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#### Recommended Citation

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## *Charting the Turbulent Waters of Federalism: Striking the Proper Balance Under the Clean Water Act*

by William L. Andreen

**PUD No. 1 of Jefferson County and the City of Tacoma  
v.**

**State of Washington, Department of Ecology,  
Department of Fisheries, and Department of Wildlife  
(Docket No. 92-1911)**

*Argument Date: February 23, 1994  
From: Supreme Court of Washington*

Congress enacted the Clean Water Act to restore and maintain the chemical, biological, and physical integrity of the nation's rivers and lakes. To accomplish that ambitious objective, Congress created a comprehensive regulatory structure that relies on a complicated partnership between federal and state agencies.

That regulatory structure sets forth two basic mechanisms to combat water pollution. The first is aimed at the control of "point source" discharges — pipes and other discernible conveyances through which pollutants are added to water. Such discharges are forbidden in the absence of a permit issued by the United States Environmental Protection Agency or by an approved state program. These permits contain enforceable obligations based primarily on federally-established regulations which define minimum, technology-based effluent limitations.

Congress, however, also retained a system of state water-quality standards to supplement the new technology-driven approach. Permits for point source discharges, thus, must reflect whatever more stringent requirements are necessary to achieve compliance with state water-quality objectives.

Unlike the uniform, technology-based effluent limitations, state water-quality standards are tailored to the uses and values of specific streams and other waterways. State water-

quality standards, therefore, incorporate 1) designated uses for the waters involved, e.g., fish survival and propagation or public drinking-water supplies, and 2) scientific and technical criteria designed to protect those uses.

The second regulatory approach, found in the Clean Water Act, is aimed at "non-point source" discharges of pollution — problems generally associated with certain land-use activities, like farming, or with activities that otherwise alter the aquatic environment, like dams. State programs which deal with non-point source pollution generally specify appropriate management practices, called "best management practices" in the Clean Water Act, intended to restore and maintain compliance with water-quality standards.

In the regulation of both point source and non-point source discharges, state water-quality standards play a significant role. The significance of these state standards is further enhanced by Section 401 of the Clean Water Act. This provision requires applicants for federal licenses or permits whose activities may cause discharge into waters of the United States, including applicants seeking a license for a hydroelectric project, to obtain a certificate from the affected state. State certification means that any resulting discharge will comply with state water-quality standards, as well as with other pertinent requirements of the Clean Water Act. Consequently, state certification must contain whatever limitations are necessary to ensure compliance with applicable Clean Water Act requirements and any other appropriate requirements of state law. In the absence of a Section 401 certificate, no federal license or permit may be issued.

### *Case at a Glance*

**P**rior to the 1970s, the federal government held exclusive authority over the licensing of hydroelectric facilities. Congress, however, recognized the important role states could play in controlling water pollution and vested them with the authority to review and even veto federal hydroelectric licenses on the basis of state water-quality standards. This case explores the scope of this authority: Is it limited to scientific and technical criteria associated with state water-quality standards or does it also include the protection of beneficial water uses such as fish habitat?

compliance with applicable Clean Water Act requirements and any other appropriate requirements of state law. In the absence of a Section 401 certificate, no federal license or permit may be issued.

### **ISSUES**

All parties agree that this case presents the following question: Did the State of Washington exceed its authority under federal law by imposing minimum stream flow requirements as a condition to water-quality certification under Section 401 of the Clean Water Act for a proposed hydroelectric facility subject to Federal Power Act licensing requirements? The Petitioners, the City of Tacoma and Public Utility District No.

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1 of Jefferson County, also contend that the Supreme Court should decide whether the Federal Power Act grants the Federal Energy Regulatory Commission the exclusive authority, unaffected by Section 401 of the Clean Water Act, to determine such minimum stream flows.

## FACTS

The Dosewallips River is a pristine and undeveloped stream that drains a large portion of the Olympic Peninsula in western Washington. The river runs east through the Olympic National Park, a national wilderness area, a national forest, and private land prior to flowing into the western reaches of Puget Sound. The Dosewallips supports three species of fish— steelhead trout as well as Chinook and Coho salmon.

In March 1986, the City of Tacoma and the Jefferson County Public Utility District No. 1 (“PUD”) filed an application with the Federal Energy Regulatory Commission (the “FERC”) to build the Elkhorn Hydroelectric Project (the “Elkhorn Project”) on the Dosewallips River. This facility would involve building a diversion weir, a small dam, just outside the Olympic National Park. The weir would divert water from a 1.2 mile stretch of the river — the bypass stretch.

The diverted water would flow through a nine-foot diameter tunnel, called a penstock, at a relatively constant elevation, whereas the natural river falls rather steeply. After running parallel to the river for 1.2 miles, the penstock would drop almost vertically through two hydroelectric turbines, rated at a total of 13.3 megawatts, after which the water would be returned to the river through a channel, called a tailrace.

Since a Section 401 certificate under the Clean Water Act was a precondition to FERC licensing action for the Elkhorn Project, Tacoma and PUD applied for state water-quality certification in 1983. As part of the certification process, Tacoma and PUD, in cooperation with a number of federal and state agencies, embarked on a two-year study to examine the effect of the Elkhorn Project on fish in the bypass reach of the Dosewallips.

At the conclusion of the study, Tacoma and PUD proposed to maintain a minimum flow of water in the Dosewallips River (“minimum stream flow”) of between 65 cubic feet per second and 155 cubic feet per second (“cfs”), depending on the month. (The natural flow in that stretch of River ranges between 149 cfs and 738 cfs.) In June 1986, the Washington State Department of Ecology issued a Section 401 certificate requiring minimum stream flows of between 100 cfs and 200 cfs.

