

Exhibit 9

The Untapped Power of Clean Water Act Section 401

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INTRODUCTION

Clean water is a national priority—among citizens, the scientific community, and many elected officials at national and local levels.¹ But at a time when many recognize the need for beefing up the existing federal Clean Water Act (CWA, or Act)² and looking at pollution problems and solutions in a more integrated way,³ others are proposing to fragment and weaken pollution control efforts under the guise of regulatory reform, returning control to the states, and making more efficient use of limited resources.⁴

The federal scheme's limitations with respect to controlling significant sources of water pollution are widely recognized today.⁵ Most

1. See, e.g., Linda Nash, *Water Quality and Health*, in *WATER IN CRISIS* 25 (Peter H. Glick ed., 1993); ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT: 20 YEARS LATER* (1993). According to the president of the Association of State and Interstate Water Pollution Control Administrators, "the American public expects and demands clean water." *Views Sought on CWA Reauthorization: Bill Outline Expected by Early Aug*, ENV'T REP. CURRENT DEVELOPMENTS, July 7, 1995, at 529. "[W]ater pollution is the top environmental concern of the American people. Ninety-six percent of the public considers water quality the most important environmental issue . . ." 140 CONG. REC. S6351 (daily ed. May 25, 1994) (statement of Sen. Baucus). "Clean water ranked number one in the September 1993 Money Magazine's poll of considerations for choosing the ideal community in which to live." *Best Management Practice Status Summary*, CLEAN WATER WAYS, Spring 1994, at 5. See M.T. Smith & S. Nance-Nash, *The Best Places to Live Now*, MONEY MAGAZINE, Sept. 1993, at 124.

2. 33 U.S.C. §§ 1251-1387 (1994).

3. See, e.g., ADLER ET AL., *supra* note 1; *Hearing before the U.S. House of Representatives Committee on Merchant Marine and Fisheries, Subcommittee on Environment and Natural Resources*, 103d Cong. 2d Sess. (1994) (statement of Steven N. Moyer, Government Affairs Director of Trout Unlimited); Natural Resources Law Center, University of Colorado, *America's Waters: A New Era of Sustainability*, 24 ENVTL. L. 125, 142-43 (1994) (recommendations of the Long's Peak Working Group on National Water Policy, a panel of national experts) [hereinafter *Long's Peak Report*]; David H. Getches, *Groundwater Quality Protection: Setting a National Goal for State and Federal Programs*, 65 CHI.-KENT L. REV. 387 (1989).

4. Many in Congress, in particular, seem oblivious to the undeniable public support for continued efforts to clean up America's water. See *infra* note 9.

5. See ADLER ET AL., *supra* note 1. See also *Long's Peak Report*, *supra* note 3, at 130-31:

A central objective of the Clean Water Act—to restore the chemical, physical, and biological integrity of the nation's waters—remains unfulfilled. . . . Despite some progress many obstacles remain in the way of maintaining high quality water. Serious remaining problems include: poorly controlled polluted runoff (nonpoint source discharges)—which accounts for half of national pollution loads; failure to integrate land and water management; fragmented regulatory responsibility; inadequate water quality standards and lax enforcement; and inadequate attention to ecosystem protection.

See also *infra* note 10.

authorities agree that the country has made significant progress in cleaning up pollution from "point sources," such as most industrial discharges and sewage treatment plants.⁶ However, much remains to be done, and certain problems, such as combined sewer overflows and nonpoint source pollution from agricultural runoff, have scarcely been addressed.⁷ In fact, according to some commentators, "we are actually going backward in our efforts to restore the health of our aquatic ecosystems," when one considers our inability to curb polluted runoff and the ongoing destruction of important wetland and aquatic habitats.⁸

Unfortunately, the political prognosis for the Clean Water Act and for continued progress in resolving water quality problems may be bleaker than at any time in the recent past.⁹ Yet despite its limitations, the Act in its present form both accords states greater authority

6. See, e.g., ADLER ET AL., *supra* note 1, at xii, 14-19, 85; Brian Weeks, *Trends in Regulation of Stormwater and Nonpoint Source Pollution*, ELR NEWS & ANALYSIS, 25 ELR 10300, 10301 (1995) (noting the drastic reductions in surface water pollution from point sources as a result of 20 years of command-and-control regulation); William K. Reilly, *The Issues and the Policy: View from EPA*, EPA J., Nov./Dec. 1991, at 21 (reporting that by 1988 nearly 90% of city sewage treatment plants and an even higher proportion of major industrial dischargers met federal and state water pollution control requirements). See also *infra* note 10.

7. See, e.g., ADLER ET AL., *supra* note 1, at 18, 85-86, 236-37, 241; LAND LETTER, June 20, 1995, at 7 (describing Natural Resources Defense Council (NRDC) report that "[drinking] water contamination has increased because of aging water treatment plants and continued non-point source pollution"); Weeks, *supra* note 6, at 10300-01, 10304 n.65. See *infra* note 10.

8. ADLER ET AL., *supra* note 1, at xii; see also *id.* at 76 ("overall integrity of our aquatic ecosystems is deteriorating dramatically").

9. Examples abound, but a few House bills amply illustrate the point. The "'most direct onslaught' on water quality" is the Clean Water Act amendment and reauthorization bill, H.R. 961, which passed the House of Representatives 240-185 on May 16, 1995. See *Clean Water Rewrite, Regulatory Bills Would Degrade Environment, Group Says*, ENV'T REP. CURRENT DEVELOPMENTS, June 9, 1995, at 310 (quoting NRDC report *Save Our Summers: Congress' Assault on Clean Waters*). NRDC claimed that the measure would erode water quality by weakening controls on sewage and toxics. *Id.* The bill also would exempt federal hydroelectric projects from regulation under the Clean Water Act, weaken wetlands regulation, replace the existing permit program for storm water discharges with a management program based on voluntary measures, and empower states to waive cleanup requirements. See *Funds for Wetlands Could be 'Zeroed Out'*, ENV'T REP. CURRENT DEVELOPMENTS, May 26, 1995, at 249; *House Clean Water Act Deals Big Blow to Federal Power*, ENV'T WEEK, May 18, 1995, at 2. According to the Administration, it "abandon[s] efforts to curb agricultural and urban nonpoint source pollution." *House Passes Bill to Reauthorize Clean Water Act*, NONPOINT SOURCE NEWS-NOTES, June 1995, at 2.

The House appropriations bill, which passed the House 228-193 on July 31, also would have drastic consequences for existing water pollution control programs, via its reductions in the EPA budget and its restrictions on EPA's enforcement of several laws and regulations. See EPA, *House Appropriations Bill Would Cut EPA Operating Funds by 34% and Prohibit Funding for EPA's Wetlands, Sewer Overflow, Polluted Runoff, and Stormwater Programs Pending CWA Reauthorization* (Aug. 1, 1995). The so-called regulatory reform bill, H.R. 9, also could have consequences for water quality protection. NRDC asserted that this measure, if enacted, would require that "billions of dollars of taxpayer money be

for controlling pollution than they are currently exercising (and concomitantly, constrains federal discretion), and holds out a potent, but infrequently wielded, weapon against the most underregulated category of pollution, nonpoint sources.¹⁰ All of this power may be found in one section, section 401, the certification provision of the Clean Water Act.¹¹

Reduced to its essentials, section 401 empowers states to review for compliance with their water quality requirements any proposed facility or activity that requires a federal permit and that may result in a "discharge" into state waters. The state may then "certify" (or approve) the activity, certify it with conditions, or deny certification. Any conditions included in the state's certification become conditions of the federal permit, and no federal permit may issue if certification is denied.¹² Although section 401 has been a part of the federal law of water pollution control in some form for twenty-six years, it remains a largely untapped fount of state authority, and many federal agencies go about their business unfettered by and oblivious to its provisions.¹³

spent to pay polluters not to pollute." ENV'T REP. CURRENT DEVELOPMENTS, June 9, 1995, *supra*, at 311.

10. Pollution sources are divided into two categories under the Clean Water Act. "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, . . . conduit, [etc.]" 33 U.S.C. § 1362(14). Point sources are subject to a permit requirement, *id.* § 1342, and all point source discharges are illegal unless permitted, *id.* § 1311. Generally speaking, pollution sources that are not defined as point sources escape regulation under the CWA and are referred to collectively as "nonpoint sources." See *id.* §§ 1288, 1329. The CWA does not define nonpoint source (NPS), but EPA has adopted the following (nonregulatory) guidance:

NPS pollution is caused by diffuse sources that are not regulated as point sources and normally is associated with agricultural, silvicultural and urban runoff, runoff from construction activities, etc. . . . In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.

EPA, NONPOINT SOURCE GUIDANCE DOCUMENT 3 (Dec. 1987).

11. 33 U.S.C. § 1341. Section 401 requires that "[a]ny applicant for a Federal license or permit to conduct any activity . . . , which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with" certain specified sections of the Clean Water Act. *Id.* § 1341(a)(1). It further provides that states may impose conditions on certifications, designed to ensure such compliance, and that the federal permit may not issue unless certification has been obtained or waived. *Id.* § 1341(a)(1), (d).

12. See *infra* text accompanying note 29 (quoting the crucial provisions of § 401).

13. Professor William Rodgers has written that "[t]he certification provisions [of the CWA] are very much a loose cannon, and in need of serious study." 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.16, at 253 (1986 & Supp. Feb. 1995). Section 401 has also been called a "sleeping giant." Katherine Ransel & Erik Meyers, *State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant*, 7 VA. J. NAT. RESOURCES L. 339, 340 (1988). See also *id.* at 345; ADLER ET AL., *supra* note 1, at 203; OFFICE OF WATER, EPA, WETLANDS AND 401 CERTIFICATION—OPPORTUNITIES AND GUIDELINES FOR STATES AND ELIGIBLE INDIAN TRIBES 10 (Apr.

Meanwhile, it is becoming increasingly evident that nonpoint source (NPS) pollution poses a grave threat to the nation's water quality.¹⁴ This is so especially in the West, where many activities on public lands—notably, grazing, silvicultural operations, and road building—are actual and potential causes of nonpoint source pollution.¹⁵ Since “[a]lmost two-thirds of the runoff in the eleven western states, and all the great western rivers, originate on the public lands,”¹⁶ poorly managed or regulated land use practices on these lands seriously threaten the quality of surface waters in the West.¹⁷

1989) [hereinafter WETLANDS AND 401 CERTIFICATION]. But recently Ms. Ransel has written that the “giant has awakened.” See Katherine P. Ransel, *The Sleeping Giant Awakens: PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 25 ENVTL. L. 255 (1995). See *infra* part III.A. (discussing the federal permits that have traditionally received scrutiny pursuant to § 401 and many others that arguably should be subject to 401 certification).

14. In its National Water Quality Inventory 1986 Report to Congress, EPA reported that pollution from diffuse nonpoint sources was the leading cause of water quality impairment. In those states providing information, NPS was responsible for the failure to support designated uses of 65% of streams and rivers, 76% of lakes, and 45% of estuaries. JACKSON B. BATTLE & MAXINE I. LIPELES, ENVIRONMENTAL LAW: WATER POLLUTION 422 (2d ed. 1994). In 1992 EPA reported that “private and governmental actions at all levels have not resulted in significant net reductions of NPS pollution on a national scale. Indeed, the problem has become the most important source of degradation of water quality in this country.” EPA, STATE AND LOCAL FUNDING OF NONPOINT SOURCE CONTROL PROGRAMS 3 (Sept. 1992) (emphasis in original). Polluted runoff is now responsible for the impaired condition of more than half the nation's waters. *Statement of Steven N. Moyer, supra* note 3, at 5. A water is “impaired” if it fails to meet water quality standards or designated uses. Agricultural runoff accounts for more than 50% of polluted runoff. *Id.* See also ADLER ET AL., *supra* note 1, at 171.

15. See Robert L. Glicksman, *Pollution on the Federal Lands II: Water Pollution Law*, 12 J. ENVTL. L. 61 (1993); Richard H. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems, and Clean Water Law*, 17 ENVTL. L. 43 (1986). See also *infra* part III.

16. GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 17 (3d ed. 1993). This runoff derives from the high percentage of federal lands in the West and the fact that many of those lands are at higher elevations, which receive more moisture and produce more runoff. See *id.* at 12. See also Andrew A. Leven et al., *Water Quality Protection on National Forest Lands in California*, in PROCEEDINGS, CALIFORNIA WATERSHED MANAGEMENT CONFERENCE 27 (Nov. 18-20, 1986) (Wildland Resources Center, Rep. No. 11) (U.S. Forest Service administers about 20% of lands in California, but over half of the annual runoff in the state comes from those lands).

17. As Professor William Rodgers has explained:

In the forefront of any analysis of nonpoint source pollution is the role of the federal government as manager of approximately one-third of the U.S. land area constituting the federal lands. The federal government is intimately involved in a wide range of activities that include the development of energy sources on federal lands (oil shale, coal, uranium and geothermal sources) as well as a number of other practices (grazing, silvicultural, construction of roads, railroads and airports, siting of landfills) that can lead to water pollution problems.

RODGERS, *supra* note 13, § 4.9, at 130 (footnotes omitted). See also OFFICE OF WATER, EPA, MANAGING NONPOINT SOURCE POLLUTION (1989) (Final Report to Congress on Section 319 of the Clean Water Act, summarizing State NPS Assessment Report data).

Section 401 holds tremendous potential for combatting the nonpoint source pollution that is proceeding unabated on many of our western public lands. According to EPA, the most significant “limitation” on a state's section 401 certification authority is its restriction to activities that require a federal license or permit.¹⁸ The prevalence of federal public lands in the West,¹⁹ and the need for a federal permit to conduct many activities on those lands,²⁰ suggests that 401 may wield even greater clout in the West than elsewhere.

At least until recently, section 401 had attracted limited attention from commentators,²¹ and only slightly more notice in the courts. Few if any reported cases have examined thoroughly the language of the statute or considered systematically its relation to other Clean Water Act provisions. No reported case has expressly considered whether the section 401 certification authority extends to nonpoint source pollution caused by federally permitted activities conducted on the public lands. However, in a recent case, *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the Supreme Court held that the State of Washington could include a minimum stream-flow requirement in a certification issued under section 401 in a dam licensing proceeding.²² Although the *PUD No. 1* decision leaves certain specific issues unresolved, it sheds considerable light on the question of the application of section 401 to nonpoint source pollution and provides an appropriate starting point for exploring the scope of section 401.²³

This article thus begins with a review and discussion of *PUD No. 1*. In subsequent parts, it attempts to build upon that case's teachings with a more detailed analysis of section 401 in the context of the Clean Water Act generally, its legislative history, federal agency interpretations of the statute, and relevant case law and commentary. These investigations not only corroborate the result reached in *PUD No. 1*, but justify an extension of states' 401 authority beyond that traditionally exercised by states and examined by the *PUD No. 1* Court. The

18. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 10.

19. Approximately half of the land area of the 11 western states is owned by the federal government. COGGINS ET AL., *supra* note 16, at 12.

20. See *infra* note 135 and accompanying text, and part III.

21. While this article was in preparation an article was published that introduces some of the ideas developed herein. See Ransel, *supra* note 13.

22. 114 S. Ct. 1900, 1914 (1994). *PUD No. 1* is the only case in which the Supreme Court has been called upon to interpret the scope and intent of § 401. *Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1992), discussed § 401(a)(2) in the context of one state potentially affected by the certification and permitting of a pollution source in another state. But the statute was not directly at issue there, nor did the Court discuss the meaning of § 401(a)(1) or (d).

23. In fact, according to one § 401 scholar, *PUD No. 1* “awakened the sleeping giant” that had been § 401. See Ransel, *supra* note 13.

article accordingly argues that section 401 should apply to *any* federally permitted activity that may cause water pollution, whether as a result of a point source or nonpoint source discharge, and it suggests additional federal permits or programs that should be subject to section 401 review. It culminates by focusing on livestock grazing as an archetypal example of a public land activity that warrants greater scrutiny by federal and state regulators, and which is amenable to regulation via the section 401 certification process.²⁴

I

SECTION 401 ACCORDING TO THE SUPREME COURT: *PUD*
NO. 1 V. WASHINGTON DEPARTMENT OF
ECOLOGY

*PUD No. 1 v. Washington Department of Ecology*²⁵ will be an important case in environmental law for some time to come, for several reasons.²⁶ It effectively limits the Federal Energy Regulatory Commission's authority to supplant state water quality regulation in dam licensing proceedings,²⁷ and it recognizes that reduced streamflows can constitute water pollution under the Clean Water Act.²⁸ But for the purposes of this article, the significance of *PUD No. 1* is twofold: it hints at an extremely broad application for Clean Water Act section 401, yet it leaves open or does not address several questions that must be answered to determine the precise contours of section 401's scope.

A. *The Court's Analysis*

PUD No. 1 involved two portions of section 401, paragraphs 401(a) and (d). Paragraph 401(a) sets out the predicates for section 401 certification:

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 . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . No license or permit shall be granted until the certification required by this section has been obtained or has been

24. See *infra* part III.

25. 114 S. Ct. 1900.

26. See generally Ransel, *supra* note 13.

27. See 114 S. Ct. at 1907, 1914. See also Ransel, *supra* note 13, at 267-68 (interpreting *PUD No. 1* as meaning that "FERC does not have discretion to impose conditions different from those" in the state's certification).

28. 114 S. Ct. at 1913.

waived as provided in [this paragraph]. No license or permit shall be granted if certification has been denied²⁹

The section's concluding paragraph, 401(d), authorizes states to impose conditions on their 401 certifications:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, 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, and shall become a condition on any Federal license or permit subject to the provisions of this section.³⁰

Although the *PUD No. 1* Court's analysis of these two paragraphs is quite complicated, the facts underlying the dispute are easily related. The State of Washington had imposed a minimum stream flow requirement as a condition on its section 401 certification of a federally permitted hydroelectric project.³¹ The proposed facility would divert water from the Dosewallips River, run the water through electricity-generating turbines, and then return it to the river at a point 1.2 miles downstream.³²

All parties agreed that the project required 401 certification.³³ The dispute was over the propriety of the minimum stream flow con-

29. 33 U.S.C. § 1341(a)(1) (emphasis added). Sections 1311, 1312, 1313, 1316, and 1317, to which § 401 refers, are, respectively, Clean Water Act §§ 301 (effluent limitations), 302 (water quality related effluent limitations), 303 (water quality standards and implementation plans), 306 (national standards of performance for new sources), and 307 (toxic and pretreatment effluent standards). Sections 301 and 303 are of greatest relevance to this article; the others apply chiefly to point sources subject to CWA § 402, 33 U.S.C. § 1342. "[A]pplicable provisions" in § 401(a) "means [1] that the requirement which the term 'applicable' refers to must be pertinent and must apply to the activity and [2] the requirements must be in existence by having been promulgated or implemented." HOUSE COMM. ON PUBL. WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, H.R. REP. NO. 911, 92d Cong., 2d Sess. (1972), reprinted in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, VOL. 1, at 753, 808 (USGPO Ser. No. 93-1, 1973) [hereinafter LEGISLATIVE HISTORY, VOL. 1]. The portions of § 401(a)(1) omitted in the text provide for certification by an interstate water pollution control agency or by the Administrator of EPA, in certain circumstances, and set forth provisions for waivers, public notice, and other procedural requirements. The meaning of the operative term "discharge" in § 401(a) received no attention by the *PUD No. 1* Court and hence will be addressed more fully in subsequent sections of this article. See *infra* part II.A.1.

30. 33 U.S.C. § 1341(d).

31. 114 S. Ct. at 1905, 1908.

32. *Id.* at 1907. See Ransel, *supra* note 13, at 255-57, for a more detailed description of the Dosewallips project.

33. State of Washington Dep't of Ecology v. PUD No. 1, 849 P.2d 646, 649 (Wash. 1993) (en banc).

dition imposed by the State. The Court resolved that dispute by holding that "the State may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard."³⁴ In so holding, the Court made two determinations relevant to the scope of section 401. First, the Court held that states "may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of State law.'"³⁵ Second, the Court held that Washington's minimum streamflow condition was such an appropriate requirement.³⁶

Following a brief overview of the Clean Water Act and relevant Washington water quality law, the Court began its analysis by discussing the thresholds for Washington's exercise of its section 401 certification authority. First, the Court noted that petitioners were required by the Federal Power Act to obtain a license from the Federal Energy Regulatory Commission (FERC) to construct and operate the project.³⁷ Later, the Court stated that the "project will result in two possible discharges—the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace."³⁸ However, the Court did not consider whether these were point source or nonpoint source discharges—perhaps because petitioners conceded the existence of a discharge or perhaps because the State's concern was not with the effect on the river of either of the "possible discharges," per se, but of the impact on anadromous fish of

34. 114 S. Ct. at 1914. According to Ransel, "the Court held the state may impose conditions *reasonably related* to the achievement of water quality standards, including . . . criteria, as well as the use designations." Ransel, *supra* note 13, at 265 (citing 114 S. Ct. at 1910-12) (emphasis added). But this mischaracterizes the Court's express holding. The State of Washington had advanced the "reasonably related" test, see Brief for Respondents at *10, *22, PUD No. 1 v. State of Washington Dep't of Ecology, 1993 WL 632337 (U.S. Dec. 13, 1993) (No. 92-1911) [hereinafter Respondents' Brief], and *infra* note 56, but the Court employed instead the term "necessary," presumably reflecting the language of § 401(d) ("limitations necessary to assure . . . [compliance]") or § 301(b)(1)(C) ("any more stringent limitation . . . necessary to meet water quality standards"). See 114 S. Ct. at 1910, 1914. Nevertheless, Ransel's interpretation is consistent with EPA's and at least one state's. See *infra* note 293 (citing EPA rule and OHIO ADM. CODE ANN. 3745-32-05(C) (Anderson 1995) ("director may impose such terms and conditions . . . as are appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of water quality.")).

35. 114 S. Ct. at 1910 (quoting 33 U.S.C. § 1341(d)).

36. *Id.* at 1914.

37. *Id.* at 1907. Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (1988), authorizes FERC to license hydroelectric facilities.

38. 114 S. Ct. at 1908. The respondents had argued that the project would "cause at least three kinds of 'discharges' covered by § 401," i.e., "(1) discharges of dredged and fill material, (2) discharges of pollutants, and (3) discharges of non-point source pollution." Respondents' Brief at *32, PUD No. 1. The first two types of discharges generally would constitute point source discharges. See *infra* note 205.

the *removal of water* from the 1.2-mile "bypass reach" between the diversion point and the tailrace.³⁹ Instead, the Court summarily concluded that, "[b]ecause a federal license is required, and because the project may result in discharges into the Dosewallips River, petitioners are also required to obtain State certification of the project pursuant to [CWA] § 401."⁴⁰

Having established that section 401 applied, the Court next determined whether the certification condition imposed by Washington—the minimum instream flow requirement in the bypass reach—was authorized by section 401. This determination involved two separate inquiries: one to determine the scope of the state's authority under section 401, and a second to determine whether the specific condition imposed by Washington fell within that scope.

Petitioners claimed that the condition was beyond the scope of section 401 since it was *unrelated to any discharges* that the project would cause.⁴¹ The dissenters agreed with petitioners on this point.⁴² Even the majority conceded that this argument "would have [had] considerable force" if not for the further provisions of section 401(d).⁴³

In light of section 401(d), however, the Court found that "*activities*—not merely discharges—must comply with" the enumerated provisions of the Clean Water Act, including state water quality standards (WQS).⁴⁴ The majority distinguished between "subsection 401(a),

39. 114 S. Ct. at 1907-08. In other words, PUD No. 1 involved no concern about the discharge of *pollutants* from the tailrace or about the direct effects of the discharge of fill material during project construction. Rather, the State's concern was with the resultant *hydromodification*—a type of nonpoint source pollution expressly identified in 33 U.S.C. § 1314(f)(2)(F). The D.C. Circuit Court of Appeals explained § 304(f) as "reflect[ing] congressional understanding that some dam-induced water quality problems are nonpoint source pollution." National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 168 n.36 (D.C. Cir. 1982). See *infra* notes 205, 229.

40. 114 S. Ct. at 1907.

41. *Id.* at 1908 (citing the pertinent language of § 401(a)). See also Reply Brief for Petitioners at *8 n.14, PUD No. 1 v. State of Washington Dep't of Ecology, 1994 WL 131622 (U.S. Jan. 5, 1994) (No. 92-1911) (rejecting respondents' assertions that the project would cause discharges of pollutants and nonpoint source pollution, not apparently because petitioners thought that such "discharges" were outside the scope of § 401, but because "[s]uch consequences were not cited as a ground for regulating streamflow in the § 401 certificate or the Washington Supreme Court's opinion"). See *infra* part II.B.1 regarding the discharges issue.

42. "The minimum stream flow condition . . . has no relation to any possible 'discharge' that might result from petitioners' proposed project. . . . [A] minimum stream flow requirement is a limitation on intake—the opposite of discharge. Imposition of such a requirement would thus appear to be beyond a State's authority as it is defined by § 401(a)(1)." 114 S. Ct. at 1915 (Thomas, J., dissenting).

43. *Id.* at 1908.

44. *Id.* at 1909 (emphasis in original). Washington offered an additional, persuasive argument in support of this interpretation, namely, that "Congress uses 'activity' and 'discharge' interchangeably in § 401," citing as examples the clause " '[i]n the case of any such

which refers to a state certification that a 'discharge' will comply with certain provisions of the Act," and section 401(d), which refers to the compliance of the "applicant," not the discharge.⁴⁵ In the Court's view, section 401(d) "expands the State's authority to impose conditions on the certification of a project,"⁴⁶ thus authorizing the "State to impose 'other limitations' on the *project in general* to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law.'"⁴⁷ The Court found support for this conclusion in EPA's regulations implementing section 401, specifically the rule requiring "reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards."⁴⁸ Thus, the Court summarized: "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."⁴⁹

Finally, the Court considered the propriety of the minimum stream flow condition. The State of Washington had determined that the condition was necessary to protect one of the designated uses of the river, namely, "[s]almonid migration, rearing, spawning, and harvesting."⁵⁰ The Washington Supreme Court had held that "the antidegradation provisions of the State's water quality standards required the imposition of minimum stream flows."⁵¹ The U.S. Supreme Court found that the river's designated uses and the State's antidegradation policy were both parts of Washington's water quality standards, approved by EPA pursuant to the procedure in CWA sec-

activity for which there is not an applicable effluent limitation or other limitation' in § 401(a)(1) and similar provisions in § 401(a)(4), (5). Respondents' Brief at *30, *PUD No. 1* (emphasis added).

45. 114 S. Ct. at 1908-09 (emphasis added). See *supra* note 29 and accompanying text for the wording of § 401.

46. 114 S. Ct. at 1908-09.

47. *Id.* at 1909 (quoting portions of § 401(d); emphasis added).

48. *Id.* (quoting 40 C.F.R. § 121.2(a)(3); emphasis in opinion). The Court also cited WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 23, and noted that EPA's interpretation was entitled to deference. 114 S. Ct. at 1909.

49. *Id.* at 1909.

50. See *id.* at 1906-08, 1910 (quoting WASH. ADMIN. CODE § 173-201-045(1)(b)(iii) (1990)).

51. *Id.* at 1908. Washington's antidegradation policy, much like the federal policy, see 40 C.F.R. § 131.12 (1995), essentially requires maintenance of existing uses and prohibits any degradation of water quality that would interfere with or harm existing uses. See 114 S. Ct. at 1906-07.

tion 303, and could be enforced through the certification process.⁵² The Court

agree[d] with the State that ensuring compliance with § 303 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, 33 U.S.C. § 1311. Section 301 in turn incorporates § 303 by reference. See 33 U.S.C. § 1311(b)(1)(C).⁵³

The Court reasoned:

[S]tate water quality standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. . . . 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." 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.⁵⁴

In spite of some confusion introduced by the Court's analysis,⁵⁵ the upshot of this reasoning is plain: states may, via the certification process, require compliance with official state WQS and can impose on

52. See *id.* at 1906-07, 1910. See also *infra* note 64.

53. *Id.* at 1909 (citation to the legislative history of § 401 omitted). See *infra* text accompanying note 278. Section 301, 33 U.S.C. § 1311, is entitled "Effluent limitations." Among other things, it makes discharges of pollutants from point sources illegal unless pursuant to a permit and in compliance with the Act, and it establishes schedules for point source compliance with increasingly stringent effluent limitations.

54. 114 S. Ct. at 1909 (quoting CWA § 401(d)). The Court noted that this interpretation is "consistent with EPA's view of the statute." *Id.* (citing EPA's § 401 regulations and WETLANDS AND 401 CERTIFICATION guidance document). In a footnote, the majority responded to the dissent's "assert[ion] that § 301 is concerned solely with discharges, not broader water quality requirements." *Id.* at 1909 n.3. The majority acknowledged that "§ 301 does make certain discharges unlawful," but countered that the "broad enabling provision" in § 301(b)(1)(C) "expressly refers to state water quality standards, and is not limited to discharges." *Id.* at 1910 n.3. Section 301(b)(1)(C), to which the Court referred, provides: "In order to carry out the objective of this chapter [*viz.* the chemical, physical, and biological integrity of the Nation's water] there shall be achieved not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations . . ." 33 U.S.C. § 1311(b)(1)(C), quoted at 114 S. Ct. at 1909, 1910 n.3. Clearly, the "more stringent limitation[s]" to which § 301 refers could be construed to mean limitations on discharges more stringent than the technology-based effluent limitations otherwise prescribed by § 301. Conceivably, the phrase might also refer to other, nondischarge-related limitations—perhaps, for example, a stream flow requirement. It can only be presumed that this latter alternative was what the Court had in mind, since its explanation ends with the cryptic pronouncement that the quoted provision of § 301 "is not limited to discharges."

55. See *infra* note 277 and accompanying text.

the permitted activity conditions designed to ensure such compliance.⁵⁶

The Court offered no clear guidance as to the kinds of "limitations," i.e., conditions, on certification that a state may impose under section 401(d).⁵⁷ Nevertheless, its resolution of the precise issue raised in *PUD No. 1*—whether Washington's minimum stream flow condition was such a "limitation"⁵⁸—provides some crucial insights.

The Court held that Washington "may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard."⁵⁹ For the purposes of this article, it is unnecessary to explore the specifics of the Court's lengthy analysis, insofar as it pertains to minimum stream flows.⁶⁰ What are relevant to this question of appropriate "limitations" under section 401(d) are the Court's determinations that (1) use designations, as well as water quality criteria, are enforceable via certification conditions;⁶¹ (2) a state's antidegradation regulations can serve as the predicate for conditions designed to maintain and protect a designated use of a water body;⁶² and (3) a state's decision that a condition is "necessary" to protect designated uses is entitled to deference.⁶³ The first

56. The Court found it unnecessary to determine "what additional state laws, if any, might be incorporated by the § 401(d) term "any other appropriate requirement of State law." 114 S. Ct. at 1909. By "additional state laws" the Court may have meant laws in addition to, or other than, state WQS. In fact, Washington had argued:

Section 401 does not limit the State to ensuring compliance with water quality standards. Section 401(d) further authorizes the states to impose conditions necessary to ensure compliance within [sic] "any other appropriate requirement of state law." Because RCW 90.54.030(2)(a), which requires minimum instream flows to protect, inter alia, fish and wildlife, is reasonably related to the policies and purposes of the CWA, it is an "appropriate" state law requirement, within the meaning of § 401(d).

Respondents' Brief at *10, *PUD No. 1*. Nevertheless, the reader is reminded that the Court did not classify state WQS as among the "other appropriate requirements of State law" referenced by § 401(d), but rather among the "other limitations" referenced earlier in that same paragraph. See 114 S. Ct. at 1909 (quoted *supra* in text accompanying note 54). See also *supra* text accompanying note 30 for language of § 401(d). The Court declined to decide Washington's argument.

57. The statute refers simply to "limitations . . . necessary to assure that any applicant for a Federal license or permit will comply with" the referenced CWA provisions and "other appropriate requirement[s] of State law." 33 U.S.C. § 1341(d).

58. 114 S. Ct. at 1910.

59. *Id.* at 1914 (emphasis added).

60. For instance, this article is not concerned with the intricacies of state water allocation law, nor with how *PUD No. 1* may have "disrupt[ed]" the careful balance between state and federal interests that Congress struck in the Federal Power Act." See *id.* at 1919 (Thomas, J., dissenting). For a review of these and other interesting aspects of the case, see generally Ransel, *supra* note 13.

61. 114 S. Ct. at 1910-12. See discussion *infra* note 64.

62. 114 S. Ct. at 1912. See discussion *infra* at note 70.

63. See 114 S. Ct. at 1912. See also discussion *infra* note 74.

two determinations are explicit elements of the Court's decision; the third is implicit.

The first element—that the use designation and water quality criteria components of state WQS are independently enforceable—seems unassailable.⁶⁴ As the Clean Water Act provides, and the opinion clearly sets forth, water quality standards are composed of two elements, the "designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses."⁶⁵ EPA regulations define both components and further provide that, "[w]hen water quality criteria are met, water quality will generally protect the designated use."⁶⁶ The Court accepted the argument that criteria cannot always be sufficiently narrowly tailored to ensure that maintaining them will in turn protect all designated uses of all water bodies to which they apply.⁶⁷ Thus, the Court concluded, a state, in exercising its section 401 authority, must be able to enforce both components in order 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."⁶⁸ One can see that this conclusion af-

64. I say this despite the dissent's arguments to the contrary. See 114 S. Ct. at 1918-19 (Thomas, J., dissenting). See also Lisa M. Bogardus, *State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act*, 12 VA. ENVTL. L.J. 43, 80 (1992) (arguing, on the basis of a non-401 case, that neither narrative criteria nor designated uses can properly form the basis for section 401 conditions).

65. 33 U.S.C. § 1313(c)(2)(A). "Uses" include such things as fish rearing and harvesting, as seen in this case, as well as agricultural use, municipal water supply, contact recreation, etc. Water quality criteria may be either "objective," numerical criteria (specifying acceptable levels or concentrations of physical or chemical parameters such as pH, turbidity, toxins, or nutrients) or "broad, narrative criteria based on, for example, 'aesthetics.'" See 114 S. Ct. at 1911 (citing 33 U.S.C. § 1313(c)(2)(B)), which specifies only one set of criteria (certain toxics) that must be numerical, and 40 C.F.R. § 131.11(b)(2) (1992), which provides for narrative criteria when numerical criteria cannot be established). The Court noted that Washington's criteria for class AA waters (a category that includes the Dosewallips River) are "open-ended" narrative criteria, which "must be translated into specific limitations for individual projects." *Id.* at 1911. Water quality standards also have a third component, an antidegradation policy. See *id.* at 1905-06; Andrew H. Sawyer, *Rock Creek Revisited: State Water Quality Certification of Hydroelectric Projects in California*, 15 PAC. L.J. 973, 1000 (1994). See also *infra* notes 70-72 and accompanying text.

66. 114 S. Ct. at 1911 (quoting 40 C.F.R. § 131.3(b) (1992); emphasis added).

67. See *id.*

68. *Id.* (emphasis added). *Accord* Bangor Hydro-Electric Co. v. Board of Envtl. Protection, 595 A.2d 438, 442-43 (Me. 1991). The Maine court upheld the State's authority to consider designated uses as well as water quality criteria in making its certification decision, declaring that a contrary interpretation would render the designated use's component of water quality standards a "nullity." *Id.* at 442. See also Sawyer, *supra* note 65, at 999-1001. Sawyer also quotes a letter from EPA to FERC in which an EPA Assistant Administrator explains that "[p]rotection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of the multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands, and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system." *Id.* at 1005. *But see* Bogardus, *supra* note 64, at 78-83 (arguing that only numerical criteria, not narrative criteria or designated uses, should be enforceable); Com-

fords states considerable latitude in certifying a proposed project's compliance with state WQS.⁶⁹

The second relevant element has to do with the Clean Water Act's antidegradation policy.⁷⁰ The Court left no doubt that this policy is a part of a state's water quality standards⁷¹ and, as such, is enforceable via section 401 just as are use designations and criteria.⁷²

monwealth Dep't of Env'tl. Resources v. City of Harrisburg, 578 A.2d 563, 564 (Pa. Commw. Ct. 1990) (suggesting that state authority is limited to reviewing "physical changes in the river"); *de Rham v. Diamond*, 295 N.E.2d 763, 768 (N.Y. 1973) (decided under § 401's predecessor, § 21(b)).

69. The dissent found this latitude troubling. In Justice Thomas's view, "decoupling 'uses' and 'criteria'" allows states to

pursue, through § 401, their water goals in any way they choose; the conditions imposed on certifications need not relate to discharges, nor to water quality criteria, nor to any objective or quantifiable standard, so long as they tend to make the water more suitable for the uses the State has chosen. In short, once a State is allowed to impose conditions . . . to protect "uses" in the abstract, § 401(d) is limitless.

114 S. Ct. at 1918-19 (Thomas, J., dissenting). This criticism, however, is founded on mischaracterizations and omissions. There is nothing "abstract" about a minimum stream flow necessary to support salmon migration, nor was there any evidence that the State was attempting to make the river "more suitable" for (as opposed to simply maintaining) that designated use. Moreover, in arguing that uses should be protected solely by "reference to the corresponding criteria," *id.* at 1918, the dissent ignores the EPA rule that acknowledges that criteria may not always protect designated uses, *see id.* at 1911 (citing 40 C.F.R. § 131.3(b)), and renders essentially nugatory the statutory term "use." And the dissent fails altogether to address the antidegradation policy. *See infra* notes 70-72 and accompanying text. Finally (and somewhat curiously), Justice Thomas used recreation, rather than fish habitat, and conditions with "little relation," rather than *no* relation (which would have better proved his point), to water quality, to illustrate this alleged "limitless" power of states under § 401(d). *See id.* at 1919 (emphasis added). Given the facts of *PUD No. 1* and the majority's phrasing of the holding in terms of conditions "necessary to enforce a designated use," *id.* at 1914 (emphasis added), the dissent's concerns seem misplaced or overblown.

