to balance out of existence. When interpreting these statutes, courts must also not view the in-state water quality factor so broadly that it alone overwhelms all other factors, at

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244 114 S. Ct. 1588 (1994).
246 See Pierce, supra note 209, at 752 (stating that "[t]he inevitable result" of the Supreme Court's recent reliance on a hypertextualist interpretive approach "will be cacophony and incoherence throughout the administrative state").
247 Consider, for example, the dismaying story that Representative Gejdenson tells about the City of Norwich, Connecticut, which was trying to develop Yantic Falls, a scenic park, into a regional tourist attraction. FERC wished to license a hydroelectric plant at that site, which would have destroyed the scenic value of the area, while providing a minimal amount of apparently excess energy. See Hearing, supra note 7, at 201-03. Representative Gejdenson stated: "Despite overwhelming local opposition, the fact that these areas are being protected as parklands, economic factors, and aesthetic reasons, coupled with the apparent lack of demand or need for the electricity, developers know that FERC will issue a license regardless of the site or the level of local opposition." Hearing, supra note 7, at 203.
least some of which will have out-of-state impacts unlikely to be considered by the state when identifying its WQSs.248

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248 To illustrate my point by reference to the continuum of interpretations of state certification power under § 401, I believe that the correct interpretive place along the continuum is the place marked by the Connecticut Superior Court. See supra notes 164-165 and accompanying text. The Supreme Court's decision in PUD No. 1 appears to give states the greater power that is associated with the position of the Vermont court along the continuum. See supra notes 166 and accompanying text. The Supreme Court, of course, declined to decide whether states have the certification power recognized by courts in Oregon and Washington. See supra notes 167-170, 176-183 and accompanying text.