70. The term "antidegradation policy" is used herein, as in *PUD No. 1*, to refer, individually or collectively, to the "policy" reflected in § 303(d) of the Clean Water Act, the federal regulations implementing the policy (at 40 C.F.R. § 131.12), and/or state regulations implementing the federal requirements. *See generally* 114 S. Ct. at 1906-07, 1912.

71. *See id.* at 1905-06 ("[CWA] § 303 also contains an 'antidegradation policy' [and] EPA's regulations implementing the Act require that state water quality standards include 'a statewide antidegradation policy'"). The antidegradation policy is well entrenched in water pollution control law. The Court charted its history, noting that federal law required, and all 50 states had, such a policy even before the 1972 FWPCA amendments were passed; that the 1972 Act provided that all such state standards would remain in force; that EPA has consistently required states to have an antidegradation policy; and finally, that Congress had ratified the policy in the 1987 CWA amendments. *Id.* at 1912. *See also Sawyer*, *supra* note 65, at 1000 ("elements which must be included in each state's water quality standards . . . includ[e] designated uses, water quality criteria, and an antidegradation policy").

72. *See* 114 S. Ct. at 1912 ("the State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations"). EPA has also taken the position that certification decisions may properly be based on the antidegradation policy. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 18-20. *See also* Hi-Line Sportsmen Club v. Milk River Irrigation Dist., 786 P.2d 13, 16 (Mont. 1990) (State had based certification condition on, *inter alia*, the State's "nondegradation [sic] requirements").

This holding, readily supportable as a matter of law, refines and probably expands the scope of a state's power under section 401.⁷³

The third, albeit implicit, element of the Court's holding involves the deference to be accorded a state's choice of certification conditions. The Court did not query whether any other condition, perhaps less onerous than a minimum flow requirement, might have achieved the objective of protecting the river's designated uses. Nor did it question the actual flow requirement imposed by the State or the State's study, which led to the selection of conditions.⁷⁴ In other words, the Court did not attempt to define precisely what the statute means by "limitations . . . necessary to assure" compliance with the specified legal requirements.⁷⁵ Instead, after concluding that the *law* was on the State of Washington's side, the majority simply seemed to accept the State's *factual* conclusion that the specified minimum stream flow must be maintained in order to maintain the designated use.⁷⁶ This aspect of the Court's holding cements the states' section 401 authority.⁷⁷

73. I say "probably" because the Court's opinion does not expressly hold that the antidegradation policy serves as an *independent* ground for denying or conditioning a certification. However, the State of Washington had argued that the antidegradation policy is "an integral and independently enforceable part of Washington's standards" and that the project would violate it "by injuring *existing* water uses." Respondents' Brief at *10, *PUD No. 1* (No. 92-1911) (emphasis added). Because the Court held that designated uses, as one component of state water quality standards, are enforceable independently of water quality criteria, the only reasonable inference is that the antidegradation policy—also a separate component of water quality standards—is independently enforceable. *See* 114 S. Ct. at 1908, 1912. Indeed, if the antidegradation policy is not accorded independent significance, it adds nothing to the other components of state water quality standards. *See, e.g., Oklahoma v. EPA*, 908 F.2d 595, 618-19 & n.35 (10th Cir. 1990) (finding that Oklahoma's Beneficial Use Limitations/Anti-Degradation Policy is designed to provide additional protection beyond other water quality standards), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91 (1992). Courts would shun such an interpretation. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2413 (1995). Thus, *PUD No. 1* should be read as holding that the antidegradation policy constitutes a proper, and *separate*, ground for conditioning a § 401 certification.

74. *See* 114 S. Ct. at 1908 (noting that the State had undertaken a study to determine the requisite minimum flow).

75. 33 U.S.C. § 1341(d) (emphasis added).

76. *See* 114 S. Ct. at 1912. By "the law" I mean the Court's conclusions (1) that use designations are a separate element of state WQS and enforceable independently from the water quality criteria adopted to support those uses; and (2) that antidegradation requirements are also part of state WQS and enforceable to protect designated uses. "Enforceable" in this context means enforceable via appropriate conditions in a § 401 certification.

77. *See infra* notes 501-05 and accompanying text (regarding lenient proof requirement that should flow from allowing conditions to protect uses, not just water quality criteria).

B. The Significance of PUD No. 1

PUD No. 1 provides considerable support for an expansive reading of section 401. Its two central holdings are unquestionably important. The first holding—that states may use section 401 to ensure that the whole of an activity meets state water quality requirements whenever the threshold conditions of a license or permit and a discharge are met⁷⁸—allows states to regulate a much broader range of threats to water quality than if their authority were restricted to regulating only pollution tied directly to the discharge. The second holding—that states may require compliance with all of their official water quality standards, including the designated use and antidegradation portions of the standards—led the Court to rule that Washington's minimum streamflow condition was an appropriate condition of its certification.⁷⁹

As important as the Court's explicit holdings, however, are the implications of its decision and some of the language therein. Although the Court had no occasion to determine exactly what federal activities are subject to section 401 certification (since there was no dispute that the dam, which required a license from FERC, was subject to 401 certification), the Court made clear that the certification requirement applies to a wide variety of federally permitted activities.⁸⁰ Similarly, as noted above,⁸¹ the Court did not discuss whether either of these potential discharges was a point source discharge. But because most courts would consider the tailrace discharge to be a nonpoint source discharge,⁸² the decision also provides support for the proposition that *all* "discharges," including those not regulated as point sources under the Clean Water Act, can trigger a state's section 401 review authority.⁸³ Finally, given its deference to the State of Washington's determination that a minimum stream flow was necessary to maintain the river's designated use, *PUD No. 1* implies that a state's authority to ensure compliance with "any other appropriate requirement of State law" through certification is extremely broad.

PUD No. 1 thus provides chiefly implicit support for the proposition advanced in this article, namely, that section 401 applies to *any* federally permitted activity that may cause water pollution as a result of a point source or nonpoint source discharge.⁸⁴ Ample explicit sup-

78. 114 S. Ct. at 1907. See *supra* text accompanying note 49.

79. See 114 S. Ct. at 1910-14.

80. *Id.* at 1914. See also *infra* note 124 and accompanying text.

81. See *supra* note 39 and accompanying text.

82. See *infra* note 205.

83. See *infra* part II.A.2 for further development of this point.

84. Any hesitation to "extend" *PUD No. 1*'s holding to activities or water quality impacts not expressly dealt with in that opinion should be eased by Justice Stevens' bold concurrence. He declared: "[T]his is (or should be) an easy case. Not a single sentence,

port for this thesis exists, however, and is set forth in the next part of this article.

II

SECTION 401: THE REST OF THE STORY

The initial impression conveyed by the section 401 certification statute—of a broad, across-the-board, state review-and-approval power over federally permitted activities—is confirmed on closer inspection.⁸⁵ This part of the article expands upon the *PUD No. 1* Court's analysis of section 401 and related provisions of the Clean Water Act and explores the legislative history, agency guidance, case law, and commentary, seeking clarification of the congressional design behind certification.

The discussion is organized much like section 401 itself. The first part covers the two threshold conditions that must be met before states can exercise their section 401 review authority. The second part explains the scope of section 401 once the thresholds are satisfied; that is, it considers the activities on which states may impose conditions and the range of permissible conditions. The final part explores the ways in which section 401 can be enforced in the courts.

A. The Triggers to States' Section 401 Authority

An activity must meet two conditions to be subject to the states' section 401 review authority: (1) It must involve issuance of a federal license or permit (2) for a facility or activity that may result in a discharge. To date the states have interpreted these straightforward thresholds in an unduly narrow fashion.⁸⁶ The following two subparts present the case for a more generous interpretation of the triggers to states' section 401 authority.

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." 114 S. Ct. at 1915 (Stevens, J., concurring). See also Ransel, *supra* note 13 (arguing that *PUD No. 1* should have sweeping effect).

85. See *supra* text accompanying notes 29-30 for pertinent portions of the language of § 401(a), (d). These are, as three commentators have observed, "remarkably absolute terms." ADLER ET AL., *supra* note 1, at 203; see also Ransel, *supra* note 13, at 268-70.

86. EPA has said that "[t]ime and the courts may be needed to resolve some of the more complicated and contentious issues surrounding 401 certification such as which federal permits and licenses require 401 certification." WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 38. This statement implies an extant controversy over the scope of the 401 authority; however, lack of interest or awareness more aptly describes the current state of affairs. Perhaps the authors of the EPA report meant only to suggest that state attempts to exert § 401 review authority over *additional* activities not now being reviewed could be expected to be controversial. Certainly, such a prognostication could not be faulted. But the plain language of, and intent behind, § 401 belie their assessment of this issue as a "complicated" one, as I hope to demonstrate in this article.

1. Permits/Licenses Subject to Certification

Section 401 requires "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in a discharge" to obtain state certification.⁸⁷ This plain language, the statute's legislative history, and the Supreme Court's remarks in *PUD No. 1* all strongly suggest that a wide variety of federal permits are subject to the states' section 401 authority. After discussing the types of permits presently regarded as subject to section 401 review, this subpart examines the sources of authority that support a more comprehensive application of section 401.

Several kinds of permits are generally acknowledged as triggering section 401 review. According to EPA's Office of Wetlands Protection,

[there are] five federal permits and/or licenses which authorize activities which may result in a discharge to the waters. These are: permits for point source discharges under Section 402 and discharges of dredged and fill material under Section 404 of the Clean Water Act; permits for activities in navigable waters which may affect navigation under Sections 9 and 10 of the Rivers and Harbors Act (RHA); and licenses required for hydroelectric projects issued under the Federal Power Act.⁸⁸

It is undisputed that three of these five permits are subject to section 401 certification. First, activities resulting in point source discharges subject to the requirements of CWA section 402 are included, at least so long as they are subject to permitting by EPA and not by the respective states.⁸⁹ In fact, section 401(a)(6) refers expressly to section 402 permits.⁹⁰ EPA's regulations provide for certification of NPDES permits,⁹¹ and several courts have resolved challenges to state

87. 33 U.S.C. § 1341(a)(1) (emphasis added).

88. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 20 (emphasis deleted); *see also id.* at 20 (noting the likelihood that additional permits and licenses should be subject to § 401).

89. *See* 40 C.F.R. pts. 122-123 (1995) (defining requirements for federal NPDES permits and for approval of alternative state programs). *See also* Ransel & Meyers, *supra* note 13, at 345 n.33 (noting that, "at the least, [certification] would seem to be redundant" in cases where the state had been delegated permitting authority under § 402). Section 402, 33 U.S.C. § 1342, requires permits for all point source discharges. *Cf.* Minnesota regulations (cited *infra* note 106).

90. *See* 33 U.S.C. § 1341(a)(6) (exempting from certification certain facilities constructed before a specified date, "[e]xcept with respect to a permit issued under section 1342 of this title"). *See also* Senate Consideration of the Report of the Conf. Comm., *Exh. 1*, reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 176 ("Conferees intend that the certification provision will ensure a state water pollution control agency an opportunity to determine whether or not effluent limitations established for discharges subject to a section 402 permit will be at least as stringent as any applicable requirements of existing State program [sic]").

91. *See, e.g.*, 40 C.F.R. §§ 122.4(b), 124.53(a) (1995) (prohibiting issuance of an NPDES permit to an applicant until a 401 certification is obtained or waived). *See also id.*

certification of 402 permits, assuming if not holding expressly that the state possessed this authority.⁹²

Just as surely within the compass of 401 are the section 404 dredge-and-fill permits issued by the U.S. Army Corps of Engineers (Corps).⁹³ Section 401(c)(6) refers to "spoil disposal areas under [the Secretary of the Army's] jurisdiction,"⁹⁴ a clear reference to the Secretary's section 404 permitting authority.⁹⁵ As does EPA, the Corps provides by rule for certifications,⁹⁶ and no court that has entertained a challenge to the denial or conditioning of a certification for a section 404 permit has questioned the states' right to exercise this authority.⁹⁷

The third category of permits universally recognized as subject to section 401 certification are licenses to build new hydroelectric facilities.⁹⁸ Section 4(e) of the Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) to license these facilities,⁹⁹ and FERC provides by rule for certification of these license deci-

§ 124.51 (noting that tribes may be qualified for treatment as states for purposes of certification).

92. *See, e.g.*, *Miners Advocacy Council v. State Dep't of Env'tl. Conservation*, 778 P.2d 1126, 1129 (Alaska 1989), *cert. denied*, 493 U.S. 1077 (1990); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041 (1st Cir. 1982); *United States v. Puerto Rico*, 721 F.2d 832 (1st Cir. 1983).

93. 33 U.S.C. § 1344. "No one has ever argued that section 401 does not apply to the literally hundreds of thousands of Clean Water Act section 404 permits granted by the Corps of Engineers each year." Ransel, *supra* note 13, at 270. Section 404 requires permits for all discharges of dredged or fill material to navigable waters. 33 U.S.C. § 1344. Both individual and general permits issued or reissued by the Corps are subject to certification. *See id.* § 1344(a), (e); 33 C.F.R. § 330.4(c) (1995); *id.* § 330 app. A. Activities authorized by a Corps "letter of permission" are also subject to certification. *Id.* § 325.2(e)(1)(ii)(c). *See also* Ransel & Meyers, *supra* note 13, at 339, 345 n.33 (noting that certification "would seem to be redundant" if the state had been delegated permitting authority under § 404). Only Michigan and New Jersey are currently authorized to issue § 404 permits. *See* Oliver A. Houck, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242 (1995).

94. 33 U.S.C. § 1341(c).

95. *See id.* § 1344.

96. *See, e.g.*, 33 C.F.R. §§ 320.3(a), 325.1(d)(4), 325.2(b)(ii), 330.4(c), 330.6(a)(3)(iii), 336.1(a)(1), (b)(8) (1995).

97. *See, e.g.*, *Keating v. FERC*, 927 F.2d 616, 619 (D.C. Cir. 1991); *Commonwealth Dep't of Env'tl. Resources v. City of Harrisburg*, 578 A.2d 563, 567 (Pa. Commw. Ct. 1990).

98. *See, e.g.*, *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1907 (1994); *Keating v. FERC*, 927 F.2d at 619; *City of Fredericksburg v. FERC*, 876 F.2d 1109, 1111 (4th Cir. 1989); *de Rham v. Diamond*, 295 N.E.2d 763, 768 (N.Y. 1973). *See also* Sawyer, *supra* note 65. The U.S. Supreme Court concluded summarily in *PUD No. 1* that, "[b]ecause a federal license is required, and because the [hydroelectric] project may result in discharges" into a navigable water, applicants for FERC licenses must obtain 401 certification. 114 S. Ct. at 1907.

99. 16 U.S.C. § 797(e) (1994).

sions.¹⁰⁰ Relicensing of FERC projects also should be subject to the certification requirement.¹⁰¹

The final categories of activities identified by EPA's Office of Wetlands Protection as requiring certification are those subject to permitting under section 9 or 10 of the Rivers and Harbors Act (RHA).¹⁰² Regulated activities include constructing dikes and dams in navigable waters (section 9) and placing other structures or doing work in or affecting navigable waters (section 10). Permits for constructing dikes and dams are issued by the Corps;¹⁰³ the Coast Guard, per delegation from the Secretary of Transportation, permits the construction of bridges and causeways.¹⁰⁴ States apparently do not exercise their section 401 authority uniformly in these areas, however.¹⁰⁵

Beyond the categories just surveyed, states have failed to take advantage of their section 401 authority.¹⁰⁶ The certifying state

100. 18 C.F.R. § 4.38(a) (1995). Note, however, that H.R. 961, currently under consideration in Congress, would exempt FERC hydropower projects from regulation under the Clean Water Act. See *Funds for Wetlands Could be "Zeroed Out," supra* note 9, at 249.

101. See Ransel, *supra* note 13, at 271-72; Sawyer, *supra* note 65, at 1003-04. This is significant because of the number of hydroelectric projects whose licenses are expiring and because of mounting concerns over the effects of some of these dams on native stocks of anadromous fish, particularly in the Pacific Northwest. See Ransel, *supra* note 13, at 271 (arguing that states should be able to use § 401 to "recover" designated uses that have been eliminated by dams).

102. 33 U.S.C. §§ 401, 403 (1994). See 33 C.F.R. § 320.4 (1995) (setting forth policies applicable to the processing of all Department of the Army permits). 33 C.F.R. § 320.4(d) explains that the required certification under CWA § 401 is "conclusive with respect to water quality considerations." Note that most RHA § 9 activities, and some § 10 activities, also require a CWA § 404 permit and thus are clearly subject to § 401 certification. See 33 C.F.R. §§ 321.1, 322.1.

103. 33 U.S.C. § 401; 33 C.F.R. § 321.1 (1995).

104. 33 U.S.C. §§ 401, 509 (1994); 49 C.F.R. §§ 1.41(a), 1.46(c)(5) (1995).

105. See Ransel & Meyers, *supra* note 13, at 346 & n.39.

106. The states take a variety of approaches to identifying permits subject to 401 certification. South Carolina, for instance, recognizes that permits subject to its certification authority are "not necessarily limited to" Corps and FERC permits, S.C. CODE REGS. 61-101.A.3. (1993), but its certification procedures (more extensive than most other states') nevertheless seem to have been drafted with § 404 permits in mind. See *id.* 61-101. Similarly, Ohio's regulations specify two Corps permits as subject to certification and then add: "any other federal permit or license to conduct any activity which may result in any discharge to waters of the state." OHIO ADMIN. CODE ANN. § 3745-32-02(A)(4) (Anderson 1994). Kansas regulations broadly state: "No action that impacts upon water quality shall be taken unless the department has issued a water quality certification." KAN. ADMIN. REGS. 28-16-28f(c)(1) (1993). The rule defines "action that impacts water quality" somewhat circuitously, as certain discharges of wastewater, applications for federal permits subject to § 401, and "[a]ny action in which the person proposing the action requests . . . certification." *Id.* 28-16-28f(c)(1)(A)(i)-(iii). Minnesota rules, on the other hand, reflect some confusion about NPDES permits and certification. They provide: "If the applicant is required to obtain a certification under section 401 . . . , no [402] permit may be issued by the agency unless the agency finds that the certification has been obtained by the applicant." MINN. R. 7001.1100(2) (1995). But Minnesota itself issues NPDES permits, see *id.* 7001.1100(1), 7001.1470(2); thus, no certification should be required for these permits.

agency may lack notice of the proposed activity, or the agency may not realize that it has the authority to review a proposed action.¹⁰⁷ Moreover, "many states have not adopted regulations implementing their authority to grant, deny, and impose conditions on water quality certification," thus diminishing the potential impact of state certification.¹⁰⁸

Yet despite these practical limits on implementation of section 401, the section's language makes clear that Congress intended no such constraints. The statute provides only that "[a]ny applicant for a Federal license or permit to conduct any activity" that may cause a discharge must obtain certification.¹⁰⁹ Furthermore, Congress provided in the CWA neither a list of licenses and permits to which certification applies nor any restrictions on those subject to section 401 review. Nor does the Act define "license or permit."¹¹⁰

In the absence of explicit definitions and any legislative history suggesting a narrow construction, the only tenable reading of the meaning of "license or permit" is a broad one. On its face, section 401 contains no de minimis test. The statute applies to *any* activity that may result in *any* discharge.¹¹¹ Moreover, the words "license" and "permit" have well-established legal definitions, and these definitions are extremely broad. Black's Law Dictionary defines "license" as the "permission by competent authority to do an act which, without such

107. EPA predicted in 1972 that "many States, for various reasons, may waive certification." H.R. REP. NO. 911, at 170, reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 857 (comments of EPA on H.R. 11895 and 11896). Most waivers probably are passive (i.e., result from the state's inaction for the statutory or regulatory time period, see 33 U.S.C. § 1341(a)(1)) instead of the result of any affirmative/overt action by the state. Even more ostensible "waivers" probably reflect the certifying agency's lack of notice of the proposed activity or development and/or its failure to recognize that it has any authority with respect thereto. See, e.g., WATER QUALITY DIVISION, WYOMING DEP'T OF ENVTL. QUALITY, 1994 WYOMING WATER QUALITY ASSESSMENT 293 (1994) [hereinafter WYOMING 1994 ASSESSMENT] (stating that, "[f]or the most part, the only applicable federal permits are section 404 dredge and fill permits and [FERC] licenses"); Bill DiRienzo, *404 Permitting/401 Certification*, CLEAN WATER WAYS, Jan. 1992, at 1-2 (stating that, of the "variety of permits . . . and licenses . . . which are subject to 401 certification, only two types are of significance to Wyoming"—404 permits and FERC licenses).

108. See WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 9. This failure to enact implementing rules suggests, I believe correctly, that § 401 is self-implementing; i.e., that certifying agencies need not adopt implementing regulations. See *State of California ex rel. State of California Water Resources Control Bd. v. FERC*, 966 F.2d 1541, 1554 (9th Cir. 1992) (holding that FERC rule concerning § 401 waiver period "was an interpretive rule that simply applied the one-year limitation set forth in the CWA"). See also *infra* note 392 and accompanying text.

109. 33 U.S.C. § 1341(a)(1).

110. EPA's certification rule essentially recites the statute: "License or permit means any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into the navigable waters of the United States." 40 C.F.R. § 121.1(a) (1995). See *supra* notes 29-30.

111. 33 U.S.C. § 1341(a)(1).

permission, would be illegal, a trespass, or a tort."¹¹² The Administrative Procedure Act (APA)¹¹³ defines "license" to include "permit . . . or other form of permission."¹¹⁴ Cases involving "licenses or permits" that are generally considered to be subject to section 401 have found such licenses to be "licenses" per the APA.¹¹⁵

This broad reading of "license or permit" is supported by the legislative history of section 401. The Senate clean water bill, S. 2770, initially defined "permit" to "mean[] any permit or equivalent document or requirement issued to regulate the discharge of pollutants,"¹¹⁶ but this definition was deleted in conference.¹¹⁷ Nevertheless, the conferees stated their "intent" regarding the meaning of "permit" in exactly the same terms used in the Senate bill definition.¹¹⁸ In the next and final sentence in the paragraph describing this change, the conferees expressed their further intent that "the term 'navigable waters' be given the broadest possible constitutional interpretation."¹¹⁹ One can only speculate about the import of this discussion, but it does indicate that Congress contemplated "permit" broadly and did not intend to limit the term's meaning to permits for discharges into waters considered (under prior law) "navigable" in fact.¹²⁰

112. BLACK'S LAW DICTIONARY 829 (5th ed. 1979).

113. 5 U.S.C. §§ 551-706 (1994).

114. *Id.* § 551(8) (" 'license' includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission"). The APA definition of "license" is "extremely broad." *Air N. America v. Department of Transp.*, 937 F.2d 1427, 1437 (9th Cir. 1991); *see also* *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 880 n.15 (1st Cir.) (noting that the definition of "license" is very broad), *cert. denied*, 439 U.S. 824 (1978).

115. *See, e.g., Seacoast Anti-Pollution League*, 572 F.2d at 880 & n.15 (implying that APA term "license" encompasses CWA § 402 permit). *Cf.* LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 162, 179 (Senate consideration of the Conference Committee report, noting that the Committee's amendment of the definition of "citizen" in the citizen suit provision of the Clean Water Act was "based on Section 10 of the Administrative Procedures [sic] Act, 5 U.S.C. § 702"); *see also* S. REP. NO. 1236, 92d Cong., 2d Sess. 146 (1972), *reprinted in* LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 329.

116. S. 2770, 92d Cong., 1st Sess. 167 (1971), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1700 [hereinafter LEGISLATIVE HISTORY, VOL. 2]. The House bill contained no definition of "permit."

117. S. REP. NO. 1236, 92d Cong., 2d Sess. 143-44 (1972), *reprinted in* LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 326-27. The conferees' stated reason for this amendment suggested that "permit" as defined had referred only to §§ 402 and 404 permits. *Id.* at 144, *reprinted in* LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 326. Note: This discussion of the term "permit" was not specific to the § 401 context.

118. "It is the conferees' intent that a permit means any permit or equivalent document or requirement issued to regulate the discharge of pollutants." *Id.*

119. *Id.*

120. *See* *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (ruling that "the term 'navigable' as used in the Act is of limited import," and "navigable waters" includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term"). "[V]irtually every lower court opinion on the jurisdictional issue" goes even farther, though, to hold that "permitting authority under the

Furthermore, during debate on a proposed amendment to section 401 in S. 2770, bill sponsor Senator Muskie stated: "All we ask is that activities that threaten to pollute the environment be subjected to the examination of the . . . State . . . before the Federal license or permit be granted."¹²¹ He indicated that section 401 was addressed to "the AEC [Atomic Energy Commission] and every other agency,"¹²² and concluded: "what we are talking about is subjecting every activity in the private and public sector . . . —they are all subject to this kind of scrutiny, and every other Federal activity is."¹²³

Although no cases deal specifically with the issue of what permits are subject to section 401 review, the Supreme Court in *PUD No. 1 v. Washington Department of Ecology* stated that "certification applies . . . to all federal licenses and permits for activities which may result in a discharge."¹²⁴ The Court provided insight in the public lands arena, citing federal permits "from the Secretary of the Interior or Agriculture for the construction of reservoirs, canals, and other water storage systems on federal land," as examples of permits requiring section 401 certification.¹²⁵ These examples might imply that 401 review is limited to federal permits required for water project-related facilities,¹²⁶ but many other projects requiring the same federal permits may also result in a discharge to waters.¹²⁷

Water Act [by virtue of the breadth of the term "navigable waters"] extend[s] as far as the reach of the federal commerce power." *BATTLE & LIPELES, supra* note 14, at 48-49. The expression "discharge into the navigable waters" is used in CWA §§ 401, 402, and 404. Sections 402 and 404 pertain to permits issued under the authority of the CWA, while § 401 applies to "any Federal license and permit," which has been construed to encompass 402 and 404 permits as well as permits issued under various other authorities. *See supra* notes 88-105 and accompanying text. Given the variety of "permits" potentially brought within § 401's net, it would have been difficult for Congress to draft a more specific definition to cover them all. The conferees' broad construction of "navigable waters," into which discharges subject to various "permits" may occur, thus takes on greater significance—as evidence of an intent to cast a wide net around all permits with relevance for CWA purposes. "Navigable waters" does, however, serve to limit the universe of permits subject to § 401. *See infra* notes 151-56 and accompanying text.

121. LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 1388.

122. *Id.* at 1389 (emphasis added).

123. *Id.* at 1390 (emphasis added).

124. 114 S. Ct. 1900, 1914 (1994).

125. *Id.* The Court was referring to right-of-way grants issued pursuant to the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761 (1994), by the Secretaries of Agriculture and Interior. *See also* 43 C.F.R. pt. 2800 (1995) (defining procedures for right-of-way permit applications). "Right-of-way" is defined to include lease, permit, license, or easement. 43 U.S.C. § 1702(f) (1994).

126. 114 S. Ct. at 1914. *But see* *California ex rel. State Water Resources Control Bd. v. FERC*, 966 F.2d 1541, 1561 (9th Cir. 1992) (holding that BLM right-of-way authority under FLPMA does not include facilities licensed by FERC).

127. *See* 43 C.F.R. § 2800.0-7(a) (1995) (listing the kinds of activities that require a right-of-way grant or temporary use permit). The 401 certification process could be easily accommodated within the framework established by the 43 C.F.R. part 2800 regulations. *See, e.g.,* 40 C.F.R. § 2801.1-1(g), (k) (requiring that any right-of-way grant be as limited in

At least some activities requiring federal right-of-way permits (particularly those listed by the Court) also would require a section 404 permit, which itself would trigger 401 certification.¹²⁸ But even if a section 404 permit is not required because no discharge of dredged or fill material will occur, the nonpoint source impacts of the activity for which the right-of-way grant is sought should be subject to section 401 review.¹²⁹

Academic commentary also supports a broad interpretation of the term "Federal license or permit." Ransel and Meyers argue for such an interpretation based on the plain language of section 401 and the legislative history of the 1972 Clean Water Act amendments,¹³⁰ but they do not speculate as to what additional federal licenses and permits (beyond sections 402 and 404 permits, FERC permits, and permits under RHA sections 9 and 10) should qualify for 401 review.¹³¹ Instead, they conclude by urging EPA to amend its section 401 rules to clarify the scope of states' section 401 authority.¹³² The EPA and Ms. Ransel have suggested that section 401 should apply to applications for permits to conduct activities on public lands.¹³³ The

scope and comply with any other applicable provision of law); 40 C.F.R. § 2801.2 (requiring, *inter alia*, right-of-way terms "to ensure that activities in connection with the grant or permit shall not violate applicable . . . water quality standards"); 40 C.F.R. § 2801.3 (dealing with taking right-of-way without permit); 40 C.F.R. § 2802.1 (providing for coordination among federal, state, and local government agencies during pre-application phase); 40 C.F.R. § 2802.3(b)(1) (providing for applicants to submit with their applications any "State approvals required for the proposal"); 40 C.F.R. § 2802.4 (denying permit approval if proposal does not meet state requirements).

128. A recent example from Wyoming involves the permitting of a proposed natural gas pipeline. The stream crossings along the proposed route would involve discharges of dredged or fill material and hence require a § 404 permit. The Wyoming Department of Environmental Quality warned the project proponent that certification of two of these discharges would be denied unless compliance with a specified state water quality standard could be assured. FEDERAL ENERGY REGULATORY COMMISSION, PGT/PG&E AND ALTAMONT NATURAL GAS PIPELINE PROJECTS FINAL ENVIRONMENTAL IMPACT STATEMENT, COMMENTS/RESPONSES SA-55, SA-56 (1991). Certain facilities requiring a FLPMA right-of-way may also need a FERC license, which itself would trigger 401 review. See *supra* notes 98-101 and accompanying text.

129. Concerning NPS discharges and § 401 generally, see *infra* part II.B.1. This issue takes on added significance because of 43 U.S.C. § 1761(c), which authorizes the conversion of certain federal rights-of-way to *permanent easements* if certain requirements are met and written application is made by December 31, 1996. Even if § 401 applied to these rights-of-way when initially granted, it is not certain whether it is applicable now or by what mechanism it could be applied. *But cf.* Ransel, *supra* note 13, at 271 (arguing that states should be able to use § 401 to "recover" designated uses that have been eliminated by dams).

130. See Ransel & Meyers, *supra* note 13, at 346-53.

131. See *id.* at 345-47.

132. *Id.* at 353. EPA acknowledges that "the water quality certification process is continually evolving." WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 6.

133. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 20; Ransel, *supra* note 13, at 269, 271. Ms. Ransel's is apparently the first suggestion in the literature that § 401 may apply to federal grazing permits and timber sales. Nor had the question been litigated

EPA and Professor William Rodgers have suggested that licenses to construct and operate nuclear power plants also require certification.¹³⁴

Thus, all authority supports the proposition that many activities requiring federal permission, beyond those discussed above, may come within the purview of section 401. Indeed, assuming the truth of the proposition in the next subpart—that the "discharge" from the permitted facility or activity may be from a point source or a nonpoint source—many additional federal permits should be subject to section 401 review. The following list of permits and licenses is not meant to be exhaustive, but will illustrate the potential range and diversity of these activities.¹³⁵

—permits issued under the Shore Protection Act¹³⁶

—special use permits issued by the U.S. Forest Service for activities conducted in national forests¹³⁷

—use authorizations for acquired forest lands under the Bankhead-Jones Act¹³⁸

—special land use permits issued by the Bureau of Land Management (BLM)¹³⁹

prior to this year. See *infra* notes 467-71 and accompanying text. Certification of federal grazing permits is taken up in more detail in part III of this paper.

134. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 20; RODGERS, *supra* note 13, § 4.2, at 26; *id.* § 4.16, at 252. Nuclear facilities are licensed by the Nuclear Regulatory Commission (NRC), formerly AEC, pursuant to 42 U.S.C. §§ 2133-2134 (1994). See also *id.* §§ 2235, 2242 (1994). The legislative history of § 401 indicates that thermal pollution from nuclear power plants was one of the concerns behind the certification requirement. See *infra* note 180 and accompanying text. See also S. REP. 414, 92d Cong., 1st Sess. 69 (1971), reprinted in LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1487 (noting that a state could deny a permit and thereby prevent the issuance of a permit or license "by such Federal agencies as the Atomic Energy Commission, Federal Power Commission, or the Corps of Engineers").

135. This list is provided for discussion purposes only. I have not examined each of these permit programs in detail with respect to CWA § 401 as I have federal grazing permits issued pursuant to U.S. Forest Service and Bureau of Land Management authority. See *infra* part III.

136. 33 U.S.C. §§ 2601-2623 (1994) (vessel permits are issued pursuant to *id.* § 2602).

137. 16 U.S.C. §§ 497, 497b, 551 (1994); 36 C.F.R. § 251.50 (1995).

138. 7 U.S.C. §§ 1010-1012 (1994); 36 C.F.R. § 213.3 (1995). See *Duncan Energy Co. v. United States Forest Serv.*, 50 F.3d 584 (8th Cir. 1995) (holding that Forest Service approval was required for mineral exploration on claims owned by plaintiff underlying acquired lands within Custer National Forest).

139. 43 C.F.R. pt. 2800. According to BLM regulations, the natures of the interests in the right-of-way grant and the related temporary use permit are identical. 43 C.F.R. § 2801.1-1(a). "Right-of-way grant" and "temporary use permit" are defined at 43 C.F.R. § 2800.0-5(h) and (i), respectively. Thus, it would seem absurd to call the latter but not the former a "permit" for purposes of CWA § 401. The same would seem true for at least some leases, as well as permits, covered by 43 C.F.R. part 2920, Leases, Permits, and Easements. See 43 C.F.R. § 2920.0-5(c), (d) (1995) (defining leases and permits as, *inter alia*, authorizations to use public lands). An exception might be oil and gas leases, which do not in themselves authorize any surface disturbance and which thus would not result in any discharge. See, e.g., *Park County Resource Council, Inc. v. United States Dep't of Agric.*,

- public land range improvement permits¹⁴⁰
- issuance of timber contracts¹⁴¹
- deepwater port permits¹⁴²
- Marine Mammal Protection Act permits (for activities within navigable waters)¹⁴³
- facility licenses issued pursuant to the Ocean Thermal Energy Conversion Act¹⁴⁴
- contracts to use federal irrigation project water¹⁴⁵
- incidental take permits under the Endangered Species Act¹⁴⁶

817 F.2d 609, 622 (10th Cir. 1987) (holding that BLM's finding of no significant impact due to oil and gas leases was appropriate). *But see* *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 (D.C. Cir. 1983) (holding that agency can preclude surface disturbance only if lease contains a "no surface occupancy" stipulation). In contrast, a permit to drill, obtained subsequent to an oil and gas lease, should be subject to § 401. *See* 43 C.F.R. §§ 3162.2, 3162.3-1, 3592.1 (1995) (BLM regulations for drilling permits and operating plans); 36 C.F.R. § 228.106-108 (1995) (conditions for drilling on national forests). Section 401 review of possible impacts to water due to activities conducted pursuant to an oil or gas drilling permit could be more extensive than the review triggered by the application for a § 402 permit for the discharge of produced waters from the well.

140. *See* 43 C.F.R. § 4120.3-3 (1995).

141. *See* *McClellan Ecological Seepage Situation v. Cheney*, 763 F. Supp. 431, 441 (E.D. Cal. 1989) (noting, in dictum, that a U.S. Forest Service timber sale contract is a "license" under the Administrative Procedure Act, 5 U.S.C. § 551(8)), *vacated and remanded with instructions*, *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir.), *and cert. denied*, 116 S. Ct. 51 (1995). *See also* *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 & n.10 (9th Cir. 1986) (discussing impacts of road construction and timber harvesting on water quality and fish habitat), *rev'd sub nom. on other grounds*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1425 (9th Cir. 1989) (concerning effects of timber sale on water quality).

142. The Deepwater Port Act, 33 U.S.C. §§ 1501-1524 (1994), requires a license for operating a port beyond the territorial seas. States would have no § 401 authority over the port area itself, but should be able to review the potential water quality impacts of traffic between shore and the port within the three-mile zone included in the Act's definition of "navigable waters." *See infra* notes 151-56 and accompanying text.

143. *See* 16 U.S.C. § 1374 (1994).

144. 42 U.S.C. §§ 9101-9168 (1994).

145. *See, e.g.*, Reclamation Reform Act of 1982, 43 U.S.C. §§ 390aa to 390zz-1 (1994). The water quality and fish and wildlife impacts of irrigation, including irrigation using federal project water, are well documented. *See generally* George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. DAVIS L. REV. 461, 465-66 (1990); Gary Bobker, *Agricultural Point Source Pollution in California's San Joaquin Valley*, NAT. RESOURCES & ENV'T, Winter 1995, at 13; TOM HARRIS, *DEATH IN THE MARSH* (1991) (concerning Kesterson National Wildlife Refuge in California, where selenium in contaminated runoff caused heavy mortality and widespread deformities in wildlife, particularly fish and migratory birds). An entire article could be devoted to analyzing whether contracts to use federal irrigation project water under the Reclamation Act may be considered a "Federal license or permit" for purposes of CWA § 401. Concerning the distinction between contracts and licenses, *see generally* *Anderson v. Eby*, 998 F.2d 858 (10th Cir. 1993); *McClellan*, 763 F. Supp. at 441.

146. 16 U.S.C. § 1539(a)(1)(B) (1994). This suggestion may seem to stretch states' 401 authority to the breaking point, but consider that certification could provide a means of regulating the nonpoint source impacts of the activity that may incidentally "take" a

- facility permits issued by EPA under the Resource Conservation and Recovery Act (RCRA)¹⁴⁷
- Clean Air Act permits¹⁴⁸
- operating plans for mining on public lands¹⁴⁹
- permits for construction of artificial reefs¹⁵⁰

The universe of 401-reviewable permits is bounded, however, by virtue of the statutory prerequisite of a "discharge into the navigable waters."¹⁵¹ The term "navigable waters" is defined in the Clean Water Act to include the territorial seas.¹⁵² "[T]erritorial seas" refers to the belt of "open sea" three miles wide lying along the shores of coastal states.¹⁵³ Consequently, discharges into the sea beyond the seaward limit of the territorial seas, although potentially subject to permitting under section 402, escape scrutiny under section 401.¹⁵⁴ This conclu-

threatened or endangered species, when otherwise those impacts might go unregulated under the Clean Water Act.

147. 42 U.S.C. § 6925 (1994) (requiring permits for facilities that treat, store, or dispose of hazardous wastes). Discharges to water from these facilities may be subject to permitting under CWA § 402, but if the potential discharges are not point-source-related and if the state is not authorized to administer RCRA, § 401 would provide the source state authority it would not otherwise possess to regulate the possible water quality impacts of the facility.

148. *See* 42 U.S.C. §§ 7475, 7651g (1994). Major stationary sources of sulfur dioxide and nitrogen oxides can contribute to acid deposition, with known (and suspected) effects on surface water quality and vegetation. *See id.* § 7475(d) (regarding air quality-related values). Where EPA, rather than the state, is the permitting agency, § 401 review of the potential water-quality-related impacts of some of these facilities may be appropriate.

149. 43 C.F.R. § 3809.1-4 to .1-7 (1995) (operating plans on BLM lands); 36 C.F.R. § 228.4-.5 (1995) (operating plans on national forests). Each federal agency's regulations already require that state water quality requirements be met, e.g., 36 C.F.R. § 228.8(b) (1995); 43 C.F.R. § 3809.2-2(b) (1995), but stop short of authorizing the agency to veto mining on public lands. At least some in Congress do not believe that the Forest Service has statutory authority to prohibit prospecting or mining. *See* COGGINS ET AL., *supra* note 16, at 488-89 (citing letter from Montana Sen. Melcher to former Forest Service Chief John Maguire, stating House Subcommittee on Public Lands' belief that the Forest Service lacks authority to prohibit mining or prospecting). Yet all authorities agree that § 401 gives states a veto power over federally permitted activities that may violate applicable water quality requirements. *See infra* part II.B.3.

150. *See* 33 U.S.C. §§ 2101, 2104 (1994). But note that these permits are issued under other permitting authorities, such as CWA § 402 or § 404. 33 C.F.R. §§ 322.2(g), 322.5(b), (1995). And CWA § 401 would be relevant only to permits issued for artificial reefs in navigable waters. *See infra* notes 151-56 and accompanying text.

151. 33 U.S.C. § 1341(a)(1).

152. *Id.* § 1362(7).

153. *Id.* § 1362(8) (" 'territorial seas' means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles").

154. "Discharge of a pollutant" is defined to mean both "(A) any addition of any pollutant to navigable waters from any point source, [and] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." *Id.* § 1362(12) (emphasis added). "[C]ontiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone." *Id.* § 1362(9). "[O]cean"

sion is confirmed by the legislative history,¹⁵⁵ and at least one reported case has so held.¹⁵⁶

2. The Existence of a Discharge

The second prerequisite for section 401 application is the potential for a "discharge." Although to date states have usually exercised their section 401 authority to review only permits for activities involving a point source discharge, this subpart argues that either a point source or a nonpoint source discharge can serve as the trigger for section 401 certification.

Section 401 applies to "any activity . . . which may result in any discharge."¹⁵⁷ On its face then, section 401's application is not limited to point source discharges. This conclusion is corroborated by the meaning of the term "discharge" in the context of the Clean Water Act as a whole.

The Clean Water Act defines "discharge" and related terms of art as follows: "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."¹⁵⁸ "[D]ischarge of a pollutant' . . . means (A) any addition of any pollutant to navigable waters from any point source . . ."¹⁵⁹ "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equip-

means any portion of the high seas beyond the contiguous zone." *Id.* § 1362(10). Thus, as an example, states should have no authority under § 401 to review permits for ocean dumping issued under §§ 102 and 103 of the Marine Protection, Research, and Sanctuaries Act, *id.* §§ 1412-1413 (1994).

155. H.R. REP. NO. 911, 92d Cong., 2d Sess. 124 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 811 ("It should be clearly noted that the certifications required by section 401 are for activities which may result in any discharge into navigable waters. It is not intended that State certification is or will be required for discharges into the contiguous zone or the oceans beyond the territorial seas.").

156. *Natural Resources Defense Council v. United States EPA*, 863 F.2d 1420, 1435-36 (9th Cir. 1988) (holding that certification was not required for discharges that occurred more than three miles offshore, i.e., beyond the limits of the territorial sea). The court noted that only discharges into the "navigable waters" are subject to certification under § 401, and "navigable waters" is defined in the CWA, at 33 U.S.C. § 1362(7), as "the waters of the United States, including the territorial seas." *Id.* at 1435. This had been interpreted to mean "only those waters landward from the outer boundary of the territorial seas." *Id.* (citation omitted; emphasis in original). The court further found that the legislative history supported this conclusion. *Id.* at 1436. See *supra* note 155. But see *Save Our Sound Fisheries Ass'n v. Callaway*, 387 F. Supp. 292, 306 (D.R.I. 1974) (implying that certification would have been required for discharges of dredged spoil 4.6 miles offshore, but for the then-extant exemption in § 401(a)(6) of federal agencies from the requirement to obtain a certification). (The exemption of federal agencies in § 401(a)(6) was deleted by the 1977 CWA amendments.)

157. 33 U.S.C. § 1341(a)(1) (emphasis added).

158. *Id.* § 1362(16) (emphasis added).

159. *Id.* § 1362(12) (emphasis added).

ment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."¹⁶⁰ And finally, " 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, . . . conduit, [etc.]"¹⁶¹ In plain language, then, a "discharge of a pollutant" is a discharge from a point source, such as an industrial or sewage treatment plant outflow pipe, whereas a generic "discharge" includes, but is not limited to, a "discharge of a pollutant."

The definitions of "discharge" and "discharge of a pollutant" contrast starkly. The compass of the former term is largely uncircumscribed; the latter is defined precisely. The definition of "discharge" is the *only one* of twenty definitions in the CWA that employs the word "includes." Every one of the other nineteen definitions uses "means" or "mean."¹⁶² This plainly reveals that Congress intended "discharge" to be interpreted as *including, but not limited to*, point source discharges. If Congress had intended otherwise, it would simply have said, one more time, "discharge means . . ." One must conclude that Congress intended the two terms to encompass different, although overlapping, categories of things. Otherwise, one or the other is "mere surplusage," an interpretation the courts eschew.¹⁶³

160. *Id.* § 1362(6). This definition is not intended to be an inclusive list. See, e.g., *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174 & n.56 (D.C. Cir. 1982). EPA itself "admits that 'sediment' is a pollutant, although not clearly listed." *Id.*

161. 33 U.S.C. § 1362(14).

162. See *id.* § 1362(1)-(15), (17)-(20).

163. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2413 (1995); *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994) (read statutes to give independent effect to all provisions). See also *National Wildlife Fed'n v. Gorsuch*, 693 F.2d at 172 ("Congress [in § 506(6)] used restrictive phrasing—the term 'pollutant' means dredged spoil, [etc.]—rather than the looser phrase 'includes,' used elsewhere in the Act."; footnote omitted, emphasis in original); *Ransel, supra* note 13, at 269 ("[w]here Congress took the trouble separately to define these terms, the argument that 'any discharge' in section 401 is no broader than the definition of 'discharge of pollutant' [is] only wishful thinking").

EPA's rule at 40 C.F.R. § 122.2 (1995) (providing that "[d]ischarge when used without qualification means the 'discharge of a pollutant'" (second emphasis added)), is inapposite. It applies only to parts 122, 123, and 124 of EPA's regulations, which pertain to permits issued pursuant to § 402 of the Act (known as NPDES permits, for the National Pollutant Discharge Elimination System established by that section). *Id.* For purposes of NPDES permits, "discharge" does mean a discharge of a pollutant, i.e., a discharge from a point source. Thus, this rule is not inconsistent with the comparative construction of the terms "discharge" and "discharge of a pollutant" as defined in the CWA and discussed in this part of the article. Nor does the legislative history alter this conclusion. Although the report of the Senate debate on the Conference Committee Report on S. 2770 states that " 'discharge' is a word of art in the legislation [which] refers to the actual discharge from a point source into the navigable waters," the report was distinguishing not between the terms "discharge" and "discharge of a pollutant" but between "direct" and "indirect" discharges (that is, between point source discharges directly to navigable waters and discharges indirectly into waters via publicly owned treatment plants). See LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 178.

These distinctions make clear that the discharges subject to certification (i.e., "any discharge[s]") are not limited to "discharges of pollutants," i.e., point source discharges, but must include any *other* discharges as well.¹⁶⁴ In section 401 the generic term "discharge" is "used without qualification."¹⁶⁵ Indeed, as if to reinforce the term's open-ended scope in the 401 context, Congress wrote "*any* discharge," even though "discharge" alone clearly would have sufficed, given its statutory definition. Moreover, the word "pollutant" (as in "discharge of a pollutant") appears *nowhere* in section 401.¹⁶⁶

It also makes no sense to read "point source discharge" into the sentence of section 401(a)(1) containing the language "*any* applicant for a Federal license or permit to conduct *any* activity . . . which may result in *any* discharge." The effect of such an inference would be to conflate all permits to which section 401 applies to only two kinds of permits—section 402 (NPDES) permits and section 404 (dredge-and-fill) permits—because *all* point source discharges, unless expressly exempted by Congress, require one of these permits.¹⁶⁷ If such were Congress's intent in section 401, we would expect it to have said "*any* applicant for a permit under section 1342 or 1344 of this title," and to refer to the "Administrator or Secretary"¹⁶⁸ instead of to "the Federal agency issuing such license or permit" or "the licensing or permitting agency."¹⁶⁹ Indeed, we might expect section 401's provisions simply

164. Cf. *Natural Resources Defense Council v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd*, *Natural Resources Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The *NRDC* court concluded, based on the definition of "discharge of pollutant," which refers to point sources, that all *nonpoint sources* are therefore excluded from the NPDES permit requirement. 396 F. Supp. at 1395 ("[t]hus, all nonpoint sources are excluded"). Conversely, the use in § 401 of the statutory term "discharge," as opposed to "discharge of pollutant," should mean that § 401 is *not* limited to point sources.

165. See 33 U.S.C. § 1362(16).

166. Similarly, the word pollutant does not appear in the discussion of § 401 in the Conference Report accompanying S. 2770, S. REP. NO. 1236, 92d Cong. 2d Sess. 138, reprinted in *LEGISLATIVE HISTORY, VOL. 1*, *supra* note 29, at 321, nor in EPA's regulations, 40 C.F.R. part 121. On the other hand, a Corps of Engineers regulation, which purports to paraphrase the CWA certification requirement, refers to "any activity that may result in a discharge of a pollutant." See 33 C.F.R. § 320.3(a) (1995). The rule's wording might be simply an oversight. Alternatively, the rule may reflect the fact that § 404 permits are required specifically for the *discharge of dredged material*, which is a type of "pollutant." See 33 U.S.C. § 1362(6) ("pollutant" includes "dredged spoil"). In any event, because the word "pollutant" does not appear in CWA § 401, this regulation must be deemed to take an unjustifiably narrow view of the scope of the certification review.

167. See *supra* notes 10, 93. See also *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1379 (D.C. Cir. 1977) (holding that EPA may not exempt any category of point sources, as defined in the CWA, from regulation).

168. "Administrator" refers to the Administrator of EPA, assigned responsibility for issuing § 402 permits; "Secretary" refers to the Secretary of the Army, responsible for the § 404 program. See 33 U.S.C. §§ 1342, 1344.

169. See, e.g., *id.* § 1341(a)(5).

to have been incorporated in section 402 and section 404. But, of course, Congress did or said none of these things.¹⁷⁰

Section 401 is not alone among Clean Water Act provisions in using a broad definition of "discharge." Section 311 of the Act,¹⁷¹ which pertains to liability for spills of oil and hazardous substances, provides an express example of a "discharge" which is *not* a "discharge of a pollutant." A section 311 discharge "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, *but excludes* . . . discharges in compliance with a permit under section [402],"¹⁷² i.e., "discharges of pollutants." Spills or leaks of oil, which are "discharges" under section 311, would thus qualify as "discharges" for purposes of section 401, though not for section 402.¹⁷³

The legislative history also shows no intent to require a point source discharge as a predicate for section 401 review. The "any discharge" language of section 401 also occurred in the section's predecessor, section 21(b) of the Water and Environmental Quality Improvement Act of 1970 (or 1970 Water Quality Act).¹⁷⁴ Because the use of this phrase predates the adoption of the "point source" definition in the 1972 Federal Water Pollution Control Act (FWPCA) Amendments,¹⁷⁵ it goes without saying that Congress was not contemplating "point source discharges" when it wrote "any discharge" into the precursor of section 401.¹⁷⁶ Moreover, because Congress was well aware of the nonpoint source pollution problem at least as early as

170. In fact, in documenting the amendment of § 401 in 1977 to incorporate references to CWA § 303, see *infra* note 186, the Conference Committee stated that "a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with state water quality standards." H. REP. NO. 830, 95th Cong., 1st Sess., 96, reprinted in *A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977: A CONTINUATION OF THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT, VOL. 3*, at 280, Ser. No. 95-12 (U.S.G.P.O. Dec. 1977) (emphasis added) [hereinafter *LEGISLATIVE HISTORY, VOL. 3*].

171. 33 U.S.C. § 1321.

172. *Id.* § 1321(a)(2) (emphasis added).

173. Cf. *Roosevelt Campobello Int'l Park Comm'n v. United States EPA*, 684 F.2d 1041, 1055-56 (1st Cir. 1982). It is possible that Congress was prompted to adopt a definition of "discharge" that included point source discharges *and* other "discharges" because it realized that it was exempting from point source status, and hence from regulation under the Act, some "discharges" that result in "pollution"—for instance, runoff from agricultural, silvicultural, mining, and construction activities. See 33 U.S.C. § 1314(f). Indeed, the term "discharge" was used by some members of Congress to refer to such runoff. For instance, during the House debate on H.R. 11896, Rep. Wright of Texas stated that § 304 called for "the development of guidelines . . . and methods to control nonpoint sources of pollutants, including those from agricultural activities. That would include *discharge* from livestock operations other than the 'point source' discharge covered in section 502[.]" *LEGISLATIVE HISTORY, VOL. 1*, *supra* note 29, at 645-46 (emphasis added).

174. Pub. L. No. 91-224, 84 Stat. 91 (1970).

175. Pub. L. No. 92-500, 86 Stat. 816 (1972).

176. See *de Rham v. Diamond*, 295 N.E.2d 763, 766 (N.Y. 1973) (citing "any discharge" language in § 21(b) of the former statute, 33 U.S.C. § 1171).

1970,¹⁷⁷ it cannot be argued persuasively that the legislature simply was not thinking of polluted runoff when it debated and passed section 401. According to EPA, a focus on the contribution of federal activities and operations to the nation's water pollution problems characterized congressional consideration of section 401 from the beginning:

When the Congress first enacted the water quality certification provision in 1970 [in § 21(b) of the 1970 Water Quality Act], it spoke of the "wide variety of licenses and permits . . . issued by various Federal agencies," which "involve activities or operations *potentially affecting water quality*." The purpose of the water quality certification requirement, the Congress said, was to ensure that no license or permit would be issued "for an activity that through inadequate planning or otherwise could in fact *become a source of pollution*."¹⁷⁸

The legislative history of section 21(b) contains considerable evidence supporting EPA's view of congressional intent behind certification. According to Senator Muskie, the objective of section 21, which included the certification requirement, in the 1970 legislation was the "regulation of Federal activities *affecting water quality*."¹⁷⁹ Thermal pollution by Atomic Energy Commission (AEC) projects apparently was a motivating force behind the requirement in section 21(a) that "[e]ach Federal agency . . . having jurisdiction over any real property or facility . . . shall . . . insure compliance with applicable water quality standards and the purposes of this Act in the administration of such

177. For example, during the Senate debate on the 1970 Water Quality Improvement Act (S. 7), Sen. Jennings Randolph spoke of the Senate Public Works Committee's consultations with an expert advisory panel on such topics as "the impact of land mismanagement from highway construction, from urban development, from mining, or from sanitary landfills"; "biological imbalances created by dredging, thermal pollution, pesticides, and air pollution"; and "problems connected with flooding and dam construction, the effects of building reservoirs, and the use of nuclear energy." 115 CONG. REC. 28,962 (1969). See also H.R. REP. NO. 911, 92d Cong., 2d Sess. 106 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 793 (discussing fact that "nonpoint sources of pollution are a major contributor to water quality problems," and that more stringent effluent limitations on point sources may not be sufficient to achieve water quality standards); ADLER ET AL., *supra* note 1, at 171 ("[NPS] pollution was widely acknowledged as a water quality problem even before 1972"). In the 1972 Amendments, Congress enacted CWA § 208(b), which called for areawide waste treatment management plans that would, *inter alia*, identify nonpoint sources of pollution and establish methods for controlling them "to the extent feasible." 33 U.S.C. § 1288(b)(2)(F).

178. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 20, 22 (quoting, first, H.R. REP. NO. 127, 91st Cong., 1st Sess. 6 (1969), and second, 115 CONG. REC. H9030 (Apr. 15, 1969), and 115 CONG. REC. S28, 958-59 (Oct. 7, 1969); emphasis added); see also *id.* at 22.

179. LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1256 (Sen. Muskie is considered "the key Congressional architect of the Clean Water Act of 1972."). Beverly M. Smith, *The Viability of Citizens' Suits Under the Clean Water Act After Gwaltney v. Smithfield v. Chesapeake Bay Foundation*, 40 CASE W. RES. L. REV. 1, 13 (1989-90).

property, facility, or activity."¹⁸⁰ But to an implicit suggestion on the House floor that the certification provision (in section 21(b)) was addressed *principally* to thermal pollution, such as by AEC plants, Rep. McEwen of New York responded: "[The certification requirement] applies to other matters other than just steamplant power generating facilities, it applies to *anything where a license is required*."¹⁸¹

Rep. Edmondson of Oklahoma corroborated this latter view and further explained:

A wide variety of licenses and permits—construction, operating, and otherwise—are issued by various federal agencies. Many of them involve activities or operations potentially affecting water quality. The purpose of subsection [21(b)] is to provide reasonable assurance that no license or permit will be issued by a federal agency for an activity that through inadequate planning or otherwise could in fact become a source of pollution.¹⁸²

180. Pub. L. No. 91-224, § 21(a), 84 Stat. 91 (1970). See, e.g., 115 CONG. REC. 9027, 9036, 9050 (1969) (comments of Rep. Reid of New York, stating that § 21 was "specifically intended to require that the [AEC] take thermal pollution into consideration when issuing licenses for nuclear generating facilities").

181. 115 CONG. REC. 9027 (1969) (emphasis added); see also *id.* at 9050.

182. *Id.* at 9030. See *supra* note 179 and accompanying text. Other senators and representatives echoed these comments. Sen. Cooper from Kentucky, for example, made it unmistakably clear that many federal activities had been discussed in the context of § 21 and that all federal activities were meant to be included:

Many Federal activities contribute directly to water pollution and these include such diverse activities as naval vessels discharging sewage and waste into the waters of the United States, dredging activities of the Corps of Engineers, and sewage and waste disposal from Federal facilities of all kinds. Indirectly, the Federal Government *contributes to pollution* in its licensing activities over such things as nuclear power plants, hydroelectric power plants licensed by the [FPC] and dredge and fill permits issued by the [Corps]. S. 7 will require, *without exception*, that all Federal activities that have any effect on water quality be conducted so that water quality standards will be maintained. . . .

. . . Section 16 of the bill [section 21, as enacted] provides an integrated and comprehensive program designed to require compliance with applicable water quality standards in *all* Federal activity and federally licensed or permitted activity [sic]. . . . [S]ection 16 makes *no exception* for any licensed or permitted activity from its operative principle of State certification. Furthermore, section 16 is consistent with, and arises out of the policy of the 1965 [water quality] act that the primary responsibility for controlling water pollution rests with the States. . . . 115 CONG. REC. 28,971 (1969) (emphasis added). See also *id.* at 28,955 (remarks of Sen. Muskie, describing the bill's "mechanism for insuring that all Federal activities will comply with the philosophy and intent of the Nation's water quality program"); *id.* at 28,956 (Sen. Muskie, stating that the bill "explicitly requires that all federally supported public works projects and programs be planned, developed and administered with full consideration of their impact on our air, water and land"); *id.* at 67 (remarks of Sen. Young, indicating that Title II of the bill, including § 16, is addressed to "all Federal moneys spent on public works activities which affect the environment"). Rep. Eilberg stated: "Federal agencies which control property or issue licenses and permits for construction or development, have a major role to play in pollution control, since many of these facilities and operations affect water quality. . . . [Section 21] simply means that the Federal Government, in *all of its activities*, will lead the way in preventing pollution." *Id.* at 9051 (emphasis added). Similarly, Rep. McEwen of New York stated that the § 21(b) certification requirement "applies to *anything where a [federal] license is required*." *Id.* at 9027 (emphasis added). McEwen

Three years later, during debate on the 1972 amendments to the FWPCA, bill sponsor Senator Muskie made similar comments concerning the proposed section 401, indicating that its provisions were addressed to "the AEC and every other agency."¹⁸³ He continued: "[W]hat we are talking about is subjecting every activity in the private and public sector . . . —they are all subject to this kind of scrutiny, and every other Federal activity is."¹⁸⁴

The contemporary significance of this history lies in the fact that the certification language was changed only minimally when Congress enacted the current section 401 in 1972.¹⁸⁵ Thus, the legislative history of section 21(b) is also relevant to congressional intent behind section

was responding to an implicit suggestion by a colleague that the certification provision was addressed principally to thermal pollution. At least one member of the Senate also believed that § 21 was "directed primarily at thermal discharges, and pollution from dredged spoil." *Id.* at 28,958 (comments of Virginia Sen. Spong). But such views were clearly in the minority. See *supra* note 181. Moreover, nothing in the language of § 21(b) or the current § 401 gives them credence today.

183. LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1389 (emphasis added).

184. *Id.* at 1390 (emphasis added).

185. See H.R. REP. NO. 911, 92d Cong., 2d Sess. (1972), reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 753, 808 ("Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the [FWPCA]"); accord S. REP. NO. 414, 92d Cong., 2d Sess. 69 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1487. See also LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 143, 147 (letter from EPA Administrator Ruckelshaus to President Nixon, in which Ruckelshaus describes § 401 as a "State certification mechanism like that now provided by Section 21 of the [FWPCA]"); *id.* at 852 (letter from Ruckelshaus to House Public Works Committee, noting that "Section 401 is essentially the same as the present section 21(b)"); LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1204, 1393-94, 1487. Accord RODGERS, *supra* note 13, § 4.2, at 25.

Section 21 addressed both pollution from federal lands and facilities (in paragraph (a)) and state certification of federally permitted activities (in paragraph (b)). The operative language of § 21(b) was:

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 of the United States, 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 . . . , that there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards. . . . No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided [herein].

§ 21(b) of Pub. L. 91-224, 84 Stat. 91 (1970), reprinted in 1970 U.S.C.C.A.N. 97, 116 (emphasis added). The italicized language denotes those provisions that differ from CWA § 401(a)(1). First, § 401(a) uses the abbreviated term "navigable waters," defined by the Act as "waters of the United States." 33 U.S.C. § 1362(7). Second, § 401(a) requires states (or interstate agencies) to certify "that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316 and 1317 of [title 33]." *Id.* § 1341(a). As noted above, the purpose of this revision of § 21(b) was to assure that the certification requirement "conforms and is consistent with the new requirements of the [1972 FWPCA]." LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 808. (Note: The reference to § 1313 was added to this sentence of § 401(a) by the 1977 amendments. See *infra* note 186.)

401. Moreover, since 1972, Congress has amended the statute only once, "to add section 303 to the list of the Act's provisions for which a State must certify compliance before a license or permit can be issued."¹⁸⁶ Thus, the substantive provisions of the certification statute have remained essentially unchanged since 1970. Reflecting this fact, EPA's section 401 implementing regulations,¹⁸⁷ promulgated under the 1970 Water Quality Act¹⁸⁸ (prior to the 1972 amendments), have also remained in effect unchanged since then.¹⁸⁹

As noted earlier, Congress knew, in 1972 and even earlier, that NPS pollution was a serious and widespread problem.¹⁹⁰ In the face of this knowledge, it opted to leave to the states control and management of NPS pollution.¹⁹¹ Constraining the states from considering NPS impacts when conducting their 401 reviews would drastically undermine their ability to carry out their responsibility to control NPS pollution and, indeed, to implement their water quality standards.¹⁹² On the other hand, authorizing states to review for compliance with their water quality requirements and to certify any federally permitted activity that might result in pollution of state waters is sensible and fits with the statutory scheme.

Furthermore, paragraphs (2) through (5) of § 21(b) contained provisions substantially similar to those of paragraphs (2) through (5) of § 401(a). In paragraph (5), as in the first paragraph of the certification provision, the phrase "applicable provisions of section 1311, 1312, 1313, 1316 or 1317 of [title 33]" has replaced the "applicable water quality standards" language of § 21(b)(5).

186. H. REP. NO. 830, 95th Cong., 1st Sess. 96, in LEGISLATIVE HISTORY, VOL. 3, *supra* note 170, at 280. This amendment was "intended to clarify the requirements of section 401. It is understood that section 303 is required by the provisions of section 301," which had been included in § 401 since 1972. *Id.* (emphasis added). That water quality standards are a relevant consideration in the certification review process is reflected in the language of § 21(b) in the 1970 Act, see *supra* note 178, and in the 1972 legislative history. See, e.g., LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 404 ("state certification that appropriate water quality standards and limitations will not be violated"). See also PUD No. 1 v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1909 (holding that § 301 incorporates § 303 by reference and quoting legislative history that "[s]ection 303 is always included by reference where section 301 is listed") (quoting 1977 U.S.C.A.N. 4471). Accordingly, EPA has provided by regulation that "State certification . . . shall include: (1) Conditions which are necessary to ensure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law." 40 C.F.R. § 124.53(e)(1) (1995) (emphasis added). See also 114 S. Ct. at 1909 (citing 40 C.F.R. § 121.2(a)(3)).

187. 40 C.F.R. pt. 121 (1995).

188. Pub. L. No. 91-224, 84 Stat. 91 (1970).

189. See WETLANDS AND 401 CERTIFICATION, *supra* note 13, at iv n.53 (noting, however, that the rules "may have some anomalies as a result").

190. See *supra* note 177 and accompanying text.

191. 33 U.S.C. § 1288 (directing states to prepare areawide waste treatment plans encompassing nonpoint sources of pollution).

192. See *infra* notes 265-69 and accompanying text (discussing primary role of states in setting water quality standards and combatting water pollution).

The legislative history of another provision of the Clean Water Act sheds additional light on the issue of what activities and discharges were meant to be subject to section 401. A provision in an early version of section 511¹⁹³ would have made 401 certifications conclusive with respect to water quality impacts for purposes of the analyses required by the National Environmental Policy Act (NEPA).¹⁹⁴ Because so many federally permitted activities were presumed subject to section 401,¹⁹⁵ many in Congress were concerned that this provision would unduly weaken the recently-enacted NEPA and interfere with EPA's discretion under the CWA.¹⁹⁶ The conference committee resolved the concerns by deleting this provision,¹⁹⁷ specifying which actions taken by EPA under the CWA would be subject to NEPA,¹⁹⁸ and providing that NEPA did not authorize federal permitting agencies to review 401 certifications.¹⁹⁹ This compromise minimized the intrusions on EPA's discretion under the CWA, while maintaining the states' authority under section 401. Nothing in section 511 as enacted or in its legislative history reflects an intent to restrict the scope of section 401's application.²⁰⁰ Thus, the understanding, in 1971-72, that

193. Section 511(d) of the bill, which became CWA § 511(c), 33 U.S.C. § 1371(c), concerns the relationship between certifications and review of federal projects pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d (1994).

194. 42 U.S.C. §§ 4321-4370d (1994). NEPA requires, *inter alia*, that federal agencies assess the environmental impact of any proposed "major federal action." *Id.* § 4332. NEPA, whose passage preceded the 1972 FWPCA amendments by three years, makes no distinction between water pollution caused by point and nonpoint sources.

195. Debate on the provision indicated that the "discharges" and "activities" believed to be subject to § 401 included permits issued by the Corps, EPA, AEC, FPC, and other agencies; facilities such as dams; and other activities, such as coal mining. See H.R. REP. 911, 92nd Cong., 2d Sess. 406, reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 875, 883.

196. See, e.g., H.R. REP. 911, 92d Cong., 2d Sess. 414 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 883 (separate comments of 11 Congressmen); *id.* at 875 (comments of Reps. Abzug and Rangel, endorsing views of 11 Congressmen, *supra*). See also LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 606 ("[s]uch a weakening of NEPA should not be allowed").

197. See LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 331-32.

198. Section 511(c), as amended in conference and enacted, specifies that the only "major Federal action[s]" under the CWA that will trigger NEPA review are the issuance by EPA of § 201 grants and § 402 permits. 33 U.S.C. § 1371(c)(1).

199. See *id.* § 1371(c)(2).

200. Section 511(c) is plainly addressed solely to NEPA issues, not to the states' § 401 authority generally. EPA Administrator William Ruckelshaus summarized the effect of § 511(c)(1) (as amended by the Conference Committee and ultimately passed) this way: "A State certification under Section 401 or a permit under Section 402 shall be determinative of water quality considerations for purposes of Federal licenses, except that licenses or permits other than those issued under this enrolled bill nevertheless may require an [EIS]." LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 143, 158.

section 401 would apply to all discharges that may trigger NEPA remains intact.²⁰¹

The inescapable conclusion from the foregoing analysis is that Congress lacked any intent to limit certification review to what the CWA defines as "point source discharges."²⁰² Whatever Congress meant to bring under the wide umbrella of "discharge" in section 401, it obviously intended *something more than* point source discharges of pollutants. If 401 is not limited to point sources, it must also encompass nonpoint source pollution. Indeed, the only reasonable construction of section 401 is that it is addressed to *any* form of "pollution" caused by federally permitted activities.²⁰³

This conclusion is consistent with the Supreme Court's decision in *PUD No. 1*.²⁰⁴ The opinion is marked by an absence of attention to the precise nature of the "discharges" that the proposed activity involved. If the Court believed that only point source discharges trigger application of section 401, there certainly is no evidence of it in the opinion. On the contrary, the case evinces the view that the *nature* of the discharge is of little, if any, consequence under section 401. The Court's decision was plainly not premised on the existence of any particular kind of discharge. Moreover, one of the "two possible discharges" identified by the Court would be considered a nonpoint source discharge by most courts.²⁰⁵

201. Moreover, § 401 applies to any federally permitted activity that may cause a discharge, even if it is not a "major federal action" subject to NEPA. See 42 U.S.C. § 4332. Thus, in the realm of water-polluting activities, § 401's application is even broader than NEPA's.

202. See, e.g., statement of Rep. Wright in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 538 ("States would have to certify . . . that any such discharge would have to comply with the applicable provisions of the 1977, 1981 and other goals of this act, including the "no discharge" and point limitations What we are trying to do in all of this is to reduce pollution in streams in the first place"; emphasis added). Cf. 115 CONG. REC. 28,955 (1969) (comments of Sen. Muskie, describing the certification and federal facility provisions of S. 7 as "provid[ing] an orderly mechanism for insuring that all Federal activities will comply with the philosophy and intent of the Nation's water quality program"; emphasis added).

203. "Pollution" is defined in the CWA as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). According to Professor Rodgers, the Act's "sweeping definition of 'pollution,' with its emphasis on bad effects, is oblivious to the instrumentality of the change for the worse. A physical invasion by foreign matter obviously suffices; but water can become polluted in other ways (by interferences with flow, application of heat, and so on), as the statute recognizes." RODGERS, *supra* note 13, § 4.10, at 145 (emphasis added). Professor Rodgers also says that "[f]or simplicity, the universe of the causes of water pollution should be considered as covered fully by the categories of point and nonpoint sources." *Id.* EPA's description of NPS pollution is similar: "nothing more than a pollution problem not involving a discharge from a point source." National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, at 166 n.28 (D.C. Cir. 1982) (quoting EPA memorandum).

204. *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (1994).

205. The Court stated that the "project will result in two possible discharges—the release of dredged and fill material during the construction of the project, and the discharge

Several lower court cases have also addressed 401 issues in the context of FERC hydropower projects or other permits to construct dams, and thus, like *PUD No. 1*, also involved point source and nonpoint source discharges.²⁰⁶ One of these “dam cases” provides powerful support for this part’s premise: that section 401 authority does not hinge on the existence of a point source discharge. *Power Authority v. Williams*, a New York appellate court decision, expressly rejected the argument that a 401 “discharge” must contain an “identifiable pollutant.”²⁰⁷ Such a ruling, the court said, would frustrate the CWA’s “purpose of insuring the rights of states to eliminate *conditions of pollution*.”²⁰⁸ Accordingly, the court held that the “transfer of water from the upper reservoir to the lower reservoir is a ‘discharge’ ”

of water at the end of the tailrace.” 114 S. Ct. at 1907. The first discharge noted by the Court clearly is a point source discharge; the second, however, may not be.

First, while discharges of dredged and/or fill material are not always discharges from a point source, see 40 C.F.R. § 232.2 (1995) (requiring § 404 permits for the discharge of dredged or fill material at specified disposal sites, whether or not from a point source), the discharges involved in constructing the diversion facilities in this case undoubtedly would be point source discharges subject to CWA § 404, 33 U.S.C. § 1344. See, e.g., Keating v. FERC, 927 F.2d 616, 619 (D.C. Cir. 1991); *Gorsuch*, 693 F.2d at 177. Backhoes, loaders, and/or other heavy equipment would be required in the diversion and construction activities. These types of equipment (or “rolling stock”) engaged in such activities have been held to be point sources of pollutants. See, e.g., *Avoyelles Sportsmen’s League v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983); *United States v. Larkins*, 657 F. Supp. 76, 78-79 n.2 (W.D. Ky. 1987), *aff’d*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989). The second discharge cited by the Court—water discharged from the tailrace (clearly a “discrete conveyance [such as a] pipe, . . . tunnel, [or] conduit”)—also could be a point source discharge, *but only if* it has been contaminated by “pollutants.” See *Gorsuch*, 693 F.2d at 165 n.22 (noting that EPA has required § 402 permits for grease, oil, or other materials in water passed through a dam via pipes or spillways). The D.C. Circuit held that a dam per se is not a point source, nor is the water simply released from the reservoir to the stream below the dam, *unless* it has been contaminated by the addition of pollutants from “the outside world,” i.e., from sources outside the river. See *id.* at 175; see also *United States ex rel. TVA v. Tennessee Valley Water Quality Control Bd.*, 717 F.2d 992, 999-1000 (6th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). The respondents apparently did not argue that this tailrace water would contain added “pollutants.” See Respondents’ Brief at *36, *PUD No. 1*. In sum, the first of the two discharges named by the Court is a point source discharge; the second probably is not.

206. E.g., Keating v. FERC, 927 F.2d 616 (D.C. Cir. 1991); *Niagara Mohawk Power Corp. v. New York Dep’t of Envtl. Conserv.*, 624 N.E.2d 146 (N.Y. 1993), *cert. denied*, 114 S. Ct. 2162 (1994); *City of Fredericksburg v. FERC*, 876 F.2d 1109, 1111 (4th Cir. 1989); *Environmental Defense Fund v. Tennessee Water Quality Control Bd.*, 660 S.W.2d 776 (Ct. App. Tenn. 1983); *State of California ex rel. State Water Resources Control Bd. v. FERC*, 966 F.2d 1541 (9th Cir. 1992); *National Wildlife Fed’n v. FERC*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990); *City of Klamath Falls v. Environmental Quality Comm’n*, 851 P.2d 602, 604 (Or. Ct. App. 1993), *aff’d*, 870 P.2d 825 (Or. 1994); *Arnold Irrigation Dist. v. Department of Envtl. Quality*, 717 P.2d 1274, 1279 (Or. Ct. App. 1986); *Power Authority v. Williams*, 475 N.Y.S.2d 901, 904-05 (N.Y. App. Div. 1984). *But see infra* notes 214-17 and accompanying text (discussing *Commonwealth Dep’t of Envtl. Resources v. City of Harrisburg*, 578 A.2d 563 (Pa. Commw. Ct. 1990)).

207. 475 N.Y.S.2d 901, 904 (N.Y. App. Div. 1984).

208. *Id.* (emphasis added).

and that the state could deny certification based on the applicant’s failure to demonstrate that the project would comply with state temperature standards for water.²⁰⁹ While the court did not employ the point source-nonpoint source terminology, its reasoning plainly accords with the conclusion that “discharges” resulting in nonpoint source pollution are reviewable under section 401.

The remainder of the cited cases²¹⁰ implicate the nonpoint source discharge issue less directly. Nevertheless, all involve dams (and, hence, hydromodification), and in none did the court suggest that a nonpoint source discharge could not trigger certification review.²¹¹ For instance, the D.C. Circuit Court of Appeals ruled that the “discharge” from a dam “originates” at the dam site itself and not upstream where the impounded waters may cause shoreline erosion.²¹² The court did not indicate that such erosion was not a “discharge” subject to section 401 review, but only that its occurrence in a state other than that in which the dam was constructed did not empower that state to require its own certification.²¹³

Only one court has held that a point source discharge is necessary to trigger section 401 review. That case, however, is easily dismissed. *Commonwealth Department of Environmental Resources v. City of Harrisburg* did not invoke the precise term “nonpoint source pollution,” but the case did discuss the statutory terms “discharges of pollutants,” “discharges,” and “pollution.”²¹⁴ The court held that a state’s authority under section 401 is limited to reviewing the effects of any discharge of *pollutants* and does not include the impact of any “physical changes in the river on aquatic resources [or] on wetlands and fish

209. The court noted that under New York law

[a] thermal discharge is defined as one which results or would result in a temperature change in the receiving water. Obviously, this regulation is addressed to the effect that the discharge will have on the receiving waters and does not require that the discharge must be of a heated liquid in order to qualify . . .

Id. at 905 (emphasis in original). While not using the term “nonpoint source pollution,” the court in essence rejected the argument that § 401 requires a “discharge of a pollutant” (in this case, heat; see 33 U.S.C. § 1362(6)). It held instead that the discharge from the dam of uncontaminated water, which would cause thermal pollution and which had been held to be nonpoint source pollution in *Gorsuch*, 693 F.2d at 166, 168, 183, was subject to the State’s § 401 authority. See *Power Authority v. Williams*, 475 N.Y.S.2d at 904-05.

210. See *supra* note 206.

211. Again, *City of Harrisburg* can be viewed as an exception. See *infra* notes 214-21 and accompanying text. Most cases apparently presume the existence of a discharge; hence, they do not discuss whether it originates from a point source or a nonpoint source. Bogardus, *supra* note 64, at 51.

212. *National Wildlife Fed’n v. FERC*, 912 F.2d 1471, 1484 (D.C. Cir. 1990). *National Wildlife Federation* did not cite *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). See *supra* note 205.

213. In other words, the issue of where the discharge “originated” related solely to determining which state was authorized to certify the dam.

214. 578 A.2d 563, 566-67 (Pa. Commw. Ct. 1990).

migration.”²¹⁵ The court rebuffed the state agency’s assertion that “discharge” as used in section 401 encompasses “discharges of dredged or fill material” as well as “pollution.”²¹⁶ After rejecting federal case law holding that discharges of dredged or fill material *are* “discharges of pollutants,” it held that a state’s authority under section 401 is limited to “evaluat[ing] any ‘discharge of a pollutant’ which may result from the ‘discharge of dredged or fill material,’” and that “[a]uthority to review *other* environmental effects of the discharge of dredged or fill material is vested in [EPA and the Corps of Engineers].”²¹⁷

City of Harrisburg simply cannot be reconciled with the terms of the Clean Water Act or with the construction thereof by the vast majority of cases. For instance, the court simply ignored the statutory definition of “pollutant,” which includes “dredged spoil.”²¹⁸ And it baldly proclaimed that, “[w]henver the term ‘discharge’ is used, it is *always* in conjunction with the term ‘pollutant’ ”²¹⁹—even though “pollutant” *never* appears in section 401, in conjunction with “discharge” or otherwise.²²⁰ This poorly reasoned opinion affords no basis for questioning the construction of section 401 advanced in this article. Moreover, the Pennsylvania court acknowledged that it was bound by decisions of the U.S. Supreme Court.²²¹ Thus, in light of the subsequent decision in *PUD No. 1*, this court presumably would decide the matter differently today.

Finally, several commentators have advanced broad views of the kinds of discharges that trigger section 401 application.²²² Notably,

215. *Id.* at 567.

216. *Id.* at 566.

217. *Id.* at 567 (emphasis added).

218. 33 U.S.C. § 1362(6).

219. 578 A.2d at 567 (emphasis added).

220. See *supra* note 164 and accompanying text.

221. See 578 A.2d at 566. Cf. *Niagara Mohawk Power Corp. v. New York State Dep’t of Env’tl. Conserv.*, 624 N.E.2d 146, 150 (N.Y. 1993) (“[w]hatever the outcome in the Supreme Court of the United States [in *PUD No. 1*], we respectfully reach a different conclusion”), *cert. denied*, 114 S. Ct. 2162 (1994).

222. Ransel, *supra* note 13, at 268-69; Ransel & Meyers, *supra* note 13, at 347; ADLER ET AL., *supra* note 1, at 203-04, 246. Adler et al. also argue, however, that state 401 authority is not adequate and that it should be expanded and clarified by Congress. ADLER ET AL., *supra* note 1, at 245-46. Ransel and Meyers conclude that “any project that could cause or contribute to a water quality violation should be submitted to the states for section 401 certification.” Ransel & Meyers, *supra* note 13, at 348. But even this characterization of § 401’s scope is too narrow. An applicant for a federal permit to conduct *any activity which may result in a discharge* should apply to the proper state for certification; only then can the state determine whether such activity might cause or contribute to violations of WQS. See also 40 C.F.R. § 121.24 (1995) (referring to “waters which *might be affected* by the proposed activity”); emphasis added, thus reinforcing that it need not be certain that a discharge resulting from an activity *will* affect waters before conditions may be imposed on the activity). Sawyer agrees that nonpoint source impacts should be subject

Professor Rodgers (who is acknowledged in the legislative history as having authored “the most inspiring defense of the procedures set forth in [the Clean Water Act]”),²²³ has asserted that “it is clear” that “certification turns on the existence of a federal licensing authority[,] not on whether the source is a point source.”²²⁴

B. The Scope of States’ Section 401 Review Authority

For any federal activity that satisfies section 401’s threshold requirements of a federal permit or license and a potential discharge, the states have certification authority to review the discharge for compliance “with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317” of the Clean Water Act.²²⁵ In addition, section 401(d) requires the reviewing state authority to set forth any limitations and monitoring requirements “necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations . . . and with any other appropriate requirement of State law set forth in such certification.”²²⁶

This part discusses the scope of the review authority conferred on states by these provisions. First, it explains that states are authorized to review all point source and nonpoint source impacts of the permitted activity. Second, it explores the range of permissible conditions

to § 401 review, but it is not clear whether he contemplated the application of § 401 to a federal activity which involved no point source discharge, but *only* NPS impacts. See, e.g., Sawyer, *supra* note 65, at 998 (“certification authority extends to the full activity, *not just to point source discharges* associated with the activity”) (emphasis added).

223. LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1255 (comments of Sen. Muskie, introducing debate on S. 2770, referring to an article by Professor Rodgers).

224. RODGERS, *supra* note 13, § 4.16, at 253 (citing *Environmental Defense Fund v. Tennessee Water Quality Control Bd.*, 660 S.W.2d 776 (Tenn. Ct. App. 1983) (involving certification of a dam, not a point source)). *Contra* Bogardus, *supra* note 64. Bogardus’s analysis is internally inconsistent and insupportable, however, even without the benefit of the Supreme Court’s subsequent decision in *PUD No. 1*. For instance, she cites as the applicable definition of “discharge” for purposes of § 401 the definition of “discharge of a pollutant” in 33 U.S.C. § 1362(12), even though the term “pollutant” appears nowhere in § 401. *Id.* at 46. She later acknowledges the definition of “discharge” in 33 U.S.C. § 1362(16), but attributes no significance to its use of the word “includes” instead of “means,” see *supra* text at notes 158-63, and proceeds with her analysis as if “discharge” and “discharge of a pollutant” were equivalent terms. *Id.* at 51. Furthermore, she refers to “fish, wildlife and recreation” as “nonwater quality factors.” *Id.* at 88. Indeed, in advice to FERC license applicants seeking to challenge certification decisions, she includes “designated uses” of water in the category of “factors *unrelated to water quality*”! *Id.* at 100 (emphasis added). She also contradicts herself regarding the reviewability in federal court of certification conditions. See *id.* at 95-96. And, despite the clear terms of CWA § 301 and the legislative history to the contrary, she declares that “section 402 does not require the discharge to meet water quality standards as a condition to a permit,” since CWA § 303 is not among the sections of the Act listed in § 402(a)(1). *Id.* at 67 & n.216. Cf. *supra* note 186 and accompanying text.

225. 33 U.S.C. § 1341(a)(1).

226. *Id.* § 1341(d).

that states may impose on certifications. Finally, it discusses the grounds upon which states may deny certification altogether.

1. Water Quality Impacts Subject to Review

Because nonpoint source discharges trigger states' section 401 review authority,²²⁷ it seems obvious that states would be empowered to examine any nonpoint source pollution resulting from the activity subject to review. *But even if* section 401 review authority is triggered only by a *point source discharge*, states are nevertheless authorized to review any nonpoint source impacts related to that discharge. This conclusion is confirmed by the terms of section 401, the case law, EPA's section 401 guidance, and related provisions of the CWA.

While no court, in any reported case, has discussed the point source-nonpoint source distinction in the section 401 context, several cases provide inferential support for construing section 401 to authorize review of *any* water-quality-related impact of the permitted activity, once the requirement of a discharge is met. Foremost among these is *PUD No. 1*.²²⁸ Although not characterized as such by the Supreme Court, *PUD No. 1* was essentially a nonpoint source pollution case. The State of Washington had imposed, and the Supreme Court approved, a requirement to mitigate hydromodification impacts to the river. Hydromodification is a form of nonpoint source pollution.²²⁹

As the Court observed, section 401(a) allows for review of "any such discharge" that triggers certification authority, while section 401(d) sweeps even more broadly, allowing states to conduct review not only to assure that the *discharge* complies with the standards listed in section 401(a), but also that the *applicant* complies with "other limi-

227. See *supra* part II.A.2.

228. *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (1994). See *supra* notes 80-85 and accompanying text.

229. See 33 U.S.C. § 1314(f)(2)(F). Hydrologic/habitat modification, or hydromodification, is one of eight categories of NPS pollution identified by EPA. EPA, GUIDELINES FOR THE PREPARATION OF THE 1988 STATE WATER QUALITY ASSESSMENTS 19 (Apr. 1, 1987). Hydromodification includes engineering projects, such as dams and stream channelization, which result in flow changes and which then cause increased sedimentation and habitat alteration. Ohio's certification regulations expressly authorize the state agency to deny certification if "obstructions or alterations in waters of the state will result in adverse long or short term impact on water quality." OHIO ADMIN. CODE 3745-32-05(B) (Anderson 1995). Pennsylvania requires every applicant for certification "for every dam, water obstruction or encroachment" to prepare an environmental assessment of the proposed project. 25 PA. CODE § 105.15(b) (1995). See also 40 C.F.R. § 230.11(b) (1995) (requiring evaluation of impacts of proposed discharges of dredged or fill material on water circulation, flow, etc.); 33 C.F.R. § 320.4 (1995) (requiring, *inter alia*, consideration of direct and indirect effects of proposed discharges of dredged or fill material on fish and wildlife). For examples of hydromodification BMPs, see, e.g., *Hydrologic Modifications Best Management Practices*, in WYOMING NONPOINT SOURCE MANAGEMENT PLAN (Oct. 1992).

tations" and "other appropriate requirement[s] of state law."²³⁰ Together, these two provisions would seem to authorize states to review nearly any water quality impact of a permitted activity, point source or nonpoint source. Indeed, the Court held that states are authorized to impose conditions "on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."²³¹ The Court found that this interpretation was compelled by the language of section 401(d) and EPA's interpretation of the statute.²³²

Moreover, the Court refuted the petitioners' attempted "quality/quantity" distinction,²³³ invoking provisions of the CWA that are relevant outside the point source context. The Court prefaced this portion of its analysis by pointing out what should be obvious to all—that reducing sufficiently the amount of water in a stream "could destroy all of its designated uses."²³⁴ The Court had already concluded that a state could enforce designated uses of water via its section 401 authority.²³⁵ The Court then reasoned that "the Act's definition of pollution as 'the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water' encompasses the effects of reduced water quantity."²³⁶ "Pollution," thus defined, is plainly *not* limited to the impacts of point source discharges.²³⁷ Indeed, as the Court pointed out, Congress had, in the CWA, expressly recognized that "pollution" can result from hydromodification.²³⁸ In sum, the Court implicitly gave states the nod to exercise their 401 authority to respond to any *pollution*—point source- or nonpoint source-related—that might result from federally permitted activities.²³⁹

230. 114 S. Ct. at 1908-09 (citing 33 U.S.C. § 1341(a), (d)).

231. 114 S. Ct. at 1909.

232. *Id.* See *supra* notes 44-49 and accompanying text.

233. See 114 S. Ct. at 1912-14. Basically, petitioners argued that the CWA governs water quality, not quantity, and therefore a condition regulating stream flow was outside a state's authority under § 401. See *id.* at 1912. The Court declared this distinction "artificial." *Id.*

234. *Id.* at 1913.

235. *Id.* at 1910. See *supra* notes 59-77 and accompanying text.

236. 114 S. Ct. at 1913 (quoting 33 U.S.C. § 1362(19)). The Court did not attempt to link the Act's definition of "pollution" directly to the provisions of § 401. Instead, the discussion seemed guided by the notion that any water pollution, resulting from an activity subject to § 401 review, was an appropriate object of that review. Indeed, in responding to a further argument by the petitioners, based on §§ 101(g) and 510(2) of the Act, the Court stated bluntly that those sections "do not limit the scope of *water pollution controls* that may be imposed on [water] users The certification merely determines the nature of the use to which that proprietary right [i.e., a state water right] may be put under the Clean Water Act." 114 S. Ct. at 1913 (emphasis added).

237. See *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165-66 (D.C. Cir. 1982).

238. 114 S. Ct. at 1913 (citing 33 U.S.C. § 1314(f) regarding the changes in water flow or circulation that result from dams). The Court noted that EPA regulations also reflect this "concern with the flowage effects of dams and other diversions." *Id.* (citing 40 C.F.R. § 131.10(g)(4) (1992)).

239. See *Ransel, supra* note 13, at 268-69; *Sawyer, supra* note 65, at 997-99.

Several lower court decisions add further weight to this conclusion. Cases involving dams are the most numerous²⁴⁰ and present perhaps the clearest examples of situations in which a state may be more concerned with the nonpoint source impacts of an activity (i.e., hydromodification) than with the direct impact of any discharge caused by the facility. In none of these cases did the court suggest that the reviewing state was not authorized to consider the dam's nonpoint source impacts.²⁴¹

At least one non-dam case is in accord with this view. *Roosevelt Campobello International Park Commission v. EPA* involved a challenge to an NPDES permit issued to an oil refinery and deepwater terminal on the Maine coast.²⁴² The State of Maine had included conditions in its certification "designed to minimize the risk of an oil spill which would severely impair water quality."²⁴³ While the court held that EPA lacked authority to review the conditions, it also noted that "even in the absence of state certification, EPA would be bound to include in the federal permit 'any more stringent limitations . . . established pursuant to any State law or regulations (under authority preserved by section 510).'"²⁴⁴ The court observed that the conditions imposed "are related to water quality,"²⁴⁵ thus implying that they were within the State's authority both as preserved in CWA section 510 and as incorporated in section 401. This tacit endorsement of these certification conditions also suggests that conditions imposed on nonpoint source "discharges," as oil spills from tankers or other facilities are classified pursuant to CWA section 311,²⁴⁶ are proper conditions in a 401 certification.

A further implication of *Roosevelt Campobello* is that state power under CWA sections 401(d) and 510 should be interpreted coextensively. The legislative history bears out this implication. Section 510 preserves states' authority to "adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution."²⁴⁷ The emphasized words make clear that state authority is not limited to stricter regula-

240. See *supra* note 206.

241. As discussed above, *City of Harrisburg* is an exception. See *supra* notes 214-21 and accompanying text.

242. 684 F.2d 1041, 1044 (1st Cir. 1982).

243. *Id.* at 1056.

244. *Id.* (quoting 33 U.S.C. § 1311(b)(1)(C)).

245. *Id.* (emphasis in original).

246. 33 U.S.C. § 1321(a)(2) (defining "discharge" to include, *inter alia*, "any spilling" of oil, but excluding discharges in compliance with an NPDES permit; emphasis added). See *supra* note 171 and accompanying text.

247. 33 U.S.C. § 1370 (emphasis added).

tion of point sources of pollutants, but extends to all forms of pollution, as that term is broadly defined in the CWA.²⁴⁸

An early version of section 401 expressly referenced section 510.²⁴⁹ Proposed section 401(d) provided for conditioning a certification on, *inter alia*, "any more stringent water quality requirements under State law as provided in section 510 of this Act."²⁵⁰ In fact, section 401 in both the Senate and House bills (S. 2770, H.R. 11896) in 1971 (during the first session of the 92nd Congress) contained a reference to requirements of state law.²⁵¹ The bills were subsequently amended, however, and when the Conference Committee convened in 1972 (in the second session of the 92nd Congress) section 401 of neither bill provided for compliance with additional state law requirements.²⁵² The Conference Committee then added the language now in section 401(d), explaining that "[s]ubsection (d) . . . has been expanded to also require compliance with any other appropriate require-

248. *Id.* § 1362(19). See also *California v. EPA*, 511 F.2d 963, 972 (9th Cir. 1975) (stating that § 510 "specifically distinguishes between . . . discharges of pollutants . . . and . . . 'pollution'"), *rev'd on other grounds*, 426 U.S. 200 (1976).

249. See, e.g., S. 2770, 92d Cong., 2d Sess. (1972), reprinted in LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1685.

250. *Id.*

251. See, e.g., LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1487, 1685 (report on S. 2770); LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 834, 853 (report on H.R. 11896).

252. S. REP. NO. 1236, 92d Cong., 2d Sess. 138 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 321. Although the Conference Report (dated September 1972) indicates that no language requiring compliance with state law had appeared in the clean water bills (S. 2770 and H.R. 11896) prior to the Conference Committee's work, earlier versions of the bills (during the prior session of Congress) had contained such a provision. EPA's comments on those bills are revealing. In a letter to the House Committee on Public Works, dated December 13, 1971, the agency summarized § 401(d) this way: "[Certifications] are to assure compliance with . . . any other applicable water quality requirement in such State. . . . Section 401(d) provides that any certification is to set forth . . . any more stringent requirement under State law as provided for in section 510 of the Act." H.R. REP. NO. 911, 92d Cong., 2d Sess. 166 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 853. (EPA's letter is also reprinted in LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1204.) EPA interpreted this provision as authorizing states to "certify as to . . . any applicable State requirement saved under Section 510." H.R. REP. NO. 911, 92d Cong., 2d Sess. 166 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 853 (comments of EPA on H.R. 11895 and 11896, submitted to House Public Works Committee). (EPA called H.R. 11895 and H.R. 11896 "identical bills." *Id.* at 834.) The Senate Public Works Committee had summarized the provision as "mak[ing] clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit." S. REP. NO. 414, 92d Cong., 2d Sess. 69 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1487. EPA recommended that "applicable water quality requirement" be defined as "any applicable effluent limitations under Section 301 or 302 of this Act, or prohibition, effluent standard, or pretreatment standard under Section 307 of this Act, or any more stringent water quality requirement under State law as provided in Section 510 of this Act." H.R. REP. NO. 911, 92d Cong., 2d Sess. 166 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 853. I was unable to determine more precisely when, or why, this state law/§ 510 language was removed from the clean water bills.

ment of State law which is set forth in the certification."²⁵³ The import of this amendment was subsequently discussed in the Senate:

[T]he Conferees agreed that a State may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that State. The Conferees do not intend that any such State conditions would be any less strict than the requirements which would be otherwise required by Federal law.²⁵⁴

While no longer containing an explicit reference to section 510, section 401(d) as enacted evinces no intent to limit states' authority to something less than what section 510 preserves,²⁵⁵ and indeed, courts would shun such an interpretation. Instead, section 401(d) simply requires states to *specify* in their certifications any other requirements of state law that they deem "appropriate" and with which they will require applicants for federal permits to comply.²⁵⁶ If anything, section 401(d) as enacted accords states even broader authority than did the earlier bills (or the language proffered by EPA)²⁵⁷ because the "other appropriate requirement[s] of State law" referenced by the statute are not keyed to or limited by any particular provision of the CWA or any other law.²⁵⁸ At the same time, section 401(d) as enacted is also more precise and less ambiguous, in that it requires a state to actually "*set forth in the certification*" (rather than merely reference the general authority of section 510) "any other appropriate requirement of State law" with which the permit applicant must comply.

Deciding that the certification review embraces both point and nonpoint source-related pollution, however, does not fully resolve the issue of section 401's scope. According to EPA, the agency charged with administering the CWA,²⁵⁹ "all of the potential effects of a pro-

253. S. REP. NO. 1236, at 138, *reprinted in* LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 321 (emphasis added). The language emphasized in the text is identical to the language of § 401(d) as enacted, with the trivial exception that the statute says "such certification" (emphasis added).

254. *Senate Consideration of the Report of the Conf. Comm., Exh. 1, reprinted in* LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 161, 176. The second sentence quoted in the text calls to mind the qualification in § 510, to wit, "except that . . . such State . . . may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the [requirements] under this chapter." 33 U.S.C. § 1370.

255. Indeed, Professor Rodgers has said: "Section 401 adds muscle to the no-preemptive pretensions of section 510 . . ." RODGERS, *supra* note 13, § 4.2, at 26 (footnote omitted).

256. See 33 U.S.C. § 1341(d).

257. See *supra* note 252.

258. According to EPA, the legislative history of § 401(d) "indicates that the Congress meant for the States to impose whatever conditions on the certification are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns." WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 23.

259. 33 U.S.C. § 1251(d).

posed activity on water quality—*direct and indirect, short and long term, upstream and downstream, construction and operation*—should be part of a State's certification review."²⁶⁰

Admittedly expansive, EPA's interpretation nevertheless seems compelled by the terms of the statute. Section 401(a)(3), for instance, provides that certification of a construction permit will, with certain exceptions, serve also to certify any subsequent operating permit required for the activity.²⁶¹ In other words, the statute presumes that a state asked to certify an activity or facility will consider its potential impacts on water quality at the time it is undertaken (or constructed) as well as while it is ongoing, or in operation. A new certification will be required only if relevant factors later change. The statute further provides for suspending or revoking a certified federal permit "upon the entering of a judgment . . . that such facility or activity has been operated in violation of" the specified provisions of the Clean Water Act.²⁶²

While "construction" and "operation" are meaningful terms when applied to the "facilities" subject to section 401, they may seem irrelevant to 401 "activities." The term "activity" often connotes an ongoing undertaking that may not be divisible into construction and operation phases.²⁶³ In such cases, the certifying agency may have

260. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 23 (emphasis added). *Cf.* S.C. CODE REGS. 61-101.F.3 (1993) (requiring certifying agency to consider "all potential water quality impacts of the project, both direct and indirect, over the life of the project"); *id.* 61-101.C.1(e) (requiring certification applicants to describe "all proposed activities associated with the proposed permitted project either directly or indirectly, including planned or proposed future development"); DiRienzo, *supra* note 107, at 1-2 (stating that the Wyoming "Water Quality Division will . . . consider[] all the potential water quality impacts of the project, direct and indirect, over the life of the project"). Moreover, a "State's authority under Section 401 includes consideration of a broad range of chemical, physical, and biological impacts." WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 6.

261. 33 U.S.C. § 1341(a)(3). This paragraph provides in relevant part:

The certification obtained . . . with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, . . . the State . . . notifies such agency . . . that there is no longer reasonable assurance that there will be compliance with the applicable provisions . . . of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements.

See also *id.* § 1341(a)(4) (providing for review of the activity by the certifying agency prior to its commencement if the activity is not subject to a federal operating permit).

262. *Id.* § 1341(a)(5) (emphasis added).

263. Livestock grazing serves as an example. See *infra* part III. On the other hand, the statute does employ the awkward concept "operation of an activity" in 33 U.S.C. § 1341(a)(5), see *supra* text accompanying note 262, but this should be construed merely as reflecting Congress's intention that states take account of the continuing impacts of any activity to be certified.

only one opportunity to review the activity's impacts (at least until such time as the permit is renewed). Consequently, that initial review must assess both the short- and long-term ramifications of the activity. Thus, EPA's advice that certifying agencies take a long-range, comprehensive view of a proposed facility or activity's potential impacts on water quality accurately reflects congressional intent in section 401.²⁶⁴

Assigning the states such a powerful role in approving federal activities that may affect water quality is also consistent with Congress's policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."²⁶⁵ This policy choice dates at least to the 1965 Water Quality Act and underpins many provisions of federal water pollution control legislation, including the certification provisions²⁶⁶ and the emphasis on

264. See Ransel & Meyers, *supra* note 13, at 348-52 (reaching the same conclusion, based on the language of § 401 and legislative history). In fact, these commentators conclude that "the basic letter and intent of section 401 fully support the broadest possible application of the provision." *Id.* at 352; accord *Arnold Irrigation Dist. v. Department of Envtl. Quality*, 717 P.2d 1274, 1279 (Or. Ct. App. 1986) (holding that the State "must include limitations reflecting [State land use] goals and plans in section 1341 certificates to the maximum extent that the CWA allows—that is, to the extent that they have any relationship to water quality"). See also *Bangor Hydro-Elec. Co. v. Board of Envtl. Protection*, 595 A.2d 438, 442-43 (Me. 1991) (holding that, in "reviewing a forty year [FERC] license for compliance with water quality . . . standards," it was proper for the State to consider goals set forth in the designated uses).

The U.S. Army Corps of Engineers' approach to permitting accords with EPA's view of certification. A Corps regulation, which sets forth general policies for reviewing applications for all Department of the Army permits, describes how the agency will evaluate "activities which may adversely affect the quality of waters." 33 C.F.R. § 320.4(d) (1995). The rule provides:

The evaluation [of the proposed activity's compliance with applicable water quality requirements] should include the consideration of both point and non-point sources of pollution. It should be noted, however, that the Clean Water Act assigns responsibility for control of non-point sources of pollution to the states. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations . . .

Id. Note that many of the long-range water quality impacts of Corps-permitted activities, such as dams and wetland fills (collectively labeled "hydromodification"), are nonpoint source pollution. See *supra* notes 205-29. The rule further provides that the Corps will consider "[a]ll factors which may be relevant," including the proposed project's cumulative impacts and reasonably foreseeable benefits and detriments. 33 C.F.R. § 320.4(a) (describing the public interest review process). This rule discloses that both point and nonpoint source impacts of Corps-permitted activities are subject to certification, and that all project impacts—short- and long-term, direct and indirect—should be accounted for in the certification and permitting processes.

265. 33 U.S.C. § 1251(b).

266. For example, during the Senate debate on the bill (S. 7) that contained § 401's predecessor, Sen. Cooper from Kentucky stated: "[S]ection 16 [which contained the certification and other federal facility requirements] is consistent with, and arises out of the policy of the 1965 [water quality] act that the primary responsibility for controlling water pollution rests with the States." 115 CONG. REC. 28,971 (1969); accord *id.* ("the [States']

state-established water quality standards.²⁶⁷ Under the 1965 Act, water quality standards had been the primary domain of the states.²⁶⁸ This policy was preserved in the comprehensive 1972 amendments.²⁶⁹

It has been argued that "maintaining compliance with state water quality standards was section 401's primary purpose."²⁷⁰ Indeed, the Senate Report stated that "[t]he purpose of the certification mechanism . . . is to assure that Federal licensing or permitting agencies cannot override State water quality requirements."²⁷¹ Consistent with this view, an EPA certification rule states that, where "no water quality standards are applicable to the waters which might be affected by the proposed activity, . . . [EPA] shall provide the licensing or permitting agency with advice, suggestions, and recommendations with respect to conditions to be incorporated in any license or permit to achieve compliance with the purpose of this Act."²⁷² This regulation powerfully implies that (1) conditions designed to ensure compliance

primary responsibility to control water pollution" is "relevant to understanding section 16"). Three years later, in leading off the Senate debate on S. 2770 in November 1971, Sen. Muskie noted that "Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: the States shall lead the national effort to prevent, control, and abate water pollution." LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1255. See also *District of Columbia v. Schramm*, 631 F.2d 854, 860-61 (D.C. Cir. 1980) (discussing legislative history regarding state-federal authority for the § 402 permit program adopted in 1972).

267. In 1971 EPA Administrator William Ruckelshaus told the Senate Committee on Public Works that "strengthen[ing] the current [water pollution control] law . . . can only be done if we preserve the concept of water quality standards. The new law must build upon the existing foundation of water quality standards and employ effluent limitations as a tool for the achievement of those standards." LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1180.

268. See H.R. REP. NO. 215, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.A.N. 3313, 3322; H.R. CONF. REP. NO. 1022, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.A.N. 3324, 3325-26.

269. See 33 U.S.C. § 1313.

270. Respondents' Brief at *16, *PUD No. 1* (citing LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 176); *id.* at *16 (noting that in 1977 § 401 was amended "to remove any possible doubt 'that state water quality standards would be imposed through § 301, and thus certification by the State would include consideration of water quality standards'").

271. S. REP. NO. 414, 92d Cong., 2d Sess. 69 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1487, quoted in *Environmental Defense Fund, Inc. v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980).

272. 40 C.F.R. § 121.24 (1995). For purposes of its water quality standards rules, EPA defines "[s]erve the purposes of the Act" as meaning, *inter alia*, "that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water." 40 C.F.R. § 131.2 (1995) (citing CWA §§ 101(a)(2) and 303(c)). Similarly, the Act's "purpose" may be equated with its "objective," i.e., "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," CWA § 101(a), or it could comprise either or both of the "goals" stated in that section for achieving this "objective," *id.* § 101(a)(1), (2). The EPA certification rule seriously undermines the argument that conditions imposed in certifications must relate solely to water quality standards adopted pursuant to the procedures of CWA § 303. See *supra* note 54 and accompanying text (discussing limit of *PUD No. 1* holding).

with water quality standards and conditions designed to achieve compliance with the Act are functionally equivalent, and (2) compliance with water quality standards is the "primary purpose" of section 401. States can ensure such compliance only if, as EPA advises, they consider all impacts—"direct and indirect, short and long term, upstream and downstream, construction and operation"—of proposed federal activities.²⁷³ Construing section 401 to confer such broad authority promotes the states' ability to fulfill their "primary responsibilities and rights" with respect to pollution control generally and to nonpoint source pollution in particular.²⁷⁴

2. Certification Conditions

The broad authority conferred on states by section 401(a) and (d), as set forth in the preceding subpart, presages the wide range of conditions that states may impose on federally permitted activities. Determining what constitutes a proper certification condition is a two-part inquiry. First, it must be ascertained whether the legal requirement with which the state seeks to assure compliance is among those specified in section 401(d).²⁷⁵ Second, one must ask whether the "effluent limitations and other limitations, and monitoring requirements," which the state has "set forth" in the certification, are "necessary to assure" that the applicant will comply with the applicable legal requirements.

Section 401(d) explicitly provides that states may impose conditions to ensure compliance with Clean Water Act sections 301 (effluent limitations), 302 (water-quality-related effluent limitations), 306 (national standards of performance for new sources), and 307 (toxic and pretreatment effluent standards).²⁷⁶ The Supreme Court established in *PUD No. 1* that states may also impose conditions to ensure compliance with state water quality standards adopted pursuant to CWA section 303.²⁷⁷ Arguably, the only provision of section 401(d)

273. See *supra* note 260.

274. See 33 U.S.C. §§ 1288, 1329.

275. See *supra* text accompanying note 30 for the text of § 401(d).

276. 33 U.S.C. § 1341(d).

277. *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1909 (1994). See *supra* note 54 and accompanying text. Recall that the Court did not classify state WQS as among the "other appropriate requirements of State law," but instead considered them to be among the "other limitations" to which the statute refers. See 114 S. Ct. at 1909; see also *supra* text accompanying note 54. But see Ransel, *supra* note 13, at 268. But the Court used the statutory term "other limitations" to refer also to certification conditions designed to ensure compliance with state WQS. Compounding the confusion, the Court then equated the latter "limitations," i.e., conditions, with "any other appropriate requirement of State law." See 114 S. Ct. at 1909. The Court stated: "A certification requirement that an applicant operate the project consistently with state water quality standards . . . is both a 'limitation' to assure 'compliance with . . . limitations' imposed under § 303, and an 'appropriate' requirement of State law." *Id.* at 1910-11 (emphasis added). The latter construc-

that poses any interpretational difficulty is the "any other appropriate requirement of State law" proviso.

In *PUD No. 1*, the Court declined to "speculate on what additional state laws, if any, might be incorporated by" the term "any other appropriate requirement of State law."²⁷⁸ Because the designated uses that Washington sought to enforce were among its approved WQS, the Court's failure to decide this issue may preserve some viability to the argument that state WQS are "appropriate requirement[s] of state law" (or proper "other limitations") for purposes of section 401 *only if* they have been approved by EPA pursuant to CWA section 303.²⁷⁹ But the arguments to the contrary are more persuasive.

First, even if state WQS qualify as "other limitations" under section 401(d) only if approved by EPA,²⁸⁰ that says nothing about what constitutes "any other appropriate requirement of State law" under section 401(d). These two terms in the statute are distinct; each must be accorded meaning.²⁸¹ Second, state WQS that have been adopted pursuant to CWA section 303 are, in fact, requirements of *federal* law.²⁸² Hence, there is some force to the argument that "any other appropriate requirement of State law" embraces state requirements *other* than EPA-approved WQS.

tion, however, would seem more in line with the provisions and apparent intent of § 401(d).

278. 114 S. Ct. at 1909.

279. See *Niagara Mohawk Power Corp. v. New York State Dep't of Envtl. Conserv.*, 624 N.E.2d 146 (N.Y. 1993), *cert. denied*, 114 S. Ct. 2162 (1994). *Niagara Mohawk*, a FERC case, held that the "any other appropriate requirement[s] of state law," to which the State is limited in formulating certification conditions, consist solely of standards and requirements adopted pursuant to CWA § 303. 624 N.E.2d at 151. The court appeared to be influenced in large part by a belief that state review should not interfere with the FERC licensing scheme. The decision preceded the Supreme Court decision in *PUD No. 1*, which presumably has done much to allay such concerns regarding state interference with FERC licensing.

280. This interpretation is premised on the conclusion that any reference to CWA § 301 incorporates § 303. See 114 S. Ct. at 1909. Thus, the language in § 401(d), "other limitations . . . necessary to assure that any applicant . . . will comply with any applicable . . . limitations under section 1311," read in connection with § 301(b)(1)(C)'s "any more stringent limitation, including those necessary to meet water quality standards," refers to those water quality standards adopted pursuant to § 303. 33 U.S.C. §§ 1311(b)(1)(C), 1341(d). But see *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234 (S.D. Ala. 1976) ("§301(b)(1)(C) effectively incorporates into federal law all state water quality . . . law or regulations which are more stringent than otherwise provided by federal law"; emphasis added).

281. Statutory terms should be interpreted without rendering superfluous other provisions in the statute. See *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994).

282. See *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1059 (1992).

An EPA certification regulation, which specifies procedures for EPA to follow when acting as the certifying agency,²⁸³ bolsters this interpretation. The rule states that, where “no water quality standards are applicable to the waters which might be affected by the proposed activity, . . . [EPA] shall provide the licensing or permitting agency with advice, suggestions, and recommendations with respect to *conditions* to be incorporated in any license or permit to *achieve compliance with the purpose of this Act.*”²⁸⁴ In other words, appropriate bases for certification conditions, *other than approved WQS*, may exist. And the purpose of any such conditions should be to ensure achievement of the CWA’s purposes.²⁸⁵

One court has unequivocally interpreted “any other appropriate requirement of State law” as transcending state WQS, whether approved by EPA or not. In a broadly worded decision involving the denial of certification for a hydroelectric project, the Oregon Court of Appeals concluded that Congress “allowed the states to enforce *all* water quality-related statutes and rules through the states’ authority to place limitations on section 1341 certificates.”²⁸⁶ Reading section 401 in conjunction with Oregon state law, which required the state Department of Environmental Quality (DEQ) to act in compliance with statewide land use directives, the court held that “DEQ therefore *must* include limitations reflecting [state land use] goals and plans in section 1341 certificates to the *maximum extent that the CWA allows*—that is, to the extent that they have *any relationship to water quality.*”²⁸⁷

283. 33 U.S.C. § 1341(a)(1) provides that “the State in which the discharge originates or will originate, or, if appropriate, . . . the interstate water pollution control agency having jurisdiction over the navigable waters” may certify the discharge. But “[i]n any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator” of EPA. *Id.*

284. 40 C.F.R. § 121.24 (1995) (*emphasis added*).

285. See *supra* notes 271-74 and accompanying text. See also 40 C.F.R. § 124.53(e)(3) (1995) (indicating that appropriate state law requirements include, but are not limited to, state water quality standards). Recognizing (though not conceding the legitimacy of) the argument against the applicability of unapproved standards, EPA has recommended that a state “adopt[] water quality standards that include all the water quality related considerations that it wishes to include in the 401 certification review.” WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 27. See also *infra* notes 324-26 and accompanying text (regarding the “deny/condition” dilemma).

286. Arnold Irrigation Dist. v. Department of Env’tl. Quality, 717 P.2d 1274, 1276, 1279 (Or. Ct. App. 1986) (*emphasis in original*).

287. *Id.* (*emphasis added*). *Contra* Fourth Branch Assocs. v. Department of Env’tl. Conserv., 550 N.Y.S.2d 769 (N.Y. App. Div. 1989). *Arnold Irrigation* reinforces the conclusion *supra* in the text that the certification review embraces nonpoint source pollution. The text of the opinion leaves some doubt as to the plaintiffs’ exact concerns about the facility. (The court noted only that the facility would “divert water from the Deschutes River.” 717 P.2d at 1276.) But it seems reasonable to assume that, since the State was attempting to impose *land use* requirements on the project, its concerns related to potential nonpoint source impacts rather than to a point source discharge of “pollutants.”

Compliance with alleged land use regulations was also at issue in a Ninth Circuit case. There the court upheld a certification conditioned upon the U.S. Navy obtaining a State of Washington Shoreline Management Act (SMA) permit.²⁸⁸ The court rejected the Navy’s argument that the SMA was a state land use law implementing the federal Coastal Zone Management Act, and that the Federal Act “excludes federal lands from the ‘coastal zone’ subject to state management.”²⁸⁹ The court described the SMA as “a mixed statute containing both land use and environmental regulations.”²⁹⁰ The court stated that the SMA’s provisions “relating to dredging and water quality,” which the State sought to apply to the Navy, “are environmental regulations. They do not mandate any particular use of the land, but only impose conditions to ensure that damage to the water is kept within prescribed limits.”²⁹¹ Accordingly, the court held that the Navy was required to obtain an SMA permit, and that imposing such a requirement as a condition of certification was proper.²⁹²

Thus, while the limits of the term “any other appropriate requirement of State law” have yet to be defined, a broad interpretation, not confined to state water quality standards approved by EPA per CWA section 303, seems justified.

Having identified the relevant legal requirements with which it may require compliance under section 401(d), a certifying state must then determine what kinds of limitations and monitoring requirements it may impose as conditions on certifications to ensure such compliance. EPA regulations provide that a certification “shall include . . . [a] statement of any conditions which the certifying agency deems *necessary or desirable* with respect to the discharge of the activity.”²⁹³ The regulations further provide: “State certification . . . shall

288. Friends of the Earth v. United States Navy, 841 F.2d 927, 929 (9th Cir.), *inj. dissolved*, 850 F.2d 599 (9th Cir. 1988). The case concerned the U.S. Navy’s efforts to obtain all necessary approvals to build a home port facility at Everett, Washington. The contested condition was only one of several conditions in the certification.

289. *Id.* at 936 (noting that the U.S. Supreme Court had rejected the same argument in California Coastal Comm’n v. Granite Rock Co., 480 U.S. 572 (1987)).

290. *Id.* The SMA requires local jurisdictions to adopt Shoreline Management Programs (SMP), which “constitute use regulations for the various shorelines of the state.” WASH. REV. CODE § 90.58.100(1) (1995). The City of Everett’s SMP, with which the Navy objected to complying, governed dredging activities and disposal of dredged spoil. *Friends of the Earth*, 841 F.2d at 935.

291. 841 F.2d at 935.

292. *Id.* The Navy apparently did not argue that the Shoreline Management Act did not qualify as “any other appropriate requirement of State law” for purposes of CWA § 401.

293. 40 C.F.R. § 121.2(a)(4) (1995) (*emphasis added*). Cf. OHIO ADMIN. CODE ANN. §§ 3745-32-05(C) (Anderson 1995) (“director may impose such terms and conditions . . . as are appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of water quality”). The terms “desirable” and “appropriate” illustrate the broad authority (and discretion) to be accorded certifying agencies.

include: (1) Conditions which are necessary to ensure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law"²⁹⁴

EPA takes an expansive view of section 401(d), asserting that "Congress meant for the States to impose whatever conditions on the certification are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns."²⁹⁵ To illustrate, the agency related actual examples of various conditions imposed in certain dredge-and-fill permits²⁹⁶ by three states.²⁹⁷ These conditions included complying with a grading and sediment control plan, controlling stormwater runoff, stocking fish, restricting the use of fertilizers, establishing vegetation buffers around water bodies, seeding or riprapping all fills, and minimizing instream activities.²⁹⁸ As

294. 40 C.F.R. § 124.53(e)(1) (1995). Note that this rule uses the terms "applicable," with respect to federal requirements, and "appropriate," with respect to state requirements. This undermines the views of the *PUD No. 1* dissenters, Bogardus, and perhaps others that "appropriate requirement of State law" in § 401(d) applies only to conditions related to the sections of the CWA specified in § 401(a). See *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1916 (1994) (Thomas, J., dissenting). Consider further the subsequent paragraphs of 40 C.F.R. § 124.53:

State certification . . . shall include: . . . (2) When the State certifies a draft permit instead of a permit application, any conditions more stringent than those in the draft permit which the State finds necessary to meet the requirements listed in paragraph (e)(1) of this section. For each more stringent condition, the certifying state agency shall cite the CWA or State law references upon which that condition is based. Failure to provide such a citation waives the right to certify with respect to that condition; and (3) A statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards

Id. § 124.53(e)(2)-(3). These provisions indicate that certification is intended to act as a check on the permitting process. They further imply that a certifying state may propose conditions *in addition to, but not necessarily more stringent than*, conditions already included in the draft permit without identifying the legal basis of such conditions (although states probably would identify the authority for, or otherwise explain, any condition advanced). On the other hand, a "State may *not* condition or deny a certification on the grounds that State law requires a *less stringent* permit condition." 40 C.F.R. § 124.53(c) (1995) (emphasis added). *Cf.* 33 U.S.C. § 1370 (prohibiting states from adopting less stringent effluent limitations or other limitations or standards than those adopted under the federal act).

295. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 23; see also *id.* at 25-26 ("Congress meant for the States to condition certifications on compliance with any State and local law requirements related to water quality preservation."). See also *supra* text accompanying note 270. EPA's interpretation of the statute is, of course, entitled to deference. It is also instructive in this regard that EPA has no veto authority over state certification decisions, as it does over state § 402 permitting matters, see 33 U.S.C. § 1342(c)-(d), or state- or Army Corps of Engineers-issued § 404 permits, see *id.* § 1344(c), (j). These disparities highlight the breadth of the states' authority under § 401.

296. Dredge-and-fill permits are issued by the U.S. Army Corps of Engineers (or a delegated state) under § 404 of the Clean Water Act, 33 U.S.C. § 1344.

297. See WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 23-27.

298. *Id.* at Appendix D. See also *id.* at 29 (noting that one state has conditioned certification of nationwide permit by, *inter alia*, excluding from the permit's coverage isolated or headwater wetlands of known or suspected high value).

EPA noted, "few of these conditions are based directly on traditional water quality standards, [but] all are valid and relate to the maintenance of water quality or the designated use of the waters in some way."²⁹⁹

Additional examples of certification conditions³⁰⁰ include oil spill prevention and other water-quality-related requirements imposed on a proposed oil refinery and deepwater terminal;³⁰¹ stream flow requirements and other restrictions on hydroelectric projects to protect salmon, recreation, and aesthetic values;³⁰² prescribed mixing zones around gravel-fill causeways;³⁰³ erosion control devices, monitoring plans, and stipulations that all dredging activities will cease if WQS are violated;³⁰⁴ requiring compliance with a more stringent effluent limitation;³⁰⁵ requiring permittees to obtain all other applicable approvals;³⁰⁶ and land use restrictions, if determined necessary for compliance with water quality standards.³⁰⁷ EPA's requirements for NPDES permit conditions shed additional light on the scope of possible certification conditions, since the latter conditions also become part of the NPDES permit to which they apply.³⁰⁸

299. See *id.* at 24.

300. See generally ADLER ET AL., *supra* note 1, at 203.

301. See, e.g., *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1044 (1st Cir. 1982) (noting that the Maine Department of Environmental Protection certified a proposed oil refinery and marine terminal pursuant to § 401(a)(1)).

302. E.g., *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1914 (1994) (holding that a state may include minimum streamflow requirements in a 401 certification for a hydroelectric project); *Georgia-Pacific Corp. v. Vermont Dep't of Envtl. Conserv.*, 628 A.2d 944 (Vt. 1992).

303. Alaska Department of Environmental Conservation Certificate of Reasonable Assurance, Beaufort Sea 340, NPACO 071-OYD-2-820562 (Nov. 20, 1984) (401 certification for Sohio Alaska Petroleum Co.'s Endicott Causeway in the Beaufort Sea).

304. *Virgin Islands Conservation Soc'y v. Virgin Islands Bd. of Land Use Appeals*, 857 F. Supp. 1112, 1122-23 (D.V.I. 1994). *Cf. de Rham v. Diamond*, 295 N.E.2d 763, 766 n.5 (N.Y. 1973) (describing conditions in the certification of a hydropower project, including monitoring, terminating operations upon the occurrence of WQS violations, and "initiat[ing] any change in the operation of said facility which may be required to halt and reverse any significant salt water intrusion," imposed under 401's predecessor, 33 U.S.C. § 1171(b)); WYOMING 1994 ASSESSMENT, *supra* note 107, at 293 (stating that many certifications are conditioned upon "implementation of project specific [BMPs], design criteria and/or water quality monitoring and erosion control plans").

305. *Miners Advocacy Council v. State Dep't of Envtl. Conserv.*, 778 P.2d 1126, 1130 (Alaska 1989), *cert. denied*, 493 U.S. 1077 (1990).

306. *Flax v. Ash*, 538 N.Y.S.2d 891, 893 (N.Y. Sup. Ct. 1988) (certification was "'contingent upon the applicant . . . requesting and obtaining all permits, certifications, approvals or authorizations for all stages, phases, and/or locations . . . as may be required by federal or state law").

307. *Arnold Irrigation Dist. v. Department of Envtl. Quality*, 717 P.2d 1274, 1276, 1279 (Or. Ct. App. 1986). *Cf. Friends of the Earth v. United States Navy*, 841 F.2d 927, 929 (9th Cir.), *inj. dissolved*, 850 F.2d 599 (9th Cir. 1988).

308. See 40 C.F.R. § 122.44 (1995). *Cf. MINN. R. 7001.1470(2)* (1995) (providing that § 401 certification conditions "shall be established in the same manner as special conditions are established . . . for [NPDES] permits"). The NPDES requirements include such condi-

Some of the aforementioned conditions suggest that, at least in the wetlands context, states can play a role in developing mitigation measures for federally permitted projects via the section 401 certification process.³⁰⁹ While EPA has not attempted to define that role by rulemaking or in policy documents, it has "offer[ed] as a guide EPA's general framework for mitigation under the section 404(b)(1) guidelines."³¹⁰ In essence, that framework consists of giving preference to, first, avoiding impacts; second, minimizing impacts; and lastly, requiring "appropriate and practicable compensation for unavoidable impacts."³¹¹ It must be kept in mind, however, that "mitigation," in the colloquial sense of merely alleviating impacts, would not be permissible if it failed to prevent violations of water quality standards. In the case of discharges of dredged or fill material, for example, no discharge may be permitted if it "causes or contributes . . . to violations of any applicable State water quality standard."³¹² Applying this to the certification process, if the activity as proposed would violate water quality standards, the activity must be conditioned to *avoid* the impact (the first form of mitigation under the 404(b) guidelines). If the impacts cannot be avoided, certification must be denied.

The question of what conditions may properly be included in certifications implicates one additional issue—what information about the proposed project may a state require a certification applicant to provide? A strong case can be made for allowing certifying agencies to require certification applicants to supply *any* information necessary to determine or implement any appropriate conditions. First, pursuant to section 401, an applicant cannot obtain a federal permit unless a certification has first been obtained or waived.³¹³ Second, the applicant is clearly in the best position to have access to much of the rele-

tions as monitoring requirements, best management practices, and compliance with a CWA § 208(b) water quality management plan—provisions readily adaptable to non-NPDES permits. See 40 C.F.R. § 122.44(d)(vii)(B)(6), (i), (k).

309. At least one court has upheld a state's authority pursuant to § 401 to require from a federal permit applicant information concerning mitigation measures to be used to demonstrate compliance with water quality standards. *Bangor Hydro-Electric Co. v. Board of Env'tl. Protection*, 595 A.2d 438, 443 (Me. 1991). The State of Maine had concerns about the potential impacts of the FERC project on anadromous fish passage, recreation, and water quality, *id.* at 441, and had denied certification pending the receipt of sufficient information upon which to assess the project's compliance with state water quality standards. The court held that information concerning mitigation "clearly bear[s] on the attainment of designated uses." *Id.* at 443.

310. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 25 (referring to the guidelines, at 40 C.F.R. pt. 230, for dredge-and-fill activities promulgated by EPA pursuant to CWA § 404(b)), 33 U.S.C. § 1344(b)).

311. *Id.* This "framework" resembles the approach embodied in the Council on Environmental Quality's guidelines for implementing the National Environmental Policy Act. See 40 C.F.R. § 1508.20 (1995).

312. 40 C.F.R. § 230.10(b)(1).

313. 33 U.S.C. § 1341(a)(1).

vant information.³¹⁴ Third, at least in the cases of section 402 and 404 permits, the burden is on the permit applicant, not the permitting agency, to demonstrate that the proposed discharge will comply with all applicable requirements.³¹⁵ By analogy, the applicant for certification should also bear the burden of making the necessary showings.

3. Denial of Certification

State section 401 authority transcends the power merely to impose conditions on federal activities. Section 401(a)(1)'s declaration that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived"³¹⁶ plainly authorizes states to deny certification, thus effectively vetoing issuance of the federal permit.

If the unequivocal language of section 401 (and of its 1970 predecessor)³¹⁷ left any doubt on this point, the legislative history would erase it. The House Public Works Committee, for instance, stated that "[d]enial of certification by a State, interstate agency, or the Administrator, as the case may be, results in a *complete prohibition* against the issuance of the Federal license or permit."³¹⁸ Moreover, conferring on

314. On the other hand, some information may be as readily available to the agency as to the applicant. See WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 35-36 (noting that, for wetlands certifications decisions, useful resource information may be available from other agency programs, such as The Nature Conservancy's Natural Heritage Program, U.S. Fish and Wildlife Service's Wetlands Values Data Base, etc.)

315. *E.g.*, 40 C.F.R. § 124.85(a)(1) (1995) ("The permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants to be discharged should be issued and not denied. This burden does not shift."). See also APA, 5 U.S.C. § 556(d) (1994) ("Except as otherwise provide by statute, the proponent of a rule or order has the burden of proof.")

316. 33 U.S.C. § 1341(a)(1). See also *id.* § 1341(a)(2) ("[i]f the imposition of conditions cannot insure such compliance [with applicable water quality requirements] such agency shall not issue such license or permit"); *id.* § 1341(a)(4) (providing for suspending a license or permit if it is determined that operation of a facility, for which a construction license was certified, will violate water quality requirements); *id.* § 1341(a)(5) (providing for suspending a license or permit upon entering of a judgment that operation of the facility has violated water quality requirements).

317. Both the 1970 and 1972 (current) provisions state emphatically: "No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided [herein]." § 21(b)(1), Pub. L. 91-224, 84 Stat. 91; 33 U.S.C. § 1341(a)(1).

318. H.R. REP. NO. 911, 92d Cong., 2d Sess. 122 (1972), *reprinted in LEGISLATIVE HISTORY, VOL. 1, supra* note 29, at 753, 809 (section-by-section analysis of H.R. 11896; emphasis added). The Senate Public Works Committee explained that § 401

continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the Atomic Energy Commission, Federal Power Commission, or the Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction.

S. REP. NO. 414, 92d Cong., 2d Sess. 69 (1972), *reprinted in LEGISLATIVE HISTORY, VOL. 2, supra* note 116, at 1487 (section-by-section analysis of S. 2770; emphasis added). The Sen-

states a veto over federal activities that could be expected to adversely affect water quality is consistent with the "preventive policies" embodied in federal water pollution control legislation since 1965³¹⁹ and with the states' "primary responsibilities . . . to prevent, reduce, and eliminate pollution."³²⁰ Not surprisingly, courts and commentators alike have widely acknowledged the states' section 401 veto authority, and several courts have upheld a state's denial of certification.³²¹

While no one seriously questions that states wield a veto under section 401 over certain federally authorized activities, some controversy exists with respect to the extent of this power. In particular, a few jurists and at least one commentator have reservations about the statute's effect on the balance of federal-state power in the FERC li-

ate Report thus reaffirms that this authority was not new, but rather was a continuation of states' power under § 21(b) of the Water Quality Act of 1965. See *supra* notes 185-89 and accompanying text. Some in Congress in 1970 had thought that the provisions of § 21 should be even stronger. See, e.g., 115 CONG. REC. 9041 (1969) (comments of Rep. Schwengel of Iowa); *id.* at 9043 (comments of Rep. Edwards of California).

319. "The existing water quality standards program envisions preventive policies rather than abatement procedures as the best method of pollution control. [The certification] provision of S. 7 applies that policy." 115 CONG. REC. 28,955 (1969) (comments of Sen. Muskie describing S. 7's provisions for certification and federal compliance with water quality standards). See *also id.* at 28,958 (comments of Sen. Spong: S. 7 "takes a preventive approach toward activities over which the Federal Government already exercises a degree of control"); *id.* at 28,967 (comments of Sen. Young: "Committee on Public Works recognized that pollution must be controlled at its source before it enters the bodies of water"). This preventive approach also underpins the Clean Water Act prohibition on pollutant discharges unless expressly permitted. 33 U.S.C. § 1311(a) ("Except as in compliance with this . . . title, the discharge of any pollutant by any person shall be unlawful.").

320. 33 U.S.C. § 1251(b) (emphasis added).

321. See, e.g., *Keating v. FERC*, 927 F.2d 616, 624 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989) (declaring that the "legislative history of section 401 of the Act . . . confirms that Congress intended to give the states veto power over the grant of federal permit authority for activities potentially affecting a state's water quality"); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 235-36 (S.D. Ala. 1976) (§ 401 "continues the authority of the state . . . to deny a permit"); *Power Authority v. Williams*, 475 N.Y.S.2d 901 (N.Y. App. Div. 1984) (upholding denial of certification); *Miners Advocacy Council v. Department of Envtl. Conserv.*, 778 P.2d 1126, 1129 (Alaska 1989) (overturning a certification because reasonable assurance of compliance with WQS was lacking), *cert. denied*, 493 U.S. 1077 (1990); *City of Klamath Falls v. Environmental Quality Comm'n*, 851 P.2d 602 (Or. Ct. App. 1993) (upholding denial of certification of hydroelectric facility), *aff'd*, 870 P.2d 825 (Or. 1994). Professor Rodgers has stated: "Section 401 offers a veto power to states with water quality related concerns about the licensing activities of the various federal agencies, including the [EPA, FERC, Corps, and NRC]. A denial of certification can stop the project . . ." RODGERS, *supra* note 13, § 4.2, at 26. See *also id.* § 4.16, at 252; *Sawyer, supra* note 65, at 993, 1007 (citing the legislative history of certification as revealing Congress's intent to "assure that Federal . . . agencies cannot override state water quality requirements"). See *also WETLANDS AND 401 CERTIFICATION, supra* note 13, at 15-18 (describing wetland fill cases in which certification was denied).

censing arena.³²² A response to these concerns is beyond the scope of this article, but will no doubt be taken up by others.³²³

A related issue is whether the legal grounds upon which a state may deny certification coincide with those upon which it may condition an activity via its certification. EPA has referred to this issue as the "deny/condition dilemma."³²⁴ Specifically, the question is "whether a State may use State law requirements, other than those that are more stringent than the provisions of Sections 301, 302, 303, 306 and 307 of the CWA (401(a)(1)), to deny water quality certification."³²⁵ This "dilemma" arises by virtue of the language of section 401 itself. Section 401(a)(1) prohibits the granting of a federal license or permit until the applicant obtains a certification (or a waiver thereof) that any discharge that may result from his proposed activity "will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317."³²⁶ But section 401(d) requires the certifying agency to "set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure [compliance with sections 1311, 1312, 1316, or 1317], and with any other appropriate requirement of State law."³²⁷

Two differences in this language are immediately apparent: first, section 401(a) lists one ground for denying certification (noncompliance with CWA section 303, 33 U.S.C. § 1313) which is not mentioned in section 401(d) as a basis for imposing conditions.³²⁸ Second, section

322. See *supra* notes 60, 69 (noting concerns of dissenters in *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (1994)); *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 778 n.21 (1984) (noting that the "ultimate decision whether to issue [a FERC] license belongs to the Commission"; thus, FERC may choose not to issue a license, rather than issue one with certification conditions that it deems inappropriate); *Bogardus, supra* note 64, at 83-89 (arguing that state § 401 authority should be limited to criteria components of state water quality standards). *Bogardus*, who takes a narrower view of § 401 than probably any other commentator, concedes, however, that § 401 "grants states authority to veto a federal project." *Id.* at 45.

323. See *Ransel, supra* note 13, at 257-60, 272-74; *Seth Handy, Resurgence of the River Treasure: Jefferson PUD and a Comprehensive Plan for Hydroelectric Power*, 20 VT. L. REV. 201 (1995); *Laura Underwood, Note, Better Late Than Never: States Regain the Right to Regulate Stream Flows Under the Clean Water Act: PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 26 TEX. TECH. L. REV. 187 (1994).

324. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 26-27.

325. *Id.* at 26 (emphasis in original).

326. 33 U.S.C. § 1341(a)(1).

327. *Id.* § 1341(d). See 40 C.F.R. § 124.53(e)(3) (1995) (indicating that appropriate requirements of state law include, but are not limited to, state water quality standards). See *also supra* part II.B.2.

328. As noted in the text accompanying note 186, *supra*, § 401 was amended in 1977 to include references to CWA § 303. The House Report explained that this was a clarifying amendment: "It is understood that section 303 is required by the provisions of section 301," which had been included in § 401 since 1972. H.R. REP. NO. 830, at 96, in LEGISLATIVE HISTORY, VOL. 3, *supra* note 170, at 280. The Supreme Court's endorsement of this legislative history in *PUD No. 1*, see *supra* note 186, would appear to lay to rest any sugges-

401(d) authorizes conditions to ensure compliance with "any *other appropriate* requirement of State law,"³²⁹ whereas section 401(a) does not explicitly provide for denying certification of an activity for which compliance with such "appropriate requirement[s] of State law" cannot be reasonably assured.³³⁰

At least one court has held that *any* state law requirement related to water quality is an appropriate basis for *conditioning* a certification, but that such "other appropriate requirement[s] of State law" are not proper bases for *denying* certification.³³¹ In contrast, another state court has upheld (without opinion) a certifying agency's denial of certification on the basis of state law requirements unrelated to the CWA sections enumerated in section 401(a)(1).³³²

The questions raised by these two opinions, EPA says, are "thorny."³³³ The agency suggests that a state can avoid the dilemma "by adopting water quality standards that include all the water quality related considerations it wishes to include in the 401 certification review."³³⁴ These "water quality related considerations" would then be incorporated in section 401(a)(1), via its reference to CWA section 303, and thus serve as a proper basis for denying certification.³³⁵

It is not apparent, however, that this "dilemma" has been or will be a common problem. Indeed, it seems likely that states, for political

tion that the 1977 amendment's effect was to authorize states, under paragraph 401(a)(1), to *deny* certification of a proposed activity if it determined that the activity would not comply with water quality standards adopted pursuant to § 303, but not to *condition* the activity, under § 401(d), to ensure such compliance. (Indeed, common sense and the "greater includes the lesser" principle support the same conclusion.) In addition, EPA's regulations provide: "State certification . . . shall include: (1) *Conditions* which are necessary to ensure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law" 40 C.F.R. § 124.53(e)(1) (1995) (emphasis added).

329. 33 U.S.C. § 1341(d) (emphasis added).

330. Section 401(a) does, however, use the terms "*any* water quality requirements" and "*applicable* water quality requirements." See *id.* § 1341(a)(2) (regarding certification of interstate effects; emphasis added).

331. *Arnold Irrigation Dist. v. Department of Env'tl. Quality*, 717 P.2d 1274 (Or. Ct. App. 1986). The basis for the State's denial of certification was the applicant's failure to show that its proposed activity would comply with the local land use plan and ordinances. *Id.* at 1276, 1278.

332. See WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 26 (citing *Marmac Corp. v. Department of Nat. Resources*, No. CA-81-1792 (Kanawha County, W. Va., 1982)).

333. *Id.*

334. *Id.* at 27.

335. Congress apparently did not discuss certification denials based on predicted WQS violations, but it did expressly contemplate conditioning certifications on this basis: "If a State establishes more stringent limitations and/or time schedules pursuant to Section 303, they should be set forth in a certification under Section 401." LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 171 (Senate consideration of the Conference Committee Report on S. 2770). See also *supra* note 270 and accompanying text (regarding purpose of certification to assure compliance with WQS).

or other reasons, will more often condition a certification rather than deny it outright. Furthermore, a state contemplating denying certification on the basis of noncompliance with some "other appropriate requirement of State law" should carefully consider whether the proposed activity can really be expected to comply with the enumerated CWA sections. If compliance with the applicable federal requirements cannot reasonably be assured, the certification should be denied on that basis.³³⁶

C. Judicial Review of Certification Decisions

This part reviews several topics under the general rubric of "judicial review" of certification decisions. These topics range from jurisdiction to the proper vehicles for challenging certification and the extent of deference shown by courts to certifying agencies. A primary focus is the Clean Water Act's citizen suit provision,³³⁷ which expressly encompasses certification, but whose relationship to the certification process has received scant attention from courts and commentators.

1. Jurisdiction and the CWA Citizen Suit Provision

Certifications, at least as an initial matter, involve questions of state law and are reviewable chiefly by state courts.³³⁸ Indeed, it has been said that "state certification under the Clean Water Act is set up as the exclusive prerogative of the state and is not to be reviewed by any agency of the federal government."³³⁹ Nevertheless, two excep-

336. See 40 C.F.R. § 121.2(a)(3) (1995) (requiring state certification to include a statement of reasonable assurance that activity will be conducted in compliance with applicable water quality standards).

337. 33 U.S.C. § 1365.

338. See 40 C.F.R. § 124.55(e) (1995) (review and appeals of state certifications "shall be made through the applicable procedures of the State," and not through federal appeal procedures); H.R. REP. NO. 911, at 66, 122, *reprinted in* LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 809 ("If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge the refusal . . ."); *id.* at 811 (rejecting any intent to authorize EPA to review all state certifications). See also 33 U.S.C. § 1371(c)(2) ("Nothing in [NEPA] shall be deemed to—(A) authorize any Federal agency . . . to review . . . the adequacy of any certification under section 1341 of this title [CWA § 401]"); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (rejecting EPA authority to review state certifications, and citing CWA § 511(c)(2)); *Keating v. FERC*, 927 F.2d 616, 622-23 (D.C. Cir. 1991) (citing cases holding that disputes over certification "are properly left to the states themselves"); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 101-02 (1st Cir. 1989) (holding that nationwide permit #26 was not valid in Massachusetts, and thus not available to defendants, because the State had denied certification, and further holding that challenges to the certification itself or to the process must be brought in state court).

339. *Lake Erie Alliance for the Protection of the Coastal Corridor v. United States Army Corps of Eng'rs*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981) (citing U.S.C. § 1371(c)(2)), *aff'd*, 707 F.2d 1392 (3d Cir.), *cert. denied*, 464 U.S. 915 (1983)). See also 40

tions to this rule of nonreviewability in federal courts of certifications have been recognized.³⁴⁰ The first is the case in which the United States, as applicant for a certification, wishes to challenge the state's decision.³⁴¹ The second involves a state's decision to revoke a certification after "a federal agency has acted upon it."³⁴²

Apart from these narrow exceptions, federal courts also should have jurisdiction to decide questions concerning the interpretation and application of the federal statute, such as whether a federal permittee (or applicant for a federal permit) must obtain a section 401 certification for its proposed activity. For instance, at least one federal court has decided the question, from which state(s) a permit applicant must seek certification,³⁴³ while declining to review the validity of a certification that had been obtained.³⁴⁴

Still another basis for federal court jurisdiction over certification challenges has been widely overlooked: the Clean Water Act's citizen suit provision. Section 505 of the CWA authorizes citizen suits

against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B)

C.F.R. § 124.55(e) (restricting review of state certification to state procedures); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234 (S.D. Ala. 1976). Cf. *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1920 (1994) (Thomas, J., dissenting) ("federal courts have uniformly held that FERC has no power to alter or review § 401 conditions, and that the proper forum for review of those conditions is state court").

340. Not all authorities acknowledge these exceptions, suggesting instead that all certification suits belong in state court. See *PUD No. 1*, 114 S. Ct. at 1920 (Thomas, J., dissenting); Ransel, *supra* note 13, at 274.

341. See *United States v. Puerto Rico*, 551 F. Supp. 864, 865 (D.P.R. 1982), *aff'd*, 721 F.2d 832 (1st Cir. 1983). See also *WETLANDS AND 401 CERTIFICATION*, *supra* note 13, at i n.6 (apparently referring to *Puerto Rico*). The United States challenged the Commonwealth of Puerto Rico's denial of certification to naval bombing activities, alleging jurisdiction under 28 U.S.C. § 1345 (providing for suits by the United States to be brought in federal district court). Relying partly on the provision in CWA § 313, 33 U.S.C. § 1323 (concerning federal facilities' compliance with water pollution control laws), which allows for removal to federal court of suits against the federal government, the courts held that the district court did have jurisdiction of the United States' action, despite the fact that the certification involved questions of nonfederal law. See 551 F. Supp. at 868-69.

342. *Keating*, 927 F.2d at 623-24. *Keating* held that a state's authority in such circumstances is limited by § 401(a)(3) and is reviewable by the federal courts. *Id.*

343. *Lake Erie Alliance*, 526 F.Supp. at 1074-75. Jurisdiction in *Lake Erie Alliance*, which involved two claims with respect to certification under § 401, was predicated on 28 U.S.C. § 1331 and on the Administrative Procedure Act, 5 U.S.C. § 706, not on CWA § 505. 526 F. Supp. at 1066. The court did not hold expressly that it had such jurisdiction over the certification claims, but simply addressed the plaintiff's claim that certification was required.

344. *Id.* at 1074. See also *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989) ("reject[ing] defendants' argument that the discretionary nature of the Massachusetts certification process poses constitutional concerns," while holding that the "proper forum for such a claim is state court"; emphasis added).

an order issued by the Administrator or a State with respect to such a standard or limitation.³⁴⁵

The statute specifies that, "[f]or purposes of [section 505], the term 'effluent standard or limitation under this chapter' means . . . (5) certification under section 1341 of this title."³⁴⁶ And finally, "[t]he district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties under section 1319(d) of this title."³⁴⁷ To paraphrase, section 505 authorizes suit in federal district court against any person who is alleged to be in violation of a section 401 certification.³⁴⁸ In the certification context, "any person" potentially includes the United States, a state or other certifying agency, or a holder of a certified federal permit. But section 505 does not explain, nor has any court decided,³⁴⁹ what constitutes a

345. 33 U.S.C. § 1365(a)(1).

346. *Id.* § 1365(f). This definition, including the parts not quoted, is distinctly broader than the definition of "effluent limitation" in § 502(11), which is limited to restrictions on point sources. *Id.* § 1362(11). See also *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 n.26 (1981) (noting that the phrase "any effluent standard or limitation" as used in § 505(e) is not necessarily limited to the "terms of the FWPCA" but "also could refer to state statutory limitations or to 'effluent limitations' imposed as a result of court decrees under the common law of nuisance"). But see *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 43 (5th Cir. 1980) (misstating the definition of "effluent limit" for purposes of citizen suits); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 371-72 (10th Cir. 1979) (making the same error).

347. 33 U.S.C. § 1365(a)(2). Note, however, that the civil penalties provision (CWA § 309(d), *id.* § 1319(d)), which is referenced in this paragraph, makes no mention of CWA § 401. Assuming *arguendo* that § 1365(a) precludes district courts from imposing civil penalties for violations of 401 certifications, it does nothing to infringe on the courts' usual equitable discretion. See generally *Weimberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (stating that "[t]he exercise of equitable discretion . . . must include the ability to deny as well as grant injunctive relief").

348. See *Sun Enterprises, Ltd. v. Train*, 394 F. Supp. 211, 216 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 280 (2d Cir. 1976).

349. In fact, some courts, without a nod to CWA § 505(f)(5), pronounce that *all* challenges to 401 certifications belong in state court. *E.g.*, *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989) ("Any defect in a state's section 401 water quality certification can be redressed. The proper forum for such a claim is state court, rather than federal court, because a state law determination is involved."). See also *id.* at 102 ("reject[ing] defendants' argument that the discretionary nature of the Massachusetts certification process poses constitutional concerns," and holding that the "proper forum for such a claim is state court"). On the other hand, in an early case involving a certification issue, jurisdiction was premised on the CWA citizen suit provision, as well as on the APA and 28 U.S.C. § 1331(a). See *Save Our Sound Fisheries Ass'n v. Callaway*, 387 F. Supp. 292, 297 (D.R.I. 1974). The plaintiff alleged that the defendants (federal officials and a government contractor) had violated the CWA by not obtaining certification. *Id.* at 304-05. The court found jurisdiction proper under the latter statutes, however, and thus found it unnecessary to "reach the question of the applicability of the 'citizen suit' provisions," including the defendants' argument that CWA § 505 authorizes suits only for substantive, not procedural, violations of the Act. *Id.* at 298, 299 n.7, 300 n.9. The court implied that, but for the then-extant exemption of federal agencies from the certification requirement, the Corps of Engineers' proposed dumping would have been subject to § 401. *Id.* at 306. But its opin-

violation of a 401 certification or who may violate a certification.³⁵⁰ However, the legislative history provides some clues.³⁵¹

On first impression the citizen suit provision would appear to be at odds with the "general rule" that certifications are reviewable pursuant only to state-established procedures. One way to reconcile this apparent conflict would be to limit application of section 505 to certifi-

ion gives no clue as to whether the court would have found, on these facts, a remedy under the CWA citizen suit provision.

350. Two related issues are whether anyone (and if so, whom) can be sued if (1) a project proceeds without 401 certification, or (2) water quality standards are violated despite compliance with the 401 certification. These issues are considered *infra*.

351. The Senate Public Works Committee's report on S. 2770 contains the following cursory explanation of § 505(f): "[C]itizens are granted authority to bring enforcement actions for violations of . . . provisions of certification under section 401." S. REP. NO. 414, 92d Cong., 2d Sess. 82 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1500 (emphasis added). The phrase "provisions of certification" suggests that the Committee was referring to conditions imposed in a certification. (The term would seem to have little if any meaning if applied to a certification that merely professed reasonable assurance that all applicable water quality requirements would be met, and which imposed no conditions.) This interpretation is supported by another statement in the Senate Report: "[A] certification becomes an enforceable condition on the Federal permit or license." *Id.* at 1487 (emphasis added). It is difficult to see how a certification could be "enforceable" unless it set forth conditions or express requirements. On the other hand, "provisions of certification" (the phrase used by the Senate Committee) arguably could also refer to provisions of the certification process, for instance, the procedures outlined in § 401(a) or in the implementing regulations. See, e.g., *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989) ("reject[ing] defendants' argument that the discretionary nature of the Massachusetts certification process poses constitutional concerns") (emphasis added). The Senate Committee also declared that "the [citizen suit] provision in this bill is carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to act are alleged." S. REP. NO. 414, 92d Cong., 2d Sess. 81 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 2, *supra* note 116, at 1499.

The legislative history of § 401's precursor, § 21(b) of the 1970 Water Quality Improvement Act, contains a few observations concerning judicial review of certifications. Sen. Spang remarked that § 21(b) provided "for the suspension or termination of a certificate in the event a court of competent jurisdiction finds that a facility is operating in violation of water quality standards." 115 CONG. REC. 28,959 (1969). Rep. Edmondson stated that, if an applicant for certification believes "his rights have been interfered with" (e.g., by a denial of certification for reasons other than water pollution), "the judicial procedures available now in the State courts to require action by the State would be available to the applicant. In a case where the [Interior] Secretary is the certifying authority, the Federal courts would be available to the applicant." *Id.* at 1026. And Sen. Cooper, in discussing S. 7's provisions for certification and federal compliance with state water quality standards, termed "relevant" the existing provision in the law for judicial review of "alleged violations of standards." *Id.* at 28,971.

Most references to the citizen suit provision in the 1972 legislative history, however, are mere recitations of the provisions of § 505(f). See, e.g., H.R. REP. NO. 911, 92d Cong., 2d Sess. 134 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 821 (section-by-section analysis of H.R. 11896). Substantive debate over the citizen suit provision was apparently limited to discussions of the proper scope of the category of persons or citizens authorized to sue. See, e.g., *id.* at 162, 179 (Senate consideration of the Conference Committee report, noting that the Committee's amendment of the definition of "citizen" in the citizen suit provision was "based on Section 10 of the Administrative Procedures [sic] Act, 5 U.S.C. § 702"); *id.* at 329, 671-75, 821.

cations by the EPA Administrator. Yet the statute certainly does not express such a limitation. And, like the majority in *PUD No. 1*, we should be "unwilling to read implied limitations into" the Act.³⁵² Moreover, while review of a section 402 permit issued by the EPA may be had only in the circuit courts of appeals,³⁵³ section 505 confers on the federal district courts jurisdiction to review certifications,³⁵⁴ even though any conditions in the certification become conditions of the EPA-issued permit.³⁵⁵ Thus, the traditional wisdom that certifications are strictly a matter of state law must be reconsidered.

In spite of the dearth of authority on the scope of review of certification violations under CWA section 505,³⁵⁶ some speculative analysis is possible. To begin with, the term "certification" surely contemplates the document issued by the certifying agency. Indeed, the most plausible interpretation is that section 505(f)(5) renders a federal permittee or licensee subject to suit for violating a provision, or condition, of the certification of its permit or license. For example, a permittee could be sued for failing to conduct required monitoring

352. *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1914 (1994) (referring to § 401).

353. 33 U.S.C. § 1369.

354. *Id.* § 1365(a), (f)(5).

355. *Id.* § 1341(d). In other words, construing § 505 to allow challenges to certifications results in an anomaly. CWA § 509, *id.* § 1369, dictates that appeals of § 402 permits issued by the EPA Administrator shall be in the federal circuit courts of appeals. But § 505 prescribes that review of an alleged "violation of certification" (which certification becomes a condition on the permit, *id.* § 1341(d)) shall be in the district courts. This arguable discrepancy could be used to support an argument that only violations of certification conditions (like violations of NPDES permit conditions, see *id.* § 1365(f)(6)), not certifications *per se* or the certification process, are actionable under § 505, with review of both in the district courts. See *infra* note 384 and accompanying text.

356. One early federal case, *Sun Enterprises, Ltd. v. Train*, sheds a little light on this issue, although the court's reasoning is far from clear. 384 F. Supp. 211 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 280 (2d Cir. 1976). The State of New York had certified, and EPA had issued, a § 402 (NPDES) permit for a proposed discharge of treated sewage into a stream that bordered plaintiff's property. The plaintiff had challenged the proposed development on numerous grounds, including an allegation that the State's certification was "incomplete." 384 F. Supp. at 220.

In response to this allegation, the court stated: "[N]either the federal nor state defendants could be said to be in violation within the meaning of section 505(a) of the state certification allegedly made here. Review of the action of the state defendants in rendering a certification . . . is not, at least in this case, within the jurisdiction of this Court for the reasons set forth [in this opinion]." *Id.* (emphasis added). The only "reasons" the court gave were, first, that review of a permit issued by EPA may be had only in the federal courts of appeals (under CWA § 509), and, second, that review of the certification would "interrupt[] the administrative process" and "intrude[] upon the functions of the Court of Appeals and the state courts." *Id.* The court did not explain what a "violation of . . . certification under section 401" might consist of, nor in what kind of case a district court might have jurisdiction to review "the action of [a] state defendant[] in rendering a certification." *Id.* It could be inferred (by a sort of process of elimination) that only a violation of a provision, or condition, of certification by a permittee could, in this court's view, constitute a "violation of . . . certification under section 401."

of its operations, or for violating a water quality standard imposed as an express condition of the certification.³⁵⁷ This interpretation is consistent with the meager legislative history on the topic.³⁵⁸ Allowing suit for a violation of a condition of a certification, which becomes a condition of the federal permit pursuant to section 401(d), parallels the citizen suit provision allowing suit for alleged violations of section 402 permit conditions.³⁵⁹ Indeed, when EPA issues a 402 permit, any conditions in the state's 401 certification become conditions of the permit and hence are enforceable via a citizen suit.³⁶⁰ A reasonable interpretation is that section 505(f)(5) addresses certification conditions in permits other than (or in addition to) those permits directly enforceable under section 505, i.e., sections 402 and 404 permits.³⁶¹

Interpreting section 505 in this manner would allow direct enforcement of water quality standards against the holder of a permit conditioned (via the certification) upon compliance with specified WQS.³⁶² A violation of these WQS is then actionable pursuant to section 505(f)(5), just as violations of section 402 permit conditions are actionable under section 505(f)(6).³⁶³ Any doubt that the latter conditions may include requiring compliance with WQS was mitigated, if not erased, by the Ninth Circuit's decision, on rehearing, in *Northwest Environmental Advocates v. City of Portland (NEA)*.³⁶⁴ Vacating its earlier decision,³⁶⁵ the court held that citizen suits are available "to enforce water quality standards when they are conditions of a CWA

357. See generally *supra* part II.B.2 (discussing certification conditions).

358. See *supra* note 351.

359. See 33 U.S.C. § 1365(f)(6). See generally *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 648 (E.D. Pa. 1981) (suggesting how to interpret the phrase "in violation of an effluent standard or limitation" in § 1365(a)(1)); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 700, 701 & n.46 (D.C. Cir. 1974) (discussing CWA citizen suit provision).

360. Thus, it would seem that a condition of a certification of a § 402 permit should be enforceable via § 505(f)(5) or 505(f)(6). Congress must have intended the two subparagraphs to encompass different things, however. Otherwise one or the other is "mere surplusage," an interpretation the courts shun. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995); see also *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994) (read statutes to give independent effect to all provisions). Accordingly, § 505(f)(5), relating to certification, must encompass certifications of permits other than § 402 permits, to which subparagraph (6) pertains.

361. While § 505 does not expressly authorize citizen suits for alleged violations of § 404 permits, the Clean Water Act indicates that such was Congress's intent. See 33 U.S.C. § 1344(p) (providing that compliance with a § 404 permit "shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343"; emphasis added). See also *Glicksman, supra* note 15, at 117 & n.381 (citing cases in which "courts have permitted [citizen] suits against the Army Corps of Engineers in connection with alleged violations of the dredge and fill permit provisions").

362. See 33 U.S.C. § 1341(d).

363. See *id.* § 1365(f)(5), (6).

364. 56 F.3d 979 (9th Cir. 1995), *reh'g denied*, 1996 WL 30487 (Jan. 24, 1996).

365. 11 F.3d 900 (9th Cir. 1993).

permit."³⁶⁶ The case involved an NPDES permit issued for the City of Portland's municipal wastewater treatment plant. The permit stated that, "notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards as adopted' [pursuant to Oregon statute]."³⁶⁷ The court concluded, based largely on the "plain language of CWA § 505[, which] authorizes citizens to enforce all permit conditions,"³⁶⁸ and on the Supreme Court's decision in *PUD No. 1*,³⁶⁹ that this condition of the permit was enforceable via a CWA citizen suit.³⁷⁰

Read together, *NEA* and *PUD No. 1* go far toward establishing that where compliance with water quality standards is specified in a CWA certification, which is (by law) then incorporated into a federal license or permit, those WQS (like any other condition imposed in the certification) can be enforced in a CWA citizen suit.³⁷¹ The discussion below of certification of federal grazing permits will illustrate the significance of this conclusion.³⁷²

366. 56 F.3d at 990.

367. *Id.* at 985 (quoting NPDES permit).

368. *Id.* at 986.

369. *Id.* at 987-88 (citing *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1910-14 (1994)). *PUD No. 1* was decided after the Ninth Circuit's initial ruling in *NEA*. The *NEA* decision on rehearing vindicates Professor Rodgers. Several years earlier he had written: "[W]ater quality standards are part of the grammar of the [NPDES] permit obligations that are the essence of citizen suit oversight. It is true, moreover, that a water quality standard is an example of the sort of preexisting obligation, oft-forgotten, that conforms snugly to the citizen-as-conscience model of citizen suits." RODGERS, *supra* note 13, § 4.5, at 70 (footnotes omitted).

370. The court also found the legislative history helpful. For instance, it noted that the "Senate Committee first outlined the dual purposes of water quality standards: 'The standards are intended to function . . . as a measure of performance . . . [and] to provide an avenue of legal action against polluters. If the wastes discharged by polluters reduce water quality below the standards, actions may be begun against the polluters.'" 56 F.3d at 986 (quoting S. REP. NO. 414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.A.N. 3668, 3671).

371. *Cf.* 40 C.F.R. § 121.25 (1995) (authorizing, where several specified conditions met, suspension of a federal license for uncorrected violations of WQS). *But see Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987) (ruling that judicial review of violations of WQS by nonpoint sources (logging activities) is available under the APA but not the CWA citizen suit provision). *Accord Marble Mtn. Audubon Soc'y v. Rice*, 914 F.2d 179, 183 (9th Cir. 1990); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502 (D. Or. 1991).

372. See *infra* part III. This interpretation of §§ 401 and 505 conforms with the provision in § 401(a)(5) for suspending or revoking a certified federal license "upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of" several enumerated sections of the Act, including the WQS provisions in § 303. This proviso plainly contemplates that certified activities and operations will be subject to suit under the Clean Water Act for violations of WQS. Furthermore, EPA § 401 regulations provide, under certain conditions, for suspension of an *uncertified* federal permit if the permittee cannot come into compliance with subsequently promulgated and applicable WQS. 40 C.F.R. § 121.25(a).

Section 505(f)(5) also may authorize suit against a certifying agency in the situation where the certification itself violates applicable provisions of the law or regulations.³⁷³ It might seem difficult to imagine the circumstances in which a state could be held to “be in violation of” a “certification under section [401]” by virtue of its issuance, denial, or conditioning of such certificate. However, such a violation arguably would occur if a certifying agency failed to meet its substantive obligations—after undertaking affirmatively to review a proposed federal project—by issuing the certification without providing reasonable assurance that the project would comply with all applicable water quality requirements, or by denying certification in the face of such assurance.³⁷⁴ A plaintiff also might allege that the certifying agency had considered, or imposed as a condition, an inappropriate requirement.³⁷⁵ Alleging a violation of this type is analogous to alleging that the agency’s issuance or denial of certification was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁷⁶ While no federal citizen suit case has involved such an allegation, one state court case provides a model.³⁷⁷

In addition to the *document* itself, “certification” seems to include the *process* of certifying that an activity will comply with appli-

373. *Cf.* Sun Enterprises, Ltd. v. Train, 394 F. Supp. 211, 216, 220-21 (S.D.N.Y. 1975) (reasoning that a certification cannot be challenged before the permit is issued), *aff’d*, 532 F.2d 280 (2d Cir. 1976).

374. See 33 U.S.C. § 1341(d) (“[a]ny certification provided . . . shall set forth any . . . limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable [requirements]”; emphasis added). See *id.* § 1341(a)(2). Where a discharge may affect a state other than the state in which the discharge occurs, the permitting agency “shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.” *Id.* (emphasis added). The usual means of assuring such latter compliance would be through the imposition of conditions in the certification. See *id.* § 1341(d). EPA regulations require “reasonable assurance,” as opposed to complete, or total, assurance. 40 C.F.R. § 121.2(a)(3) (1995).

375. This raises the issue of the appropriate bases for denying and conditioning permits. See *supra* parts II.B.2 and 3. Recall, however, that the dissenters in *PUD No. 1* contended that the majority opinion makes any requirements appropriate. *PUD No. 1 v. Washington Dep’t of Ecology*, 114 S. Ct 1900, 1918-19 (1994) (Thomas, J., dissenting). A similar concern was expressed during debate on the certification provision in H.R. 4148, ultimately enacted as the Water Quality Act of 1970. Rep. Harsha queried whether a “State, for reasons other than water pollution, may refuse to grant such certification.” 115 CONG. REC. 1026 (1969). In response, Rep. Edmondson assured him, first, that it could be assumed that the “States and the Federal Government will act in good faith” concerning such matters, and, second, that judicial review would be available to an applicant for certification who believed “his rights [had] been interfered with.” *Id.*

376. 5 U.S.C. § 706(2)(A) (1994) (describing scope of review of agency actions under APA).

377. See *Miners Advocacy Council v. Department of Env’t. Conserv.*, 778 P.2d 1126, 1131-33 (Alaska 1989), *cert. denied*, 493 U.S. 1077 (1990). The Alaska Supreme Court overturned the State’s certification, holding that the conditions therein did not provide reasonable assurance that applicable state water quality standards would be met by all mines covered by the permits. *Id.* at 1138-40.

cable requirements. Thus, a “violation of certification” for purposes of section 505 arguably could include a violation by the certifying agency³⁷⁸ of the procedural requirements applicable to certification.³⁷⁹ In addition, a federal agency that issues a permit, before a certification has been “obtained” or “waived,” would violate the prescribed statutory process³⁸⁰ and, consequently, could be considered to “be in violation of . . . certification.”³⁸¹

While a state’s denial of certification is subject to challenge in state court and possibly in federal court via the CWA citizen suit provision, the citizen suit may not be available to *force* a state, which has failed to exercise its 401 authority, to issue a certification.³⁸² At first blush, this conclusion seems compelled by section 401’s provision waiving certification requirements where a state fails to act within a reasonable time.³⁸³ In other words, section 401 should be deemed to

378. See 33 U.S.C. § 1341(a)(1)-(5); 40 C.F.R. § 121.21-28 (1995).

379. *Contra* Sun Enterprises, Ltd. v. Train, 394 F. Supp. 211, 216 (S.D.N.Y. 1975) (declining to interfere with the administrative process by reviewing the certification), *aff’d*, 532 F.2d 280 (2d Cir. 1976). See *supra* note 356. Procedural requirements respecting certification are minimal. The statute sets forth certain notice requirements in 33 U.S.C. § 1341(a), and EPA and some other federal agencies have promulgated rules concerning the application procedures and processing, the timing of review, etc. See, e.g., 40 C.F.R. pt. 121 (1995) (EPA); 33 C.F.R. pt. 325 (1995) (Corps of Engineers); 18 C.F.R. § 4.38 (1995) (FERC).

380. See 33 U.S.C. § 1341(a)(1).

381. *Id.* § 1365(a)(1), (f)(5). *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987), may present an obstacle to citizen suits alleging a violation of the certification process. *Gwaltney* construed the “in violation of” language of 33 U.S.C. § 1365(a) to mean that a plaintiff must allege, in good faith, some ongoing violation. *Id.* at 64-67. Once a certification has been issued, however, the certification process is complete. At that point it could be argued that any alleged violation of the certification must address the certification document itself, including any conditions. If this interpretation were to hold sway, process violations would appear to be unredressable by means of citizen suits. *Cf.* Sun Enterprises, Ltd. v. Train, 394 F. Supp. 211, 220 (S.D.N.Y. 1975) (declining to review state’s alleged “fail[ure] to make a ‘complete’ certification”), *aff’d*, 532 F.2d 280 (2d Cir. 1976). The *Sun Enterprises* court stated that “State certification is merely a step in the administrative process,” and held that “[r]eview by this Court of a state certification under section 401 . . . would not only result in interruption of the administrative process, but would also be an unwarranted intrusion upon the functions of the [federal] Court of Appeals [under CWA § 509] and the state courts.” 394 F. Supp. at 220. But note: In cases where the United States is certification applicant and plaintiff, jurisdiction can be founded on 28 U.S.C. § 1345 (1994). See *United States v. Puerto Rico*, 721 F.2d 832, 839 (1st Cir. 1983). In *Puerto Rico*, the United States contested Puerto Rico’s denial of certification. Because its suit was brought under 28 U.S.C. § 1345, rather than 33 U.S.C. § 1365 (indeed the case contains no mention of the CWA citizen suit statute), it did not allege that any person was “in violation of . . . certification under section 401.” If *Gwaltney* is given full effect in the certification arena, the United States would seem to be in a better, or at least different, position than other plaintiffs, in that it can pursue in federal court certain claims that nonfederal plaintiffs could bring only in state court, if at all.

382. *But see infra* note 401 and accompanying text.

383. The statute specifies that if the certifying agency “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 certification requirements of this subsection shall be

accord the states discretion to decide in individual cases whether to issue a certification.³⁸⁴

This tentative conclusion, however, leaves several related questions unanswered. In order to *waive* its certification authority, it would seem that the state (or other certifying agency) must have *notice* of the applied-for federal permit. But the statute is less clear whether a plaintiff may sue an applicant for a federal permit to force it to *request* a certification (or to provide evidence of a waiver), or whether a plaintiff may sue the permitting agency for failing to notify the appropriate certifying agency of an application for a permit.

This uncertainty stems in part from section 401's ambiguity concerning the respective obligations (if any) of certifying agency, applicant, and federal permitting agency. The Act does state that the "*applicant [for the federal permit] shall provide the licensing or permitting agency a certification from the State,*" and it also refers to the

waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1). States also may "fail to certify" an activity by affirmatively waiving certification. *See, e.g.*, 18 C.F.R. § 4.38(e) (1995) (allowing noncompliance with requirements waived in writing by resource agency); *Environmental Defense Fund, Inc. v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) (holding that affirmative waivers of § 401 requirements are allowed). *See infra* note 397 and accompanying text. Some agencies, by regulation, prescribe the contents and form of the certification application, *e.g.*, 18 C.F.R. § 4.38(b)-(d), (g), (h) (1995) (FERC licenses), and the effective waiver period, *e.g., id.* § 4.38(f)(7)(ii).

384. *Cf.* 33 U.S.C. § 1365(a)(2) (authorizing suits against the EPA Administrator for alleged failure "to perform any act or duty under this chapter which is not discretionary"). This discretion might be analogized to agencies' discretion to exercise their enforcement authority. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1994) (agency action "committed to agency discretion by law"); *Heckler v. Chaney*, 470 U.S. 821 (1985). The majority view in the CWA context is that CWA § 309, which provides for enforcement, imposes only discretionary duties. *See, e.g.*, *State Water Control Bd. v. Train*, 559 F.2d 921, 927 & n.34 (4th Cir. 1977) (dictum); *Zemansky v. EPA*, 16 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,862 (D. Alaska Apr. 7, 1986); *Caldwell v. Gurley Refining Co.*, 533 F. Supp. 252, 255-57 (E.D. Ark. 1982), *aff'd*, 755 F.2d 645 (8th Cir. 1985); *Smith, supra* note 179, at 71 ("Case law has established that section 505 does not authorize citizens to compel federal and state regulatory agencies to prosecute law violators."). *But see* *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 134 (D.S.C. 1978) (finding a nondiscretionary duty under § 309(a)(3) once the Administrator "finds" a violation of the Act); *accord* LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 174.

On the other hand, the discretionary authority in § 401 may be distinguishable. *See infra* notes 400-03 and accompanying text. Furthermore, states presumably may override the waiver option, choosing to require the designated agency either to certify or refuse certification to a proposed activity. For example, Oregon law seems to require the agency to *either deny or approve certification of hydroelectric projects*. *See City of Klamath Falls v. Environmental Quality Comm'n*, 851 P.2d 602, 604 (Or. Ct. App. 1993) (citing OR. REV. STAT. § 468B.040), *aff'd*, 870 P.2d 825 (Or. 1994). Or there may be a requirement in state law, enforceable by citizens, that the state act to protect water quality. For instance, the court in *Arnold Irrigation District v. Department of Environmental Quality* concluded, on the basis of state land use law, that if the State "grants petitioners' request for a [§ 401] certificate, it *must* require, as a condition of that certificate, that petitioners comply with the water-related portions of the [applicable] land use regulations." 717 P.2d 1274, 1279 (Or. Ct. App. 1986) (emphasis added).

applicant's "*request for certification.*"³⁸⁵ It further provides that, in cases where a construction permit has been certified, the "permittee *shall provide an opportunity for such certifying State . . . to review the manner in which the facility or activity shall be operated or conducted*" to determine whether it will meet water quality requirements.³⁸⁶ Similarly, the statute requires *applicants* for operating permits to *notify* the certifying agency of any relevant changes in their construction or operation since receipt of the construction permit certification in order for that certification to serve also as certification of the operating license.³⁸⁷ On the other hand, the statute requires a *federal agency* charged with issuing an operating permit to a facility for which a construction permit has been certified to *give notice* to the certifying agency before issuing the operating permit.³⁸⁸ On balance, however, the statute seems to place most of the burden on permit applicants.³⁸⁹ This would seem proper in any permitting context, such as CWA sections 402 and 404, where the permit applicant bears the burden of showing that it will meet all requirements for obtaining the permit.³⁹⁰ At least one court has construed section 401 as "requir[ing] a prospective licensee [] to seek certification."³⁹¹

Certain regulations shift this burden somewhat, and appropriately so.³⁹² EPA regulations specify that when federal permitting

385. 33 U.S.C. § 1341(a)(1) (emphasis added).

386. *Id.* § 1341(a)(4) (emphasis added).

387. *Id.* § 1341(a)(3).

388. *Id.*

389. *See* *Flax v. Ash*, 538 N.Y.S.2d 891, 892-93 (N.Y. Sup. Ct. 1988) (stating that the CWA "requires that any applicant for a federal permit . . . must obtain a waiver or certification . . . [which] means that in the instant case, the Navy had to obtain a certificate"). The statute also does not state whether an applicant is responsible for demonstrating a waiver where it has not received a certification. Such a demonstration presumably could not be made unless the applicant could show that the certifying agency had notice—provided either by the applicant or the permitting agency—that a permit was being sought for an activity that might result in a discharge. Two commentators have noted that state water quality agencies "do not seek out applications for certification." *Ransel & Meyers, supra* note 13, at 345. *Cf.* 33 U.S.C. § 1341(a)(1) (referring to a state's inaction "on a request for certification").

390. *See, e.g., supra* note 315 and accompanying text.

391. *City of Fredericksburg v. FERC*, 876 F.2d 1109, 1111 (4th Cir. 1989) (emphasis added). *Cf.* 33 U.S.C. 1341(a)(1). The court subsequently noted, however, that the applicant "never made a 'request' for certification within the meaning of FERC's regulations," 876 F.2d at 1111, and stated in a footnote: "We rest our holding solely on our reading of the FERC regulations and do not purport to decide the meaning of 'request' under [§ 401(a)(1)]." *Id.* at 1111 n.1.

392. *E.g., OHIO ADMIN. CODE ANN. § 3745-32-03* (Anderson 1995) (providing that filing an application with the Corps for a § 404 permit or an RHA § 10 permit constitutes application to the State for certification, but requiring applicants for any other permits to submit an application for certification); *MINN. R. 7001.1420* (1995) (requiring "[a]ny person who is required by [CWA § 401] to obtain a certification . . . [to] make application to the agency"). *Cf.* 25 PA. CODE § 105.15(b) (1995) (referring to "an applicant requesting water quality certification"); *WASH. ADMIN. CODE § 173-225-030* (1995) (referring to the

agencies receive a permit application without an accompanying section 401 certification, the "permitting agency shall either: (1) Forward one copy of the application to the appropriate certifying agency and two copies to the Regional Administrator, or (2) forward three copies to the Regional Administrator pursuant to an [appropriate] agreement."³⁹³ This rule is designed ostensibly to compensate for permit applicants' ignorance of certification requirements or their delay in submitting the necessary information to certifying agencies and to help effectuate the waiver provisions by ensuring that the clock starts running on the certification opportunity. Confusion about certification requirements and responsibilities is less likely to arise among those federal agencies that have promulgated their own rules concerning certification than in situations where certifications are required or obtained only inconsistently or not at all. For example, responsibilities are probably well understood in the cases of EPA-issued NPDES permits and Corps-issued dredge-and-fill permits, where certification is routinely required and the agencies have promulgated procedural regulations.³⁹⁴ If a federal agency has not promulgated certification rules, and/or does not require (or even expect) permit applicants to supply certifications, implementing the CWA certification requirements will be more difficult.

A citizen suit pending in federal district court in Oregon may be the first to raise some of these issues. In *Oregon Natural Desert Association v. Thomas*, the plaintiff organizations "are suing the Forest Service for failing to require section 401 certification before issuing a

filing of an application for certification with the department); KAN. ADMIN. REGS. 28-16-28(c)(iii) (1993) (referring to a request for certification by the person proposing the action). It seems reasonable to expect federal agencies to adopt procedures for notifying potential applicants for federal permits that the activities subject to those permits are also subject to § 401 review by the respective states. Similarly, states should promulgate rules or, at a minimum, policies, describing their review procedures. On the other hand, § 401 contains no requirement that EPA or any other agency issue rules concerning certification procedures. In other words, the statute appears to be self-implementing. Cf. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 9, 30 (discussing the advisability of implementing regulations, and observing that many states do not have such rules, but *not* suggesting that states lack power to exercise their § 401 authority absent such rules); Summit Hydro-power Partnership v. Commissioner of Envtl. Protection, 629 A.2d 367, 373 (Conn. 1993) ("The procedures that any state need adopt to process § 401 water quality certification requests are determined by the statutes promulgated by each state."). See also *supra* note 108.

393. 40 C.F.R. § 121.11(a) (1995).

394. See, e.g., 33 C.F.R. § 325.2(b)(1) (1995) (rules for certification of Department of Army, or Corps, permits); 40 C.F.R. § 124.53 (1995) (rules for certification of EPA-issued NPDES permits). The Corps provides that the district engineer will (1) notify the permit applicant if certification is necessary and (2) obtain from the applicant or the certifying agency a copy of the certification. 33 C.F.R. § 325.2(b)(1). EPA provides that if it has not received a copy of the certification by the time it has prepared a draft permit, it will send a copy of the draft permit to the certifying agency. 40 C.F.R. § 124.53(c).

grazing permit on an allotment in the Malheur National Forest."³⁹⁵ The Forest Service allegedly issued the grazing permit "to an applicant who provided no record of state certification" nor, presumably, a waiver.³⁹⁶ The situation, as alleged, is certainly not uncommon. To the author's knowledge, certification has never been required for any federal grazing permit.

Waivers of the certification requirements³⁹⁷ raise additional issues. For instance, should a state's *affirmative* waiver of certification requirements be considered legally equivalent to a state's determination that reasonable assurance exists that the activity as proposed will comply with all applicable water quality requirements? If a state were to issue a written waiver of the certification requirements—perhaps to enable the federal permit application process to go forward prior to the expiration of the statutory or regulatory review period—such a waiver might be viewed as reflecting the state's opinion that the proposed activity posed no water quality concerns. The question thus becomes, could such a waiver be considered a constructive unconditional certification?³⁹⁸ And if so, could the waiver then be challenged as an illegal (e.g., arbitrary) certification?³⁹⁹

395. Ransel, *supra* note 13, at 270 (citing Oregon Natural Desert Ass'n v. Thomas, No. 94-522 (D. Or. filed May 11, 1994)). The parties are awaiting a ruling on their summary judgment motions. Personal Communication with Bill Marlett, Executive Director, Oregon Natural Desert Association (Feb. 22, 1996).

396. Ransel, *supra* note 13, at 270. By "waiver," Ransel referred to the provision in § 401(a)(1): "If the state . . . fails or refuses to act on a request for certification, within a reasonable time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1).

397. See 33 U.S.C. § 1341(a)(1) (pertinent provision quoted *supra* note 396).

398. In *Environmental Defense Fund, Inc. v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980), the State of Alabama had "decided to waive the requirements of § 401." In view of § 401(a)(1)'s provision waiving the certification requirements where a state "fails or refuses to act on a request for certification," the court reasoned that it would be "illogical" not to allow "affirmative waivers." *Id.* Accordingly, the court held that "a state may make an affirmative decision to waive § 401 certification." *Id.* The court cited an exhibit and an affidavit as evidence of the State's decision, but the form or content of its waiver was not apparent from the decision.

399. See *supra* note 374 and accompanying text. A plaintiff might allege that the state's affirmative waiver was, in effect, a statement of reasonable assurance that the activity as proposed would comply with all applicable water quality requirements, and that this decision was arbitrary. In *Alaska Center for the Environment v. Reilly (ACE)*, the plaintiff argued, and the court held, that the State's failure, over a period of more than 10 years, to submit to EPA pollutant load calculations (called TMDLs) for Alaska waters constituted a constructive submission of no TMDLs, i.e., a submission that no TMDLs were necessary. 762 F. Supp. 1422, 1426, 1429 (W.D. Wash. 1991). TMDLs, or "total maximum daily loads," are required by 33 U.S.C. § 1313(d). This failure by the State, the plaintiff argued, had triggered EPA's nondiscretionary duty to adopt TMDLs for the state. 762 F. Supp. at 1426, 1429. The court held that EPA did have a nondiscretionary duty, under the circumstances, to establish TMDLs. *Id.* at 1429 (following *Scott v. City of Hammond, Ind.*, 741 F.2d 992 (7th Cir. 1984)). The court concluded that an inadequate state submission under

While a strong argument can be formulated, based on the language of section 401, that Congress did not intend to *require*, but rather to *permit*, states to certify federally permitted activities, there is some force to the counterargument that "State inaction amounting to a refusal to act should not stand in the way of successfully achieving the goals of federal anti-pollution policy."⁴⁰⁰ The effects of a waiver and certification are the same—i.e., a permit may then issue; while denial of certification, of course, precludes permit issuance. Arguably, then, an affirmative waiver, no less than a certification, should be subject to challenge.

The foregoing conclusion is bolstered if the rule against judicial review of agency decisions not to exercise their enforcement authority can be distinguished. As one court has noted, "statutory construction based on prosecutorial discretion is inappropriate [where] neither prosecution nor sanctions is at issue."⁴⁰¹ The discretion implicit in the certification statute may similarly be distinguished from the prosecutorial discretion at issue in *Heckler v. Chaney* and the CWA section 309 context.⁴⁰² No prosecution or sanctions are at issue, but only the prediction of federally permitted activities' compliance with applicable water quality requirements, and the imposition of conditions thereon, if necessary to ensure such compliance. This affirmative waiver argument seems unlikely to succeed, but it illustrates the fact that issues concerning the reviewability of certification decisions, including waivers, are far from settled.⁴⁰³

To summarize, while certification decisions usually have been considered a matter of state law and thus subject to state review procedures, the CWA citizen suit provision also confers jurisdiction on federal courts in some circumstances. The provision arguably autho-

the statute includes a state's "deliberate, silent inaction." *Id.* In *ACE* the plaintiff was suing not the State, for its "constructive submission," but EPA, under 33 U.S.C. § 1365(a)(2), which authorizes suit against the Administrator for an alleged failure to perform any nondiscretionary act or duty. In contrast, in the hypothetical case of a challenge to a state's affirmative waiver of certification, the complaint would allege a "violation of . . . certification," by the state, by virtue of its illegal, or arbitrary, "constructive certification." See *id.* § 1365(a)(1), (f)(5).

400. *Scott*, 741 F.2d at 998 (referring to a state's failure, over a period of several years, to submit to EPA pollutant load calculations under CWA § 303(d)). See also *ACE*, 762 F. Supp. at 1428 ("it is unlikely that Congress intended an important aspect of the federal water pollution control scheme to be frustrated by the failure of a state to act," citing *Scott*, 741 F.2d at 997). CWA §§ 303(d) and 401(a) differ significantly, however, in that the state's duty under § 303(d) seems to be nondiscretionary (the statute repeatedly uses the term "each state shall"), while § 401(a) acknowledges that a state may "fail[] or refuse[] to act." A further difference is that § 303(d), unlike § 401(a), imposes a duty on EPA to act if the state fails to adequately perform its duties under the section.

401. See *ACE*, 762 F. Supp. at 1428 n.7 (citing *NRDC v. New York Dep't of Envtl. Conserv.*, 700 F. Supp. 173, 179 (S.D.N.Y. 1988)).

402. See *supra* note 384 and accompanying text.

403. Cf. *RODGERS*, *supra* note 13, § 4.16, at 253.

izes suits for (1) alleged violations of the conditions of a certification by the recipient of the certification (and holder of the federal permit); (2) alleged substantive or procedural violations by the certifying agency; and (3) issuance by a federal agency of a permit before certification has been obtained or waived. The CWA also may authorize suit to challenge an affirmative waiver of certification.

2. Judicial Deference to Certification Decisions

At least one scholar has suggested that certification decisions are committed to agency discretion under the APA,⁴⁰⁴ and hence not amenable to any meaningful review by the courts. In his view, "certifications, depending as they do on guesses about project performance and water response, are acts of political faith; any estimate is as convincing as any other. This has consequences for judicial review of certification decisions that are often challenged because they hold the key to project success."⁴⁰⁵ But this overstates the matter somewhat. It is not apparent that certification decisions are any more (or less) political than permitting decisions.⁴⁰⁶ Both require assessing the potential impacts of the proposed activity or development and determining whether those impacts are within the limits of the applicable law.⁴⁰⁷ The assessments in each case involve predictions based on modeling, professional judgment, and, yes, educated "guesses."⁴⁰⁸ While "one estimate" of some relevant impact may be as good or "convincing" as another, the court's role, in reviewing certification decisions just as in reviewing permitting actions, remains the same—to determine whether the agency's "estimate" is reasonable (or not arbitrary) or supported by substantial evidence.⁴⁰⁹

404. See 5 U.S.C. § 701(a)(2) (1994).

405. *RODGERS*, *supra* note 13, § 4.16, at 253.

406. By "permitting decisions" I refer to any of the myriad permits and licenses to which § 401 applies, as discussed in part II.B.1., *supra*.

407. On the other hand, it is true that the "proof" required of the agency may be less extensive in the initial certification decision than in enforcement cases. At the latter point there should be more "hard data" available and thus less need to rely on "guesses," and the burden is on the agency to prove a violation of a certification condition. See *infra* notes 501-05 and accompanying text.

408. For an example of a reference to the use of modeling in the § 401 context, see *In re Petition of U.S. Army Corps of Eng'rs for a Dredged Material Placement Regulation*, No. R92-17, 1994 Ill. ENV LEXIS 135, at *12-19 (Ill. Pollution Control Bd. Feb. 3, 1994); S.C. CODE REGS. 61-101.C.1.(c) (1993).

409. As EPA has explained:

While the procedure varies from State to State, a State's decision to grant or deny certification is ordinarily subject to an administrative appeal, with review in the State courts designated for appeals of agency decisions. Court review is typically limited to the question of whether the State agency's decision is supported by the record and is not arbitrary or capricious. The courts generally presume regularity in agency procedures and defer to agency expertise in their review.

Clearly, there is law for courts to apply⁴¹⁰ in reviewing certification decisions.⁴¹¹ And courts *do* review, and occasionally overturn, certifications. The Supreme Court of Alaska reversed a certification because the record did not support the State's conclusion that the permit reasonably assured compliance with state water quality standards.⁴¹² The Supreme Court of Montana rejected the State's amendment of a certificate as "clearly erroneous."⁴¹³ Still other courts have reversed denials of certification.⁴¹⁴ While it is fair to say

WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 8 (noting, in a footnote omitted here, that a federal agency applicant may obtain review of a certification decision in federal court). See also *Power Authority v. Williams*, 475 N.Y.S.2d 901, 903-04 (N.Y. App. Div. 1984) (requiring a rational basis for denying 401 certification); *de Rham v. Diamond*, 295 N.E.2d 763, 773 (N.Y. 1973) (reviewing record for evidence that State's certification was "rational and reasonable"); *Lake Erie Alliance for the Protection of the Coastal Corridor v. United States Army Corps of Eng'rs*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981) (indicating that Ohio courts review 401 decisions to determine if they are "reasonable and lawful"). Cf. *Hi-Line Sportsmen Club v. Milk River Irrigation Dist.*, 768 P.2d 13, 16 (Mont. 1990) (rejecting a certification amendment as "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record").

410. Cf. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (holding that the APA exception to the general rule of reviewability for action "committed to agency discretion" is "a very narrow exception . . . applicable in those rare circumstances where . . . there is no law to apply"), *abrogated in part on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977).

411. The applicable law, enumerated in § 401, includes a state's water quality standards. See, e.g., *supra* note 50 and accompanying text. At least one state court has held that a state has authority, pursuant to § 401, "to enforce all water quality-related statutes and rules," potentially including state and local land use plans and laws. *Arnold Irrigation Dist. v. Department of Env'tl. Quality*, 717 P.2d 1274, 1279 (Or. Ct. App. 1986) (emphasis in original).

412. *Miners Advocacy Council v. Department of Env'tl. Conserv.*, 778 P.2d 1126, 1139 (Alaska 1989), *cert. denied*, 493 U.S. 1077 (1990). The state had certified, as a group and without analysis of individual or site-specific information, 539 NPDES permits for placer mining operations. The permits set an effluent limit (0.2 ml/l) for total suspended solids (TSS) equal to twice the state standard (0.1 ml/l) for TSS in the receiving waters. *Id.* at 1130. Finding no statutory or regulatory requirement that NPDES permits be certified individually, the court upheld the state's authority to issue such a "blanket" certification, "provided the certification ensures that Alaska water quality standards will be met." *Id.* at 1133. But the court concluded that the State had *not* provided reasonable assurance that all placer mines would meet the TSS standard. Specifically, the court found that the State was relying on dilution of the mines' effluent by the water of the receiving stream, but had failed to consider that some mining operations removed virtually all of the water from the stream. In these cases, with no water available in the stream to dilute the effluent, a 0.2 ml/l effluent limitation would not ensure that the 0.1 ml/l stream standard would be met. Indeed, the permit limit almost ensured that stream water quality would be degraded to the quality of the effluent (0.2 ml/l TSS). *Id.* at 1139-40. The State's decision apparently was premised, in part, on an assumption that permittees would employ settling ponds which would reduce TSS in the effluent to 0.1 ml/l or less. But the court rejected this reasoning since the permits did not require the use of settling ponds. *Id.* at 1139 n.20.

413. *Hi-Line Sportsmen Club v. Milk River Irrigation Dist.*, 768 P.2d 13, 16 (Mont. 1990).

414. E.g., *Summit Hydropower Partnership v. Commissioner of Env'tl. Protection*, 1992 WL 175241 (Conn. Super. Ct. July 20, 1992) (holding that the state agency had exceeded its legal authority), *rev'd*, 629 A.2d 367, 373 (Conn. 1993) (holding that plaintiff was not enti-

that state courts accord great deference to state agencies' decisions as to whether, and under what conditions, to certify an activity,⁴¹⁵ this deference cannot be equated with turning a blind eye.⁴¹⁶

III

THE UNWRITTEN STORY OF SECTION 401: FEDERAL GRAZING PERMITS

In the foregoing parts of this article I have attempted to characterize the states' broad authority under section 401, to describe the derivation of this authority, and to illustrate how the statute has been applied to date. This final part seeks to demonstrate, using federal land grazing as a case study, first, why states should exercise their certification authority more extensively and responsibly, and second, that no impediments (other than inertia and tradition) exist to prevent them from doing so.⁴¹⁷

A. The Water Quality Impacts of Grazing on Federal Lands

Nonpoint source water pollution on the public lands of the West is a problem of significant proportions, due to the immense land area involved, the ubiquity of the pollution sources, and the vulnerability

tion under state law to a hearing on the denial of its certification request); *Commonwealth Dep't of Env'tl. Resources v. City of Harrisburg*, 578 A.2d 563 (Pa. Commw. Ct. 1990).

415. The "substantial policy and technical uncertainties . . . prompt[] a deferential review in the courts. Thus, a noticeable soft glance is extended to certification choices, either to deny or to grant . . ." *RODGERS, supra* note 13, § 4.16, at 253 (footnotes omitted); see also *id.* at 254 & n.72 (citing case law example "of extreme tolerance not only of the certification choices but also of the methods the agency uses to get there"). See, e.g., *Bangor Hydro-Electric Co. v. Board of Env'tl. Protection*, 595 A.2d 438, 443 (Me. 1991); *Environmental Defense Fund v. Tennessee Water Quality Control Bd.*, 660 S.W.2d 776, 781 (Tenn. Ct. App. 1983); *City of Klamath Falls v. Department of Env'tl. Quality*, 851 P.2d 602, 606-07 (Or. Ct. App. 1993) (Rossmann, J., dissenting) (asserting that majority opinion provides only a few of the relevant facts and affirms "an absurd result"), *aff'd*, 870 P.2d 825 (Or. 1994). *But cf. de Rham v. Diamond*, 295 N.E.2d 763, 768 (N.Y. 1973) (applying rational basis test to State's determination, but also holding that State's authority under § 401 is very limited).

416. Cf. *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989) ("reject[ing] defendants' argument that the discretionary nature of the [state's] certification process poses special constitutional concerns," and holding that "[a]ny defect in a state's section 401 water quality certification can be redressed" in state court).

417. Prior to the Supreme Court's ruling in *PUD No. 1 v. Washington Department of Ecology*, 114 S. Ct. 1900 (1994), some Clean Water Act scholars had suggested that, because of conflicting case law in this area, the success of the § 401 program hinged on congressional clarification of the statute and the states' powers thereunder. *ADLER ET AL., supra* note 1, at 205. *PUD No. 1*, however, should help heal some of the division in the courts and alleviate the hesitancy that may have dissuaded states from exercising their authority more fully. And the divided case law to which *Adler et al.* referred may be due as much to the failure of states and other parties in earlier cases to argue for broad 401 authority based on a comprehensive evaluation of the statutory language, legislative history, and agency interpretations, as to the (heretofore) lack of a clear precedent.

of many surface waters and water-related resources. Nonpoint source pollution on the (principally western) federal lands results from such diverse activities as grazing, energy development, silviculture, and construction of roads and other facilities. The vast majority of public lands is open to one or more of these uses.⁴¹⁸

These activities share a common attribute—they all disturb the ground surface and enhance erosional forces, thus causing increased siltation, or sedimentation, of surface waters.⁴¹⁹ Nationwide, silt is the chief nonpoint source pollutant in all rivers and the second most prevalent in lakes.⁴²⁰ Nearly any use of land can cause erosion and, hence, siltation; but agricultural activities are the principal agent.⁴²¹

According to EPA, agriculture is “the single largest contributor to nonpoint source problems in the nation,” causing forty-one percent of all nonpoint source impacts.⁴²² Agriculture may be responsible for an even larger share of NPS pollution in the West than in the country as a whole.⁴²³ The western states themselves have identified grazing (a subcategory of agriculture) as the NPS category having the greatest impacts on the quality and beneficial uses of their waters.⁴²⁴ Wyo-

418. For instance, livestock grazing is conducted on approximately 104 of the 191 million acres managed by the U.S. Forest Service, and 170 of the 178 million acres of lands managed by the Bureau of Land Management (BLM) in the western states, outside of Alaska. See, e.g., GAO, RANGELAND MANAGEMENT: FOREST SERVICE NOT PERFORMING NEEDED MONITORING OF GRAZING ALLOTMENTS 2 (May 1991) [hereinafter FS MONITORING]; GAO, RANGELAND MANAGEMENT: COMPARISON OF RANGELAND CONDITION REPORTS 2 (July 1991) [hereinafter RANGELAND CONDITION REPORTS]; DEP'T OF INTERIOR—BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 6 (Sept. 1992); COGGINS ET AL., *supra* note 16, at 688.

419. Sedimentation, or siltation, is literally the process of depositing soil and other materials in surface waters.

420. MANAGING NONPOINT SOURCE POLLUTION, *supra* note 17, at 2. Nutrients are the leading pollutant in lakes. *Id.* Livestock grazing can result in both siltation and nutrient pollution. See *infra* notes 427-31 and accompanying text.

421. EPA subdivides agricultural activities into several source categories of nonpoint source pollution, including grazing. MANAGING NONPOINT SOURCE POLLUTION, *supra* note 17, at 15 (table 4).

422. MANAGING NONPOINT SOURCE POLLUTION, *supra* note 17, at 2, 13, 17. Indeed, “[a]griculture is the leading source of water pollution in the United States, even when point source impacts are included in the analysis.” *Id.* at 17. See also *Water Pollution: Nearly 40 Percent of U.S. Water Bodies Impaired, EPA Says in Report to Congress*, ENV'T REP. CURRENT DEV'TS, Jan. 5, 1996, at 1596 (summarizing *National Water Quality Inventory: 1994 Report to Congress*, which reports that agriculture is the leading cause of pollution of rivers and lakes).

423. “Rangeland and irrigated cropland problems are significant sources of pollution in western states. In fact, 99.5 and 89 percent, respectively, of the reported river mileage impacted by rangeland and irrigated cropland are found in the 11 western states” MANAGING NONPOINT SOURCE POLLUTION, *supra* note 17, at 17-18. (“Reported” refers to the states’ 1989 NPS assessment reports required by 33 U.S.C. § 1329(a).)

424. *Preliminary Summary of Findings: Western States Water Council's Nonpoint Source Pollution Survey I-B-2*, in NONPOINT SOURCE POLLUTION CONTROL WORKSHOP—TECHNICAL ISSUES (July 25-28, 1989) (papers presented at Western States Water Council

ming, for instance, reports that sediment and nutrients, both of which are introduced to surface waters by grazing, are the number one and two pollutants impairing the water quality of its streams.⁴²⁵ Rangeland sources in Wyoming cause forty percent of stream impairment and fifty percent of lake impairment.⁴²⁶

Grazing’s impacts, which occur both on and off the public lands, have been widely studied and reported.⁴²⁷ These impacts are not limited to muddying streams. Agricultural practices related to grazing, such as clearing riparian areas to increase crop or grass production and grazing right up to the streambank, can decrease bank stability, resulting in erosion and widening of the stream channel. These effects in turn can lead to decreased shading and thus increased water temperatures, which can impair the habitat of trout and other salmonids.⁴²⁸ Grazing also results in nutrient pollution of surface waters.⁴²⁹ In addition, livestock introduce pathogens, such as bacteria and protozoa, to water, which can threaten human health.⁴³⁰ Over-

Conference). This statistic resulted from a survey conducted by the Western States Water Council of its 15 member states (all western states, including Alaska) in 1988.

425. WYOMING 1994 ASSESSMENT, *supra* note 107, at 10.

426. *Id.* But cf. MANAGING NONPOINT SOURCE POLLUTION, *supra* note 17, at 16 (reporting that 51-75% of impacts to both Wyoming and Arizona streams are caused by siltation).

427. See, e.g., F. BRANSON ET AL., RANGELAND HYDROLOGY (2d ed. 1981); GRAZING MANAGEMENT: AN ECOLOGICAL PERSPECTIVE (Rodney K. Heitschmidt & Jerry W. Stuth eds., 1991); GAO, PUBLIC RANGELANDS: SOME RIPARIAN AREAS RESTORED BUT WIDESPREAD IMPROVEMENT WILL BE SLOW 11 (1988) [hereinafter RIPARIAN RESTORATION]; LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING (1991); Braun, *supra* note 15; FS MONITORING and RANGELAND CONDITION REPORTS, *supra* note 418.

428. TROUT UNLIMITED, THE INVISIBLE MENACE: AGRICULTURAL POLLUTED RUN-OFF IN OUR NATION'S STREAMS 5 (1994). The term “salmonid” refers to any of the various species of trout and salmon. “Riparian areas” can be defined as those areas bordering streams (lakes are sometimes included as well), whose vegetation and hydrology are influenced by the presence of the water in the stream channel or, during dry periods, the elevated water table.

429. Nitrogen and phosphorus are contributed by livestock manure as well as by fertilizers applied to forage crops, such as hay, grown to sustain livestock during nongrazing periods. See AGRICULTURE AND WATER QUALITY IN THE GREAT PLAINS: STATUS AND RECOMMENDATIONS 3 (1992) (Report of Great Plains Agricultural Council Water Quality Task Force). Excess loads of these nutrients can contribute to enhanced growth of algae and eventual consumption of dissolved oxygen in the stream, in a process called eutrophication. See TROUT UNLIMITED, *supra* note 428, at 3 (citing JAHN & SCHENK, LOW-INPUT SUSTAINABLE AGRICULTURE: POLICY DEVELOPMENTS AND IMPLICATIONS FOR FISH AND WILDLIFE (Wildlife Mgmt. Inst., 1990)); Deborah Moore & Zach Willey, *Water in the American West: Institutional Evolution and Environmental Restoration in the 21st Century*, 62 U. COLO. L. REV. 775, 777 n.8 (1991).

430. See GRAZING MANAGEMENT, *supra* note 427, at 155-56. The protozoan *Giardia* is a well-known example in the West. Livestock, humans, and some wildlife species are all sources of this water-borne parasite, which can cause severe illness in humans.

grazing can even cause arid and semiarid rangelands to become deserts.⁴³¹

Overgrazing, or mismanaged grazing, affects not only water quality and hydrology, but can also "eliminate the benefits provided by . . . riparian areas to other users"⁴³² (and uses), including wildlife, recreationists, and archeological resources.⁴³³ Riparian zones constitute less than three percent of the land area of the West (and only one percent of federal rangelands),⁴³⁴ but they are disproportionately valuable.⁴³⁵ Riparian areas provide habitat for at least eighty percent of all wildlife species.⁴³⁶ The plant communities bordering rivers protect water quality by filtering pollutants from runoff and stabilizing the streambank. In addition, streamside plants shade the water, maintain-

431. "Overgrazing [during the late 1800s and early 1900s in the American West] caused millions of acres of grasslands to become desert. Lands which produced grass 'up to your stirrups' . . . became, and remain today [1960] virtual deserts." PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* 4 (1960). "[E]ven one season of misuse [i.e., more than moderate grazing] may cause degradation and subsequently invasion by exotic annuals, thus predisposing the site to fire. After one or more burns, the diverse native plant community is converted to an impoverished community of exotic annuals." Roger Rosentreter, *Displacement of Rare Plants by Exotic Grasses* 170, 174, in *PROCEEDINGS—ECOLOGY AND MANAGEMENT OF ANNUAL RANGELANDS* (U.S. Forest Service, 1994) (Rept. No. INT-GTR-313). "Sites converted to annuals [e.g., by overgrazing] . . . represent low-quality watersheds with increased susceptibility to soil erosion and are prone to desertification . . ." *Id.* at 170. See also COUNCIL ON ENVIRONMENTAL QUALITY, *DESERTIFICATION OF THE UNITED STATES* (1981).

432. *RIPARIAN RESTORATION*, *supra* note 427, at 2, 10.

433. See, e.g., National Wildlife Fed'n v. Bureau of Land Mgmt., No. UT-06-91-1, at 15 (Dec. 20, 1993) [hereinafter *Comb Wash Decision*] (stating that overgrazing in the Comb Wash allotment in Utah has increased erosion, damaged the vegetation, and adversely affected recreation and archaeological sites). See also *MANAGING NONPOINT SOURCE POLLUTION*, *supra* note 17, at 1 ("[w]ildlife and recreation are the uses most affected by NPS pollution"); JOHN HORNING, NAT'L WILDLIFE FED'N, *GRAZING TO EXTINCTION: ENDANGERED, THREATENED AND CANDIDATE SPECIES IMPERILED BY LIVESTOCK GRAZING ON WESTERN PUBLIC LANDS* iii (1994).

434. *RIPARIAN RESTORATION*, *supra* note 427, at 2. The BLM reports that riparian areas constitute 8.7% of all public lands that it manages, but this figure accounts for Alaska. When Alaska is excluded (its riparian acres account for more than 6 million of the 6.9 million riparian acres on public lands nationwide), the national percentage of riparian lands decreases to less than 0.5%. See DEP'T OF INTERIOR—BUREAU OF LAND MANAGEMENT, *MANAGING THE NATION'S PUBLIC LANDS* 19 (FY 1992 Annual Report); *PUBLIC LAND STATISTICS 1991*, *supra* note 418, at 6, 38. In some western states, riparian areas comprise a large fraction of the state's total wetlands. See, e.g., WYOMING 1994 ASSESSMENT, *supra* note 107, at 294 ("because a large percentage of wetlands are [riparian], wetland management is roughly equivalent to riparian management").

435. See David Wann & Jack Wilbur, *Agricultural Sediment: The Case of Otter Creek*, 17 EPA J. 11, 12 (Nov./Dec. 1991). According to the Wyoming DEQ, "[r]iparian zones are the most environmentally significant lands within a watershed." WATER QUALITY DIVISION, WYOMING DEP'T OF ENVTL. QUALITY, *WYOMING NONPOINT SOURCE MANAGEMENT PLAN 71* (1989) [hereinafter *WYOMING NPS PLAN*] (draft plan, approved by EPA in all respects but grazing). This is, of course, equivalent to saying that riparian areas are, collectively, the most environmentally significant lands.

436. *RIPARIAN RESTORATION*, *supra* note 427.

ing the cool temperatures required by native aquatic flora and fauna.⁴³⁷

Because livestock (in particular, cattle) tend to congregate near water and to seek shade and the most palatable, accessible forage, they concentrate in riparian areas where all these amenities are found.⁴³⁸ The impacts on these sites, consequently, are intensified. The Government Accounting Office (GAO) has reported that riparian areas on the western public lands "remain largely in degraded condition" as a result of severe overgrazing in the late 1800s and early 1900s.⁴³⁹ The agency concluded that "livestock grazing is the major cause of degraded riparian habitat on federal rangelands,"⁴⁴⁰ and that "livestock management is the key to restoring riparian areas."⁴⁴¹

437. *Id.*

438. See *id.* at 10.

439. *Id.* at 8. The agency determined that "many thousands of miles of riparian areas . . . need restoration." *Id.* at 18. The BLM has set a goal "to get 75 percent of the riparian (streamside)-wetland acres on BLM lands into proper [functioning] condition by 1997." *MANAGING THE NATION'S PUBLIC LANDS*, *supra* note 434, at 17, 19.

Ongoing controversy marks the condition of public rangelands in general. Some claim that current range conditions are the best they have been this century. *RANGELAND CONDITION REPORTS*, *supra* note 418, at 6 (citing THADIS BOX, *RANGELANDS, NATURAL RESOURCES FOR THE 21ST CENTURY* 113-18 (1990)); S. 1459 § 101(a)(2) (Sen. Domenici's 1996 livestock grazing bill). Others cite less optimistic statistics, such as the stable or declining trend of much of the range. E.g., *RANGELAND CONDITION REPORTS*, *supra* note 418, at 3-4 (reporting that NRDC concluded that over 68% of BLM rangelands were in unsatisfactory condition); JACOBS, *supra* note 427. Conversely, a GAO official testified that, while the *trend* is that most public rangelands are stable or improving, the *condition* of more than half those lands is only poor or fair, and 20% of allotments are overstocked and hence susceptible to further damage. GAO, *MANAGEMENT OF PUBLIC RANGELANDS BY THE BUREAU OF LAND MANAGEMENT, TESTIMONY OF JAMES DUFFUS III, ASSOCIATE DIRECTOR, BEFORE THE SUBCOMM. ON NATIONAL PARKS AND PUBLIC LANDS OF THE HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, Attachment I*, at 2, 5-6 (1992) [hereinafter *GAO TESTIMONY*]. Jacobs summarized recent (and nearly contemporaneous) reports done by BLM itself; by GAO, based on surveys of BLM range managers; and by NWF and NRDC, using data from EISs prepared by BLM during 1978-85. These three studies revealed that 2.4-6% of BLM range is in excellent condition; 23-30% is in good condition; 31-42% is in fair condition; and 12-26.4% is in poor condition. BLM range managers further reported that they did not know the condition of 14% of the range. JACOBS, *supra* note 427, at 491. See also *RANGELAND CONDITION REPORTS*, *supra* note 418, at 3 (citing same studies).

440. *RIPARIAN RESTORATION*, *supra* note 427, at 11.

441. *Id.* at 3, 19. "Livestock management" includes fencing to restrict cattle access to streams and/or herding animals to limit the area or duration of their use. *Id.* at 3. See also Tony Davis, *The Southwest's Last Real River: Will It Flow On?*, HIGH COUNTRY NEWS, June 12, 1995, at 1, 10 (discussing creation of nation's first Riparian Conservation Area on San Pedro River in Arizona, and the successful revegetation and bird repopulation achieved after cattle were removed from the river). "[S]o many other areas in the West also would respond dramatically if [land managers] were to remove cows." *Id.* at 10.

B. *Current Regulation of the Water Quality Impacts of Grazing on Federal Lands*

The Forest Service and BLM authorize grazing on the public lands by permit.⁴⁴² Both agencies have explicit mandates to manage the public lands for "multiple uses," including timber, recreation, range, fish and wildlife, minerals, and watershed.⁴⁴³ But their records at implementing those mandates, particularly in the context of managing grazing, are under increasing scrutiny.⁴⁴⁴ For the most part, the water quality impacts of public land grazing are *not* being regulated. Nonpoint source pollution control, relegated to the states under the Clean Water Act,⁴⁴⁵ consists largely of vague plans and voluntary programs.⁴⁴⁶ The principal control measures are voluntary "best management practices," or BMPs.⁴⁴⁷ Few, if any, states regulate nonpoint sources, despite the apparent mandates in the Act to do so.⁴⁴⁸

442. Forest Service grazing permits are issued under the general authority of 16 U.S.C. § 551 (1994), 43 U.S.C. § 1752 (1994), and 36 C.F.R. §§ 222.3-.4 (1995). BLM issues grazing permits per 43 U.S.C. §§ 315b and 1752 (1994), and 43 C.F.R. subpart 4130 (1995). See also *infra* note 460.

443. See 16 U.S.C. §§ 528-529, 1601, 1604 (1994); 43 U.S.C. §§ 1712, 1732, 1901 (1994). A thorough examination of the agencies' statutory mandates and guiding regulations is well beyond the scope of this article. Many valuable articles and treatises are available to the reader who wishes to explore this area further. See, e.g., GEORGE C. COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* (1995); SCOTT W. HARDT, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345 (1994); RICHARD WHITMAN, *Clean Water or Multiple Use? Best Management Practices for Water Quality Control in the National Forests*, 16 *ECOLOGY L.Q.* 909 (1989).

444. See, e.g., *Comb Wash Decision*, *supra* note 433; JACOBS, *supra* note 427; JOSEPH M. FELLER, *What is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 *Id.* L. REV. 555 (1993-94); RIPARIAN RESTORATION, *supra* note 427, at 2, 10; GAO, *RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING OR OVERSTOCKED GRAZING ALLOTMENTS* (1988) [hereinafter *DECLINING AND OVERSTOCKED ALLOTMENTS*]; STEVE HINCHMAN, *Turmoil on the Range*, HIGH COUNTRY NEWS, Jan. 24, 1994, at 1, 11 (citing citizen challenges to grazing plans both "in the courts and on the ground"). See also GAO TESTIMONY, *supra* note 439, Attachment I, at 5-6 ("[BLM] is often more concerned with meeting the immediate needs of its livestock permittees than with ensuring the longer-term, broader-based viability of the resource").

445. 33 U.S.C. §§ 1288, 1329.

446. See generally ROBERT BECK, *Water Pollution and Water Quality: Legal Controls*, in 3 *WATERS AND WATER RIGHTS* 202-03 (2d ed. 1984); DANIEL R. MANDELKER, *Controlling Nonpoint Source Water Pollution: Can It Be Done?*, 65 *CHI.-KENT L. REV.* 479 (1989).

447. For water quality planning under CWA § 303, EPA has defined "best management practices," or BMPs, as:

Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

40 C.F.R. § 130.2(m) (1995).

448. See, e.g., 33 U.S.C. § 1288(b)(2)(G) (calling for areawide waste treatment management plans, which shall "set forth procedures and methods (including land use requirements) to control to the extent feasible [nonpoint sources of pollution]"); *id.*

Many agricultural BMPs were not designed specifically to protect water quality but were aimed at conserving soil or enhancing crop production. Still, many hold the potential for maintaining or improving water quality at least indirectly. But any BMP is only as good as its implementation. Because BMP implementation has been voluntary, program results have been haphazard and inconsistent.⁴⁴⁹ Although most grazing BMPs (with the exception of fencing) are not costly to implement and are highly effective in enhancing range quality,⁴⁵⁰ many operators will not adopt BMPs without financial assistance, and may not persist in their use or maintenance after the initial "demonstration period."⁴⁵¹ Moreover, neither federal agency itself implements, nor generally requires its grazing permittees to implement, BMPs.⁴⁵²

The GAO has investigated the condition of public land riparian areas and the efficacy of restoration efforts using certain BMPs. After consulting extensively with federal range managers, reviewing various

§ 1329(b)(2)(A)-(B) (mandating state NPS management programs, which shall include "[a]n identification of [BMPs] which will be undertaken" and "[a]n identification of programs (including, as appropriate, nonregulatory or regulatory programs . . .) to achieve implementation of [BMPs]"; emphasis added). Wyoming's approach to NPS pollution may be typical of western states'. Wyoming DEQ, the state agency charged with NPS pollution control, wrote:

[Wyoming's] 1988 Nonpoint Source Assessment [required by CWA § 319(a)] identified several land use activities which result in water quality impairment in Wyoming. Rather than allow the federal government to step in and dictate a program to our mining, oil and gas, construction, timber, and agricultural industries, the state chose to develop a voluntary program using education, public information, and financial assistance to demonstrate the benefits of nonpoint source pollution control.

Beth Pratt, *Why a Nonpoint Source Plan for Wyoming?*, CLEAN WATER WAYS, Oct. 1991, at 3. The threat of federal intervention perceived by the State, however, is imaginary—§ 319 gives no federal agency the authority to "step in" and devise an NPS program for a state if it does not adopt one itself. See also WYOMING NPS PLAN, *supra* note 435, at 7; WHITMAN, *supra* note 443, at 942-43 (both making same mistake). One wonders whether the State would have prepared any program had it correctly interpreted the federal statute.

449. See generally JOHN H. DAVIDSON, *The 1987 Nonpoint Source Pollution Amendments and State Progress Under the New Program*, in WATER QUALITY CONTROL: INTEGRATING BENEFICIAL USE AND ENVIRONMENTAL PROTECTION (June 1-3, 1988) (short course sponsored by the Natural Resources Law Center, University of Colorado, Boulder); MANDELKER, *supra* note 446.

450. TROUT UNLIMITED, *supra* note 428, at 10.

451. *Cf.* *DECLINING AND OVERSTOCKED ALLOTMENTS*, *supra* note 444, at 49-50 (documenting little increase in financial investment by permittees participating in experimental stewardship program, despite significantly increased BLM funding).

452. The Forest Service has, however, adopted silviculture BMPs, which it includes where appropriate as conditions in timber contracts. FOREST SERVICE MANUAL 2509.22 (SOIL AND WATER CONSERVATION PRACTICES HANDBOOK) (adopted in WYOMING DEP'T OF ENVTL. QUALITY, SILVICULTURE BEST MANAGEMENT PRACTICES (Sept. 1992)). See also *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986) (stating that BMPs are "merely a means to achieve the appropriate state plan water quality standards"); *rev'd sub nom. on other grounds*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

studies and file data, and visiting a number of restoration sites across the West, the agency concluded: "There are no major technical or scientific obstacles to overcome [in restoring riparian areas,]" and "[a]lthough specific approaches vary with the characteristics of the land, . . . the primary technique [is] a change in the *management of livestock* to give the native vegetation more opportunity to grow."⁴⁵³ Yet these management techniques are not, by and large, being implemented by the range operators or required by the management agencies. The reasons, presumably, are several, among them no legal mandate to do so, cost, politics (or agency "capture"), and tradition (or resistance to change). Several authors have written about the "capture" of land management agencies by their regulated interests.⁴⁵⁴ Similarly, the GAO's investigations produced considerable testimonial evidence that politically powerful livestock permittees are frequently able to forestall any unwelcome changes in their operations, including riparian restoration projects, and are even able to avoid reprisals for grazing trespass and other violations of permit conditions or agency regulations.⁴⁵⁵

453. RIPARIAN RESTORATION, *supra* note 427, at 51 (emphasis added). The following examples of BMPs applicable to grazing reflect the emphasis on animal management:

1. grazing rotation—moving livestock among pastures and limiting the time spent in (or forage removed from) each pasture
2. location of salt or other supplements to disperse livestock and attract them away from waterbodies
3. installing ponds or tanks to substitute for streams used by livestock for water
4. seasonal grazing
5. fencing
6. runoff diversion structures, such as retention dams
7. manure containment structures
8. judicious use of pesticides and fertilizers, including amount, timing (date and time of day), formulation, and application method
9. Integrated Pest Management (IPM)

See TROUT UNLIMITED, *supra* note 428, at 8-10; Davidson, *supra* note 449, at 40. None of these practices or ideas is new. As Professor Davidson observed, "Most have been around since the 1930's as have Soil Conservation Districts." *Id.*

454. In the grazing context, see, e.g., Foss, *supra* note 431, at 198-200; JACOBS, *supra* note 427; DENZEL FERGUSON & NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH (1983).

455. RIPARIAN RESTORATION, *supra* note 427, at 46-49. See also GAO, RANGELAND MANAGEMENT: BLM EFFORTS TO PREVENT UNAUTHORIZED LIVESTOCK GRAZING NEED STRENGTHENING (Dec. 1990). The GAO authors were told by BLM field personnel that "[grazing] permittees are managing BLM," not vice versa, RIPARIAN RESTORATION, *supra* note 427, at 46-47; that "riparian areas remain in generally poor condition" because BLM managers "fear the political power wielded by certain permittees" and so "have not taken strong action on . . . compliance problems," *id.* at 47; and even that a local manager had been told by his supervisor to "apologize to [a] permittee" whom the manager had ordered to stop unauthorized cutting of trees in a riparian area "and [to] deliver the wood to his ranch"! *Id.* After describing the success of the relatively few riparian restoration projects, the GAO report's authors also observed (one cannot but wonder whether with tongue in cheek): "Surprisingly, however, considering that the lands involved are federal, not private, obtaining comparable cooperation or enforcement in other locations has not been achieved. In these instances, ranchers question the value of riparian improvement efforts

Ironically, GAO's investigations revealed that, with few exceptions, grazing permittees who participated in riparian restoration projects were not required to reduce the numbers of livestock they were allowed to graze on public lands and were generally pleased with project results. Not only did riparian conditions (including stream and water quality) improve,⁴⁵⁶ but several operators also acknowledged increased productivity in their herds as well.⁴⁵⁷ Many of these operators had initially resisted the projects, and some had actively thwarted agency restoration efforts by allowing their cattle to trespass in the protected area.⁴⁵⁸

C. Applying Section 401 to Federal Grazing Permits

The foregoing discussion, necessarily abbreviated, suggests that the section 401 certification process could prove helpful to states seeking to regulate more effectively the water quality impacts of grazing. This final part examines the legal and policy rationales for, as well as potential obstacles to, applying section 401 to federal grazing permits.

1. The Legal Basis for Section 401 Review

The legal basis for subjecting federal grazing permits to CWA section 401 certification is easily summarized: a permit to graze livestock on the public lands (whether managed by BLM or the Forest Service)⁴⁵⁹ is a "Federal license or permit to conduct [an] activity."⁴⁶⁰ The "activity," grazing, "may result in [a] discharge into the navigable waters"⁴⁶¹ if the livestock will have access to any lake, stream, or wet-

and effectively oppose any restrictions on their livestock's access to riparian areas." *Id.* at 51 (emphasis added).

456. See, e.g., RIPARIAN RESTORATION, *supra* note 427, at 20-28, 56, 63-64, 69.

457. See, e.g., *id.* at 26, 32, 59, 62.

458. See, e.g., *id.* at 20, 22, 30, 61, 71.

459. See *supra* note 442.

460. 33 U.S.C. § 1341(a)(1). Forest Service grazing permits are issued under the general authority of 16 U.S.C. § 551, 43 U.S.C. § 1752, and 36 C.F.R. §§ 222.3-4 (1995). BLM issues grazing permits per 43 U.S.C. §§ 315b and 1752, and 43 C.F.R. subpart 4130 (1995). The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1702(p), defines "grazing permit and lease," for purposes of both agencies, as "any document authorizing use of [the respective lands] for the purpose of grazing domestic livestock." See also 36 C.F.R. § 222.1(b)(5) (1995). BLM grazing "leases" are authorized by 43 U.S.C. § 315m (1994). The only difference (other than the specific statutory authority) between leases and permits is that permits authorize use "within," while leases authorize use "outside," grazing districts established under 43 U.S.C. § 315. See 43 C.F.R. § 4100.0-5 (1995). As functionally equivalent authorizations, both should be treated as "licenses or permits" for purposes of § 401 certification. Professor Feller has suggested that a grazing permit should qualify as an APA "license." Joseph M. Feller, *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 LAND & WATER L. REV. 571, 584 n.105 (1991). It should also qualify as a "Federal license or permit" for purposes of CWA § 401.

461. 33 U.S.C. § 1341(a)(1).

land on public lands.⁴⁶² The principal "discharge[s]" that "may result" from livestock grazing are livestock urinating or defecating in surface waters or along the banks (from which deposits may then be washed into the water) and erosion of banks and streambeds caused by livestock trampling.⁴⁶³ Other "discharges" are likely as well, including increased surface runoff and erosion from stream banks and riparian zones due to compaction of soils by trampling, and erosion resulting from permittee access to and administration of an allotment (driving along or across streams, building or repairing roads, etc.).

These "discharges" meet section 401's "threshold condition"; once their potential occurrence has been established, any *other* water-quality-related impacts will be the object of proper scrutiny by the certifying agency.⁴⁶⁴ Thus, the agency can consider such things as removal of streambank vegetation and its adverse effect on water temperature and fish escape habitat; grazing-induced vegetation changes (both reduced cover and species composition alteration), which may result in lowering the water table and thus reducing stream flow; and the reduced ability of stream channels and riparian areas to accommodate floods, with the attendant impacts downstream.⁴⁶⁵ Indeed, the agency will be able to consider *any* grazing-induced impacts to the riparian and/or aquatic ecosystem.⁴⁶⁶

462. See *supra* note 120 and accompanying text (discussing the extremely broad definition and interpretation of "navigable waters" under the Clean Water Act). Certification should apply to all permits except those on allotments where water must be hauled in or where water is pumped from a well into metal tanks. (If pumped groundwater is stored in earthen ponds or tanks and has thus created an artificial wetland, however, that wetland may nonetheless qualify as a "navigable water" entitled to protection under the CWA, including § 401. See, e.g., *Leslie Salt Co. v. United States*, 896 F.2d 354, 357-59 (9th Cir. 1990), *cert. denied*, 498 U.S. 1196 (1991)). But see 51 Fed. Reg. 41,206, 41,217 (1986) (Corps comments on final § 404 rules, noting that artificial ponds "used exclusively for . . . stock watering" are generally excepted from definition of "navigable waters").

463. As discussed in detail in earlier parts of this article, there is no requirement that the "discharge" be a "discharge of a pollutant." Nevertheless, concentrated animal feeding operations (CAFOs) are expressly identified in the CWA as point sources of pollutants. 33 U.S.C. § 1362(14). One commentator has suggested that water gaps and other areas where livestock concentrate adjacent to water can be analogized to, and perhaps should be regulated as, CAFOs. Braun, *supra* note 15, at 71 n.88. Public land grazing operations, however, probably do not qualify as CAFOs as defined by EPA. See 40 C.F.R. § 122.23 & pt. 122 app. B (1995).

464. "[O]nce the threshold condition, the existence of a discharge, is satisfied," the agency is authorized under § 401(d) to impose "additional conditions and limitations on the activity as a whole." PUD No. 1 v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1909 (1994) (emphasis added). See also *supra* parts II.B.1 and 2.

465. See *supra* notes 427-41 and accompanying text.

466. Cf. PUD No. 1, 114 S. Ct. at 1909 (stating that § 401 authorizes states to impose additional conditions once the existence of a discharge is established). Cf. S.C. CODE REGS. 61-101.F.5. (1993) (requiring denial of certification if the proposed activity "permanently alters the aquatic ecosystem," "adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species," or "adversely impacts special or unique habitats"); *In re* Petition of Silver Star Hydro, Ltd., No. WQ 92-03, 1992 Cal. ENV

The legal basis for applying section 401 to federal grazing permits will soon undergo its first test. Several Oregon groups have sued the Forest Service for issuing a permit allowing grazing in the Camp Creek Allotment of the Malheur National Forest "without first requiring the permittee to obtain certification from the State of Oregon that the grazing authorized by the permit will not violate water quality standards."⁴⁶⁷ The Forest Service admitted that cattle grazing in the Malheur National Forest "causes water pollution and may cause serious adverse impacts on aquatic species, including anadromous fish."⁴⁶⁸ It denied, however, that CWA section 401 applies to livestock grazing permits.⁴⁶⁹ The plaintiffs conceded that "in practice Oregon has not

LEXIS 3, at *14, *19 (State Water Resources Control Bd. Mar. 19, 1992) (affirming denial of certification for, *inter alia*, applicant's failure to sufficiently document occurrence of rare plants in project area or effects of proposed project on vegetation, including riparian vegetation).

467. Complaint ¶ 1, Oregon Natural Desert Ass'n v. Thomas, No. 94-522 (D. Or. filed May 11, 1994). The suit was brought under the CWA citizen suit provision, CWA § 505, 33 U.S.C. § 1365. The plaintiffs alleged that "Camp Creek suffers from degraded water quality due to grazing. Water quality problems in Camp Creek caused in whole or in part by grazing include . . . increased sediment, increased summer and decreased winter temperatures, and the presences [sic] of fecal coliform and fecal streptococci." *Id.* ¶ 19. The plaintiffs' "precise claim" was that "it is a violation of § 401 to issue a license or permit without requiring 'certification under § 401.'" Plaintiffs' Memorandum in Opposition to Defendant's and Defendant-Intervenors' Motions for Summary Judgment, and Judgment on the Pleadings at 25, Oregon Natural Desert Ass'n v. Thomas, No. 94-522 (D. Or. filed May 11, 1994) (citing 33 U.S.C. § 1365(f)). See *supra* note 345 and accompanying text (discussing § 505 and how it may apply to certifications).

468. Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 9, Oregon Natural Desert Ass'n v. Thomas, No. 94-522 (D. Or. filed May 11, 1994) (citing Federal Defendant's Answer to Plaintiff Intervenor's Complaint at ¶ 16).

469. See Memorandum in Support of the United States Forest Service's Motion for Judgment on the Pleadings and in the Alternative for Summary Judgment at 2, Oregon Natural Desert Ass'n v. Thomas, No. 94-522 (D. Or. filed Dec. 15, 1994) [hereinafter Defendant's Memorandum]. After initially arguing that § 401 applies solely to point source discharges, the Forest Service subsequently amended its position and asserted that § 401 "should be read to apply only to a limited set of three specific nonpoint sources - dams, agricultural storm water discharges, and irrigated agriculture return flows." Plaintiffs' Memorandum in Opposition to Defendant's and Defendant-Intervenors' Motions for Summary Judgment, and Judgment on the Pleadings at 5, Oregon Natural Desert Ass'n v. Thomas, No. 94-522 (D. Or. filed May 11, 1994) (citing Forest Service's Motion on the Pleadings at 24). The agency's argument is premised on a distinction among nonpoint sources between (1) diffuse runoff and (2) discharges from conveyances that Congress has excepted from point source status. Defendants' Memorandum at 5. According to the Forest Service, "discharge" as used in § 401 encompasses the latter but not the former: "[D]ischarge" in section 401(a) means addition of pollutants by means of conveyance facilities such as pipes . . ." *Id.* at 24. This argument converts the CWA's (and EPA's) point source-nonpoint source dichotomy into a trichotomy. No support for this distinction can be found in § 401; indeed, the certification statute contains neither of the key terms "conveyance" or "pollutants." Moreover, the Forest Service's construction is inconsistent with the interpretation of the agency charged with administering the CWA. See *supra* note 203. Nor did the Forest Service attempt to reinforce its argument by suggesting what exempted point sources, i.e., "irrigated agriculture return flows" or "agricultural stormwater discharges," are subject to federal permitting and thus reviewable under § 401.

required § 401 certification for federally issued grazing permits," but asserted that "Oregon regulations do provide that § 401 certification applies to 'projects . . . which may result in any discharge into navigable waters or *impact water quality*.'"⁴⁷⁰ The case is awaiting a ruling on the parties' summary judgment motions.⁴⁷¹

2. Policy Rationales for Section 401 Review

Certification of grazing permits is further justified as a matter of sound environmental policy. As discussed above, the deteriorated condition of many federal grazing lands, and of riparian areas in particular, is widely recognized, livestock grazing's major contribution to that condition is not seriously disputed, and the knowledge and means to remedy the situation are in hand. Furthermore, current federal range management practices are economically inefficient.⁴⁷² The owners of *private* livestock grazing on *public* lands are subsidized to degrade water quality and water-related *public* resources,⁴⁷³ thus exacting costs on other citizens and taxpayers. And they do so with impunity—a patent violation of the otherwise universally accepted principle that the "polluter should pay."⁴⁷⁴

470. Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 19, Oregon Natural Desert Ass'n v. Thomas, No. 94-522 (D. Or. filed May 11, 1994) (quoting OR ADMIN. R. 340-48-005; emphasis in memorandum).

471. Personal communication with Bill Marlett, Executive Director, Oregon Natural Desert Association (Feb. 22, 1996).

472. According to at least one commentator: "[F]ree market economics is driving all but some of the wealthiest public-land ranchers out of business. . . . Without support from the government, which provides roads, water and forage to ranchers for little or, in some cases, no fees, many cattle operations would leave public land, some experts believe." Timothy Egan, *Grazing Bill to Give Ranchers Vast Control of Public Lands*, THE NEW YORK TIMES, July 21, 1995, at A1, C18. See also JACOBS, *supra* note 427, at 380 (noting, *inter alia*, that federal expenditures on ranching programs exceed grazing permit fee revenues to the U.S. Treasury by 10 times). Indeed, instead of relying on economics, both ranchers and agencies often cite maintenance of the ranching lifestyle and cultural traditions to justify continuing grazing programs. GAO, RANGELAND MANAGEMENT: BLM'S HOT DESERT PROGRAM MERITS RECONSIDERATION 3, 49-50 (Nov. 1991); JACOBS, *supra* note 427, at 500-01, 504-05.

473. See Taylor Grazing Act, 43 U.S.C. § 315b (1994) ("grazing privileges. . . shall not create any right, title, interest, or estate in or to the lands"); FLPMA, 43 U.S.C. § 1752(h) ("Nothing in this Act shall be construed as modifying in any way [existing law] with respect to the creation of right, title, interest or estate in or to public lands or lands in National Forests by issuance of grazing permits and leases.").

474. No one doubts that the chemical industry, for example, should pay for preventing or controlling its pollution. But agriculture has escaped such accountability. As the Agriculture Branch Chief for the Federal Office of Management and Budget (OMB) put it: "For any other sector of the economy, allocating the financial burden for prevention of contamination is an easily settled matter: The polluter pays and is compelled to do so through regulation." Susan Offutt, *The Issues and the Policy: View from OMB*, 17 EPA J. 28, 30 (Nov./Dec. 1991). Even 30 years ago, the President's Science Advisory Committee stated: "The public should come to recognize individual rights to quality of living, as expressed by the absence of pollution, as it has come to recognize rights to education, to

Exercising their 401 authority to review the impacts of public land grazing would allow states to fill a major gap in current regulation (or underregulation) of water quality. Moreover, state review of grazing permits to ascertain their water-related impacts, and to condition the permits accordingly, could easily be harmonized with the federal agencies' own legal responsibilities for regulating grazing and managing public land resources. And effectuating the states' authority under section 401, to condition or deny these permits, should help ensure that political forces do not obstruct the achievement of federal or state resource protection goals. Certification of grazing permits by states is not only feasible but likely would prove cost effective as well. Finally, certification offers states several legal advantages over bringing enforcement actions to halt grazing-related pollution.

a. Consistency with Federal Environmental Mandates

Vigorous application of section 401 to grazing permits would further federal policies favoring clean water and rangeland improvement. By exercising their authority to review proposed permits, before grazing activities have yet impacted (or jeopardized) water quality, states can more readily fulfill their responsibilities under the Clean Water Act to "prevent, reduce, and eliminate pollution"⁴⁷⁵ and facilitate achieving the national goal to "restore and maintain" the integrity of the nation's waters.⁴⁷⁶ The Clean Water Act also requires federal agencies to comply with all water pollution laws.⁴⁷⁷ Moreover, the

economic advance, and to public recreation There should be no 'right to pollute.'" 115 CONG. REC. 28,962 (1969) (Sen. Randolph, quoting Committee's 1965 Report; emphasis added). Yet the Nation persists in excusing agriculture from pollution controls, including those required of other industries. See, e.g., 33 U.S.C. § 1342(l)(1) (exempting irrigation return flows from § 402 permit requirement); *id.* § 1362(14) (exempting irrigation return flows and agricultural stormwater discharges from definition of point source); 42 U.S.C. § 6903(27) (1994) (Resource Conservation and Recovery Act (RCRA) exemption of solid or dissolved materials in irrigation return flows from definition of solid waste); *id.* § 9601(14)(C) (Comprehensive Environmental Response, Compensation, and Liability Act definition of hazardous substance, incorporating RCRA exemptions).

475. 33 U.S.C. § 1251(b) (emphasis added).

476. *Id.* § 1251(a).

477. The federal facilities section states:

Each department, agency, or instrumentality of the . . . Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity . . . which may result, in the discharge or runoff of pollutants, . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity

Id. § 1323(a). See also Oregon Natural Resources Council v. United States Forest Serv., 834 F.2d 842, 848 (9th Cir. 1987) (stating that CWA "requires all federal agencies to comply with all state requirements," and citing 33 U.S.C. § 1323); Oregon Natural Resources Council v. Lyng, 882 F.2d 1417, 1424 (9th Cir. 1989) (stating that "[t]he CWA also requires states to implement water quality standards with which federal agencies must comply," and citing §§ 1313, 1323).

federal land management agencies' individual statutory mandates require them to consider water and watershed values in their planning and management activities.⁴⁷⁸ Both agencies are also subject to the Public Rangelands Improvement Act of 1978.⁴⁷⁹ This Act acknowledges that "unsatisfactory conditions" on the public rangelands "negatively impact the quality and availability of scarce western water supplies," threaten fish and wildlife habitat, and enhance surface runoff and the risk of floods. It then "reaffirms a national policy to . . . manage, maintain and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values."⁴⁸⁰ The agencies' regulations echo these legislative requirements and provide even more specificity with respect to resource conditions, including water and watershed.⁴⁸¹

478. With respect to the Forest Service, see Multiple-Use, Sustained-Yield Act, 16 U.S.C. § 528 (1994) ("national forests are established and shall be administered for . . . watershed . . . purposes"); *id.* § 475 (national forests are established "for the purpose of securing favorable conditions of water flows"); National Forest Management Act, 16 U.S.C. § 1604(e)(1) (1994) (forest plans shall "provide for multiple use and sustained yield of the products and services obtained [from the forests, including] . . . watershed"); *id.* § 1604(g) (Agriculture Secretary shall promulgate guidelines (1) providing for obtaining inventory data on soil and water, (2) specifying guidelines for plans to "insure consideration of [land] provide for . . . watershed," and (3) insuring that timber will be harvested only where waterbodies are protected and watershed conditions are not "irreversibly damaged"). With respect to BLM, see 43 U.S.C. § 1701(a)(8) (1994) (public lands shall be managed to protect water resource values); *id.* § 1702(a) (areas of critical environmental concern include areas "where special management attention is required . . . to protect and prevent irreparable damage to important . . . fish and wildlife resources"); *id.* § 1702(c) ("multiple use" includes watershed, wildlife, and fish); *id.* § 1712(c)(8) (BLM land use plans "shall . . . provide for compliance with applicable pollution control laws, including State and Federal . . . water . . . standards or implementation plans"); *id.* § 1732 (Interior Secretary shall manage public lands under principles of multiple use and sustained yield, and shall regulate occupancy and use under terms and conditions consistent with all applicable law). The mandate to manage the national forests "for the purpose of securing favorable conditions of water flows," 16 U.S.C. § 475 (1994) (emphasis added), takes on added significance in light of the Supreme Court's recent admonition that any distinction between water quantity and quality is "artificial." PUD No. 1 v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1912 (1994).

479. 43 U.S.C. §§ 1901-1908 (1994).

480. *Id.* § 1901(b)(2); see also *id.* § 1903(b) (stating the goal of rangeland management is the improvement of those lands).

481. With respect to the Forest Service, see, e.g., 36 C.F.R. §§ 222.1(b)(2) (1995) (defining "allotment management plan" as a document which, *inter alia*, prescribes how livestock operations will be conducted in order to meet the multiple-use, sustained-yield and other objectives of land management); 222.1(b)(19) (defining "range betterment" in terms of "improv[ing] forage conditions, fish and wildlife habitat, watershed protection, and livestock production"); 222.4(a)(4) (authorizing the Secretary to cancel or suspend a grazing permit if the permittee "does not comply with provisions or requirements in the grazing permit or the regulations of the Secretary"); 222.4(a)(6) (authorizing the Secretary to cancel or suspend a grazing permit if the permittee "is convicted for failing to comply with Federal laws or regulations or State laws relating to protection of air, water, soil and vegetation, fish and wildlife, and other environmental values when exercising the grazing use authorized by the permit"); 222.4(a)(7) (authorizing the Secretary to "[m]odify the terms

One could certainly question whether these statutory and regulatory directives are receiving anything more than lip service from the agencies.⁴⁸² Implementing 401 certification of grazing permits should help facilitate achieving the watershed-related objectives of these federal requirements as well as serve state water quality purposes. For the same reason that the "water quality certification process can be an extremely valuable tool to protect wetlands,"⁴⁸³ it has substantial, untapped potential for helping to restore and maintain scarce riparian areas and headwater fisheries in the West. When employed in conjunction with a state's antidegradation policy to protect "outstanding resource waters," it could be a formidable weapon against continued deterioration of aquatic and wetland resources.⁴⁸⁴

While it is not necessary that states adopt rules implementing their section 401 authority,⁴⁸⁵ procedural rules would facilitate the review process and help ensure consistency. Many states, at the encouragement of EPA's Office of Wetlands Protection, have developed regulations implementing their section 401 certification programs to help protect streams and wetlands.⁴⁸⁶ Other states have no such regulatory program and no plans to adopt one.⁴⁸⁷ States should beware of avoiding their section 401 responsibilities, however, under the guise of

and conditions of a permit to conform to current situations brought about by changes in law . . . or other management needs"); 222.4(a)(8) (authorizing the Secretary to "[m]odify the seasons of use, numbers, kind, and class of livestock allowed or the allotment to be used . . . because of resource condition or permittee request"); 222.10(a) (requiring "range improvement programs where necessary to arrest range deterioration . . . with resulting benefits to wildlife, watershed protection, and livestock production"). With respect to BLM, see, e.g., 43 C.F.R. §§ 4100.0-8 (requiring grazing to be in accordance with both multiple-use, sustained-yield principles and land use plans, which must establish "resource condition goals and objectives"); 4130.6 (requiring permits to contain "conditions . . . appropriate to achieve management and resource condition objectives for the public lands"); 4130.3-2 (providing for other permit conditions, including "authorization to use, and directions for placement of supplemental feed, including salt, for improved . . . rangeland management," and restrictions on grazing to restore plant vigor and to prevent compacting wet soils).

482. See, e.g., *supra* notes 439-41 and accompanying text (concerning GAO report on degraded condition of public land riparian areas).

483. WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 9.

484. See *id.* at 18.

485. See *supra* notes 108 and 392 and accompanying text.

486. Idaho and Montana, for example, enacted a Stream Channel Protection Act and Natural Streambed and Land Preservation Act, respectively. These acts require certain design standards and management practices, or require permits for stream alteration activities. See DiRienzo, *supra* note 107, at 3.

487. See *id.* Wyoming, for instance, "believes that through educational programs, public participation and cooperation, voluntary implementation of conservation practices, and innovative applications of current regulatory programs, adequate protection for the state's streams, lakes and wetlands will be achieved." *Id.* According to the Wyoming DEQ, Wyoming's Nonpoint Source Management Plan, "[w]hen completed, . . . will play an important role in the 401 certification process." *Id.* at 2. However, "adoption of the . . . Plan will not significantly change how certification decisions are made. Applications will still be evalu-

needing better information or further studies.⁴⁸⁸ Delaying tactics such as these consign public resources to continued jeopardy.

b. Attaining State Water Quality Standards

Section 401 is probably the most flexible and powerful tool states have to assure themselves that permitting livestock grazing at particular locations would not degrade water quality or interfere with achieving designated uses. Recall that the Supreme Court in *PUD No. 1* held that conditions necessary to enforce designated uses of waters (for instance, coldwater fisheries or contact recreation) may be imposed by states on federal permits via the section 401 review process.⁴⁸⁹ In the grazing context, such conditions might include limiting livestock use to *nonriparian* areas, restricting the season of use, or specifying the numbers or kind of livestock. As suggested above, the certifying agency might also impose, as conditions of its certification, BMPs designed to protect water quality and other water-related values. In addition, the agency also would be authorized to deny certification if it determined in the case of a particular permit that no conditions would ensure compliance with applicable water quality requirements.⁴⁹⁰

ated on a case-by-case basis and appropriate mitigative conditions will be attached even if they have not been officially adopted as BMP's." *Id.*

488. Wyoming DEQ offers a case in point. Despite its recognition of the value of riparian areas, Wyoming DEQ has advised that statewide riparian "typing and mapping must be performed" before "meaningful and defensible BMP's and other measures to protect the resource" can be developed. WYOMING NPS PLAN, *supra* note 435, at 71 (emphasis in original). Yet, as we have seen, many studies have been done on the effects of grazing and other agricultural activities in riparian areas, and much is known about the causes of, and means for remedying, riparian damage. See *supra* notes 427, 432, 453 and accompanying text. Moreover, a certifying agency need not be able to prove that any particular conditions will necessarily achieve their intended purpose. See *supra* note 408 and accompanying text. Thus, Wyoming's concern about being able to defend BMPs or other pollution-prevention measures is probably overblown.

Indeed, it seems certain that the DEQ's recommendation is, at least in part, politically motivated. Wyoming's Nonpoint Source Management Plan has not yet been fully approved by EPA because of differences over its grazing provisions. In fact, the State has not yet adopted final grazing BMPs. See MANAGING NONPOINT SOURCE POLLUTION, *supra* note 17, at 33 (table 6); Personal communication with Beth Pratt, Wyoming Department of Environmental Quality (Apr. 16, 1996). This is so even though (or perhaps because) grazing is a major, if not the chief, source of NPS pollution in the state. See *supra* text at notes 424-26. According to the Wyoming DEQ, the extent of federal lands in Wyoming and the use of much of them for livestock grazing complicate efforts to control NPS pollution. Not only do these lands present funding problems, but the grazing activities conducted thereon contribute significantly to NPS pollutant loadings in Wyoming waters. MANAGING NONPOINT SOURCE POLLUTION, *supra* note 17, at 112. While NPS control efforts on these lands could provide tremendous benefits, DEQ argues that many grazing permittees cannot afford to share the cost of implementing BMPs. *Id.*

489. *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1914 (1994).

490. See 33 U.S.C. § 1341(a)(1)-(2). For instance, grazing might be incompatible with maintaining the high stream values in a watershed with steep slopes and highly erodible

Allowing state water pollution control agencies a greater voice in grazing decisions—as they are entitled, under the Clean Water Act—might lessen the political leverage of permittees and concomitantly alleviate the pressure to cater to grazers now felt by the federal agencies, if only because *two* regulatory agencies are involved where before there was only one.⁴⁹¹ A state voice, pursuant to section 401, could offset, or substitute for, a lack of political will on the part of the land manager, and might even mitigate some of the regulated community's criticism of federal officials. Moreover, the state agencies have their own constituencies of sorts and clearer mandates to protect a specific resource.

It remains to be seen, of course, whether the political resolve necessary for effective implementation of section 401 will exist at the *state* level. The level of resolve will no doubt vary among states, and even within a state over time as administrations and political winds change.⁴⁹² But involving state officials with affirmative responsibilities for protecting the quality and designated uses of state waters is bound to alter the calculus of range management decisionmaking.

c. Cost-Effectiveness

States may discover significant financial incentives to certify federal permits. Adler et al. reasoned that states have not used their section 401 authority more extensively because, "strapped for resources," they must either "ignore, or give only short attention to, the myriad activities, aside from actual point source discharges," that affect water quality.⁴⁹³ But it may well be cheaper for states to exercise their section 401 authority up front than to undertake enforcement action

soils; or extended rest from grazing might be required to restore soil and vegetative conditions, and hence water quality, in a watershed that has been impacted by many years of heavy overgrazing. See, e.g., RIPARIAN RESTORATION, *supra* note 427. Cf. 33 U.S.C. § 1343(c)(2) (prohibiting issuance of a § 402 permit for ocean discharges "where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines [relating to environmental effects] established pursuant to this subsection").

491. See *supra* note 455 and accompanying text (discussing the political clout of some permittees and BLM managers' reluctance to take a hard line on range condition and compliance problems).

492. "Sagebrush rebels" and "Wise Use" proponents in certain western states will undoubtedly attempt to thwart any effort by state environmental protection agencies to further regulate private activities on federal public lands. See, e.g., Marianne Lavelle, "Wise-Use" Movement Grows: Activist counties battle the federal government over land-use controls, THE NAT'L L.J., June 5, 1995, at A1; Elizabeth Larson, *Secessionism in the West*, THE DEFENDER, Nov. 1994, at 1, 9; John Howard, *Western Revolt*, THE DEFENDER, Nov. 1994, at 1; Phil Brick, *Determined Opposition: The Wise Use Movement Challenges Environmentalism*, ENV'T, Oct. 1995, at 16.

493. ADLER ET AL., *supra* note 1, at 204; see also Ransel & Meyers, *supra* note 13, at 345.

against NPS polluters that are believed responsible for impairing the water quality of state waters.

Undertaking additional certification reviews may not be as burdensome or expensive as it may seem.⁴⁹⁴ For one thing, states should charge a fee for processing certification requests,⁴⁹⁵ and applicants should bear all costs of studies or analyses required for the agency's review.⁴⁹⁶ Furthermore, states could simply impose best management practices as conditions on their certifications of grazing permits.⁴⁹⁷ States also may be able to issue "blanket certifications" for categories of activities, although they still will need sufficient site-specific information on a particular permitted activity to assure that it will comply with applicable water quality requirements.⁴⁹⁸ Nor will the burden of enforcing certification conditions fall solely on the certifying agencies. Because certification conditions become conditions of the federal permit,⁴⁹⁹ the federal agency that issues the permit becomes responsible for enforcing any conditions imposed per the certification process.⁵⁰⁰

494. While resource and other practical concerns cannot be ignored, the Senate, at least, did not intend such obstacles to thwart the goals of certification. Describing the certification and federal facility provisions of S. 7, Sen. Muskie stated that the "task [of controlling the wastes of federal agencies and their licensees and permittees] will be neither easy nor inexpensive. Nevertheless, the [Senate Public Works] committee expects that it will be accomplished." 115 CONG. REC. 28,955 (1969). Congress anticipated that the certification requirement would affect how federal agencies did business. The Senate Public Works Committee "recognized that the implementation of [§ 21 of the 1970 Water and Environmental Quality Improvement Act] will cause an adjustment in practices followed in dredging and, of course, in all other activities conducted pursuant to a Federal license or permit." 115 CONG. REC. 28,971 (1969) (emphasis added).

495. See WETLANDS AND 401 CERTIFICATION, *supra* note 13, at 23. See also *In re* Petition of Silver Star Hydro, Ltd., No. WQ 92-03, 1992 Cal. ENV LEXIS 3, at *12 (State Water Resources Control Bd. Mar. 19, 1992) (citing 23 CAL. CODE REGS. tit. 23, § 2200, which provides for a \$500 certification fee for general NPDES storm water permits, as well as other charges).

496. See, e.g., OHIO ADMIN. CODE ANN. 3745-32-05(D) (Anderson 1995) (authorizing state agency to "require that the applicant perform various environmental quality tests"); S.C. CODE REGS. 61-101.C.3. (1993) (authorizing state agency to "require the applicant to provide water quality monitoring data, . . . modelling results, or other environmental assessment"). See also *supra* note 315 and accompanying text.

497. See *supra* note 453, *infra* note 509. Cf. S.C. CODE REGS. 61-68.E.(1) (1993) (authorizing state to require BMPs for control of stormwater runoff as a condition of certification). This approach would also serve to help forestall possible complaints that the agency was taking a piecemeal, or inconsistent, approach to certification decisions.

498. See *Miners Advocacy Council v. Department of Envtl. Conserv.*, 778 P.2d 1126, 1133 (Alaska 1989), *cert. denied*, 493 U.S. 1077 (1990). Cf. S.C. CODE REGS 61-101.A.4. (1993) (authorizing "general certifications for categories of activities or for activities specified in Federal nationwide or general dredge and fill permits"); *id.* 61-101.F.4. The certifying agency could then amend the "standard conditions" applicable to the type of activity on a case-by-case basis depending on the circumstances, including the particular project's expected impacts.

499. See 33 U.S.C. § 1341(d).

500. I leave it to others to consider the related question of whether both agencies—certifying and permitting—may enforce these conditions. See, e.g., HOLME ROBERTS &

d. Legal Advantages

Certification seems preferable to relying on enforcement of water quality standards against polluters for another reason: the quantum and burdens of proof differ. In a certification decision, the burden is on the permit applicant seeking certification or opposing a certification decision; but in an enforcement action, the burden is on the agency (or citizen plaintiff) seeking a penalty or other remedy for an alleged permit violation. It also seems reasonable to expect that less evidence (and *less certain* evidence) would be needed to prosecute an agency's decision to condition or deny a certification than to support an "after-the-fact" enforcement action against a nonpoint source polluter.⁵⁰¹

This latter proposition is bolstered by *PUD No. 1*. The Court reasoned:

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.⁵⁰²

Surely the Court implies that imposing (and defending) certification conditions poses some lesser "regulatory burden" on states; i.e., that states are subject to a more lenient proof requirement when they seek, through the certification process, to impose conditions on permit applicants. States need not be able to predict with certainty a proposed activity's impact on water quality parameters, but can instead assess

OWEN LLC, COLORADO ENVIRONMENTAL LAW HANDBOOK 32 (3d ed. 1994) (stating that "representatives [of the certifying agency] are permitted to enter and inspect the area of the dredge and fill activity to determine compliance with the certification" and citing 5 CCR 1002-18 § 2.4.6.1); U.S. Army Corps of Engineers Regulatory Guidance Letter (RGL-92-4), 60 Fed. Reg. 13,703, 13,706-07 (1995) (explaining Corps's *discretionary* enforcement policy concerning § 401 conditions); S.C. CODE REGS. 61-101.I.2.-3. (1993) (certification conditions enforceable by federal or state agency; state may conduct inspections to determine compliance).

501. See *supra* note 406 and accompanying text. For instance, Wyoming's NPS Program coordinator has stated that, even where water quality data exist, determining the specific cause of water quality problems in watersheds containing several potential sources of pollution can be difficult or even impossible. "But if we find a dead cow in a stream and we can sample the water immediately above and below it, then we know what and who is causing the problem. And we can enforce the water quality standards against that operator." Personal communication with Beth Pratt, Wyoming Department of Environmental Quality (Sept. 27, 1994). (Given the livestock industry's political clout in Wyoming and elsewhere in the West, see *supra* note 455, however, the cow probably would need to be branded for the enforcement agency to take action.)

502. *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1912 (1994).

the consistency of the proposed activity with the *designated uses* of a particular water.⁵⁰³ And their decisions need only be rational.⁵⁰⁴ Moreover, if certification conditions are written not as contingencies but as concrete actions to be taken or avoided by permittees, the federal permitting agency will not have to demonstrate a cause-and-effect relationship in order to take enforcement action against a permit violation.⁵⁰⁵

A less weighty, though certainly not trivial, incentive is that section 401 offers states a means by which they can obtain data to further their NPS pollution control and water quality inventory efforts. For example, federal grazing permits could be conditioned on the permittee keeping accurate records concerning livestock use (e.g., livestock numbers, and the timing and duration of use) of riparian areas and monitoring certain water quality parameters. Under certain conditions,⁵⁰⁶ the states might be able to use this information to help satisfy other responsibilities under the Clean Water Act, such as preparing their section 305(b) reports,⁵⁰⁷ section 208⁵⁰⁸ and section 319 management plans,⁵⁰⁹ and perhaps total maximum daily load (TMDL) calculations.⁵¹⁰

503. See *id.* at 1911. Recall that the State of Washington did a study to determine what minimum stream flow was necessary to support the designated fishery uses of the Dosewallips River. Apparently, no one challenged that study, nor did the courts examine its findings or conclusions.

504. See *supra* note 407 and accompanying text.

505. The federal agency need not determine that the permitted activity is causing or contributing to water quality standards violations before instituting enforcement proceedings to redress a violation of a permit (certification) condition. Cf. *Mumford Cove Ass'n, Inc. v. Town of Groton*, 640 F. Supp. 392, 395 (D. Conn. 1986) (citing *Hooker Chemicals & Plastics Corp. v. Train*, 537 F.2d 620, 623 (2d Cir. 1976)) (no requirement to show a "direct causal link between the violations of [an] NPDES permit and the pollution [of a body of water]"). Admittedly, agency enforcement of the law respecting federal grazing permits is often lax. See, e.g., *supra* note 455 and accompanying text. But certifying agencies at least can impose clear conditions, violations of which will not be difficult for the federal agency (or a citizens group) to detect or enforce.

506. Such conditions may include quality assurance and control protocols to ensure that the data obtained are accurate and the methods for obtaining them comparable to methods used by the state.

507. These biennial reports are required by 33 U.S.C. § 1315(b).

508. *Id.* § 1288. See S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 116 (1972), reprinted in LEGISLATIVE HISTORY, VOL. 1, *supra* note 29, at 299 ("to the extent possible, the plan is required to include control over pollution related to agriculture, mine water, construction, and salt water intrusion"); see also *id.* at 300 (§ 208 plans are also "required to identify, if appropriate, 'silviculturally' related nonpoint sources of pollution as well as agriculturally related nonpoint sources").

509. See 33 U.S.C. § 1329(b). Section 319 requires states to design best management practices (BMPs) and programs to achieve their implementation. Monitoring by grazing permittees of the effectiveness of the BMPs they implement would provide useful information for improving those practices or designing better ones.

510. See *id.* § 1313(d).

Requiring such monitoring is neither unfair to permittees nor an abuse of the certification power. Section 401(d) expressly authorizes (and the legislative history supports) the imposition of monitoring requirements as conditions of certification.⁵¹¹ Moreover, a state would be within its rights, indeed obligated, to impose even more onerous conditions (such as prohibiting grazing within riparian areas if such use could, in the state's judgment, impair water quality) or even to deny grazing altogether if no conditions were believed adequate to mitigate the projected impacts. Finally, the monitoring data collected could benefit the permittee as well as the state and the federal agency, since the data might ultimately show that grazing is not adversely affecting the watershed.⁵¹²

3. Potential Obstacles to Section 401 Review

Federal permittees (and the federal agencies themselves) can be expected to resist the application of section 401 to grazing operations.⁵¹³ A purported obstacle to controlling NPS pollution is the difficulty of distinguishing natural from human-caused erosion and sedimentation of surface waters.⁵¹⁴ Western farmers and ranchers in particular are wont to claim that sediment loads in area streams are natural and that their agricultural operations contribute little, if at all, to sediment loads. Further (or alternatively), they argue that their sediment contributions cannot be distinguished from natural, or background, levels.⁵¹⁵ However, the fact that states reported "natural

511. Some states provide by regulation for requiring modelling or monitoring by certification applicants. E.g., S.C. CODE REGS. 61-101.C.3. (1993); OHIO ADMIN. CODE ANN. 3745-32-05(D) (Anderson 1995).

512. See RIPARIAN RESTORATION, *supra* note 427, at 41-44 (discussing federal agency personnel cuts in recent years and the agencies' consequent inability to "implement a quality and timely riparian improvement program"); FS MONITORING, *supra* note 418, at 4-5 (discussing effect of staffing reductions between 1979 and 1990 on the agency's ability to monitor declining and/or overstocked allotments); GAO, RANGELAND MANAGEMENT: INTERIOR'S MONITORING HAS FALLEN SHORT OF AGENCY REQUIREMENTS 19-21 (Feb. 1992) (citing staff reductions and the need to prioritize range activities as the reasons for BLM's inability to meet monitoring requirements and goals).

513. See, e.g., *supra* notes 467-71 and accompanying text (discussing case pending in Oregon).

514. See, e.g., WYOMING 1994 ASSESSMENT, *supra* note 107, at 310, 313 (noting the "complexities in accounting for levels of natural background nonpoint source pollutants (such as sediment)"). In their § 319 assessments of NPS pollution, states identified "natural sources" affecting the uses of their waters, along with source categories such as agriculture, mining, silviculture, etc. See MANAGING NONPOINT SOURCE POLLUTION, *supra* note 17, at 14-22. It must be kept in mind, however (despite the contrary inference in the Wyoming report), that only human-caused alteration of water constitutes "pollution" under the Clean Water Act. See 33 U.S.C. § 1362(19). "Natural," or "background," levels of sediments do not constitute "pollution."

515. See, e.g., John H. Davidson, *Commentary: Using Special Water Districts to Control Nonpoint Sources of Water Pollution*, 65 CHI.-KENT L. REV. 503, 507 (1989).

causes" of siltation, along with categories of human polluting activities, in their NPS Assessment Reports,⁵¹⁶ exposes the fallacy of claiming that the two cannot be distinguished. Even the Clean Water Act's legislative history undercuts this argument.⁵¹⁷ Clearly, states should not be permitted to employ this defense to rationalize their reluctance to address the problem of controlling grazing impacts.⁵¹⁸

Public land grazers can also be expected to question the fairness of subjecting their activities to section 401 when the identical activities conducted on nonfederal lands (e.g., grazing on private or leased state lands) may not be so scrutinized.⁵¹⁹ Indeed, several reform measures have been introduced in Congress that would reduce, rather than tighten, regulation of public land grazing. These bills would shift significantly the balance of power between grazing permittees and all other users of public rangelands, exempt grazing permit renewal decisions from compliance with the National Environmental Policy Act, and/or transfer ownership and management of BLM public lands to the states. Chief among these bills is S. 852, introduced by Senator Domenici (R-NM), which passed the Senate Energy and Natural Resources Committee eleven to nine in July 1995.⁵²⁰ The Domenici bill

516. See *MANAGING NONPOINT SOURCE POLLUTION*, *supra* note 17, at 17, 19, 22.

517. According to the House Committee on Public Works, "integrity" as used [in the Act's purposes section, § 101(a)] is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is [sic] maintained. . . . Although man is a "part of nature" . . . "natural" is generally defined as that condition in existence before the activities of man invoked perturbations which prevented the system from returning to its original state of equilibrium. . . . [M]an has exceeded nature's homeostatic ability to respond to change. Any change induced by man which overtakes the ability of nature to restore conditions to "natural" or "original" is an unacceptable perturbation. . . . [W]e would describe that ecosystem whose structure and function is [sic] "natural" as one whose systems are capable of preserving themselves at levels believed to have existed before irreversible perturbations caused by man's activities. Such systems can be identified with substantial confidence by scientists. . . .

H.R. REP. NO. 911, 92d Cong., 2d Sess. 66 (1972), 76-77, reprinted in *LEGISLATIVE HISTORY*, VOL. 1, *supra* note 29, at 753, 763-64 (emphasis added).

518. Compare *RODGERS*, *supra* note 13, § 4.10, at 154-55 (dismissing NPDES permittees' attempts to blame permit violations on storms or other natural events). See also *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995).

519. If any evidence were needed to support this prediction, it can be found in the GAO's anecdotal data concerning the livestock interests' political clout and reluctance to take steps to restore riparian areas. See *supra* note 455 and accompanying text. See also note 493 and accompanying text.

520. An amended but substantially similar version of S. 852, S. 1459, was passed by the Senate on March 21, 1996. Other 1995 bills included H.R. 1713 (introduced by Cooley, R-Ore.); S. 629 (introduced by Thomas, R-Wyo.) (would prohibit federal agencies from requiring NEPA environmental assessments for renewals of grazing permits); S. 636 (introduced by Daschle, D-S.D.) (would require Agriculture Secretary to issue new term permits to holders of expired or about-to-expire grazing permits); H.R. 2032 (introduced by Rep. Hansen, D-Utah) and S. 1031 (introduced by Sen. Thomas, R-Wyo.), would allow states to assume management of all BLM lands and resources within their borders.

would "largely limit public participation in grazing decisions to grazing permittees," "eliminat[e] National Environmental Policy Act (NEPA) reviews for individual permits," and "tilt toward ranchers in such things as water rights, improvements to allotments, the establishment of standards and guidelines, and representation on local grazing committees."⁵²¹ None of the proposed reform measures, however, purports to amend section 401.

Given the long-enduring, plain language of the certification statute, which unequivocally subjects only federally permitted activities to the certification procedure, and the legislative history, which is replete with evidence that Congress intended the federal government to set an example in combatting water pollution,⁵²² the stockgrowers' fairness arguments should fail. Unless and until Congress decides to amend a statute in existence for twenty-six years, and expressly ratified and strengthened once, it must be concluded that livestock grazing on the public lands is subject to section 401 review.

Section 401 thus plainly imposes a substantial responsibility upon states.⁵²³ While states may not dictate to federal land managers the proper uses of federal lands,⁵²⁴ they may, and indeed must, exercise their authority under state and federal law to protect the quality of waters within their borders. That may necessitate deciding that grazing or some other federally permitted use is inappropriate at particular locations on the public lands. But this result is consistent with the "preventive policies" in federal water pollution control legislation, including section 401 and its predecessor,⁵²⁵ and with the express terms of section 401.

CONCLUSION

Espousing the views expressed in this article might be likened to rowing upstream, given the extant attitudes of many of our national and state legislators toward regulatory reform. Yet, the law, sound policy, and general public opinion all would seem to support an effort to apply Clean Water Act section 401 to *all* federally permitted activi-

521. *DOI hits back at GOP grazing proposal; Domenici tinkering*, *PUB. LANDS NEWS*, July 20, 1995, at 4.

522. See *supra* note 182. No reason appears (in the legislative history or elsewhere) why the federal activities subject to certification should not include federal lands grazing (or logging, or pipeline construction, or outfitting, or innumerable other activities).

523. See *Ransel*, *supra* note 13, at 283.

524. See *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (holding that neither forest service regulations, federal land use statutes, nor the Coastal Zone Management Act preempted California Coastal Commission's imposition of permit requirement on operation of unpatented mining claim in national forest).

525. See *supra* note 475 and accompanying text.

ties, including public land grazing, which, through their potential discharges to water and other impacts, threaten the integrity of this nation's surface waters. Undertaking to expand states' certification activities in this way would neither distort nor extend the law. On the contrary, it would give effect to the intent of the 1970, 1972, and 1977 Congresses and to the express terms of a statute that has been on the books for twenty-six years.

An advantage of certification is that it does not add a layer of bureaucracy or regulation to existing regulatory regimes. It serves merely to give effect to, and ensure that federally permitted activities are consistent with, existing state requirements respecting water quality. Thorough and consistent implementation of the certification power would help *integrate* state and federal mechanisms for regulating land use and protecting the environment. As many scholars and others have urged, and as the escalating interest in watershed- or ecosystem-based management reflects, we must start thinking in more connected ways.⁵²⁶ "Everything is connected to everything else"—surface water, groundwater, wetlands, watersheds, ecosystems, public and private lands. Similarly, the functions and effects of regulation at the federal, state, and local levels can be partitioned only artificially and only at the peril of undermining the overall effectiveness of regulatory strategies. The section 401 mechanism is in place, and states already have experience with its use in some permitting contexts. EPA is well situated to advise the states in exercising their 401 authority—given that it acts as certifying agency when no state or interstate agency is so qualified;⁵²⁷ that it plays an important role in section 404 permitting,⁵²⁸ the context in which certification probably occurs most often; and that it has already prepared one guidance document on the subject.⁵²⁹ Admittedly, states may have to divert resources from other programs (at least initially) to achieve an enhanced presence in federal permitting decisions, but as discussed in the last part of this article, such a reallocation of resources should prove cost-effective in the long run.⁵³⁰

No substantial impediments exist to prompt and responsible execution of the states' section 401 responsibilities. The time has come to make full use of a long-available and powerful tool for "restor[ing] and maintain[ing] the chemical, physical, and biological integrity waters of the Nation's waters."

526. E.g., Michael Oppenheimer, *Context, Connection, and Opportunity in Environmental Problem Solving*, ENV'T, June 1995, at 10.

527. See 33 U.S.C. § 1341(a).

528. See *id.* § 1344(c), (g)-(l).

529. See WETLANDS AND 401 CERTIFICATION, *supra* note 13.

530. See *supra* part III.C.2.c.