Dissatisfied with the state’s approach, Tacoma and PUD appealed to the Washington Pollution Control Hearings Board which eventually determined that, while the state could impose stream flow restrictions to protect the fishery, the state had exceeded its authority by acting to enhance, rather than merely preserve, the resource. Tacoma and PUD, on the one hand, and the state, on the other, appealed this decision to the state Superior Court for Thurston County, Washington.

In an unpublished opinion dated May 8, 1991, the Superior Court reinstated the state-imposed stream flow limitations.

The court concluded that the state had the authority to set minimum stream flows not only to maintain a water resource, but also to improve it. In this case, however, the court held that the state had merely acted to protect the Dosewallips River fishery.

Tacoma and PUD then sought and were granted direct review in the Supreme Court of Washington. That court also upheld the state’s minimum stream flow requirements. *State of Washington v. PUD No. 1 of Jefferson County*, 849 P.2d 646 (1993). First, the state supreme court relied on the fact that the Dosewallips River is classified under Washington state water-quality standards as a Class AA stream — an extraordinary waterway with uses that include “fish migration, rearing, spawning, and harvesting.” Given the risks posed to the fishery by low stream flows along with the state’s antidegradation policy which requires the maintenance of all existing uses, the court held that the state had no choice but to impose minimum flow conditions. In addition, the court relied on the language of Section 401(d) of the Clean Water Act which, in its view, permits states to condition Section 401 certification on any appropriate requirement of state law, not just state water-quality standards. Therefore, the court held that the state had acted properly under a state statute providing that rivers shall be maintained with flows necessary to preserve fish and environmental values.

The Supreme Court of Washington also rejected the argument of Tacoma and PUD that the Federal Power Act preempts state action aimed at setting minimum stream flows under Section 401. The court held that Section 401 was an independent grant of authority that supplemented the otherwise exclusive federal scheme envisioned by the Federal Power Act. On this issue, the court declined to follow *California v. FERC*, 495 U.S. 490 (1990), holding that the minimum stream flow requirements preempted in that case were based entirely on state law and, were not, as in this case, authorized by federal law. Tacoma and PUD then turned to the Supreme Court, which granted their petition for a writ of certiorari to review the decision of the Washington Supreme Court.

## BACKGROUND AND SIGNIFICANCE

The authority to establish minimum stream flows is a matter of great importance to the hydroelectric power industry. The stipulation of higher stream flows can have two adverse consequences from the industry’s point of view: (1) reduction of the amount of water which can be diverted resulting in less power production, or (2) the production of power at less than optimal times.

These problems loom large because over 400 existing facilities must be relicensed between 1993 and the year 2010. The industry would prefer to keep the issue of minimum stream flow exclusively in the hands of the FERC, a familiar agency authorized to consider the need for power production when considering stream flow conditions.

Section 401, however, offers state governments the most direct and effective avenue they have to preserve fisheries that are dependent on an adequate flow of water. Without the authority to set minimum stream flow requirements, states, 44 of which have filed an *amicus* brief in support of Washington, contend that they would be unable to enforce compliance with a critical component of their water-quality standards — the preservation of certain beneficial uses such as fish habitat. In the states' view, this case is vital to preserving the integrity of the Clean Water Act.

Under the Federal Power Act (the "FPA"), the licensing of hydroelectric facilities is a matter completely within the jurisdiction of the FERC, unless and until Congress indicates otherwise. The precise scope of state authority under Section 401 is crucial, therefore, to the resolution of this case.

The Court may initially explore whether Section 401 authority is limited to discharges of pollutants from point sources, i.e., discharges from facilities that actually add pollutants to a waterway. Many dams do not physically add pollutants during their operation; rather, most water-quality problems associated with dams are more indirect, caused by diversion or impoundment of large quantities of water.

Section 401, however, merely provides that a certificate must be obtained for activities "which may result in any discharge." According to the Clean Water Act, the term discharge, when used without qualification, *includes* point source discharges, suggesting that the term applies to other sources of discharge as well. Therefore, it seems unlikely that the Court would find that a discharge that triggers Section 401 certification authority is limited to a discharge of the point source variety. Tacoma and PUD argue, however, that their dam still falls outside the scope of Section 401 because the minimum stream flow requirements do not address a discharge of any type which harms the aquatic environment.

The state contends, on the other hand, that discharge must be construed broadly to include any release or activity which alters the chemical, physical or biological integrity of water — a very conventional view of non-point source pollution. Tacoma and PUD counter that there must first be some sort of release to properly involve Section 401.

In response, both Washington and the United States, as *amicus curiae* supporting the state, point out that the construction of the dam, which will place materials in the river, and the subsequent release of water over or through the dam are discharges that require a water-quality certification. They argue that both forms of discharge will result eventually in a reduction in stream flows in the 1.2 mile bypass reach of the Dosewallips River, a situation which would threaten the continued use of the river as fish habitat and which would not have happened but for the dam. Whether this impact is too remote from any discharge caused by the Elkhorn Project is a question Tacoma and PUD ask the Court to decide.

If the Elkhorn Project is found to require Section 401 certification, the Court will have to address the scope of condi-

tions that the state may properly append to such a certificate. Under Section 401(d), the state may set forth any limitations that are necessary to assure compliance with appropriate state requirements, which would naturally include state water-quality standards.

Tacoma and PUD, however, insist that the only aspect of a water-quality standard that is operable here is the scientific and technical criteria that set objective limits for fecal coliform bacteria, dissolved oxygen, and so on, limits that are crafted to protect the designated uses of this Class AA stream. Since none of the water-quality criteria refer to stream flow, they conclude that the state clearly acted beyond its scope of authority under Section 401(d).

The designated uses of a waterway advanced by the state, on the other hand, certainly are an integral aspect of a water-quality standard. They represent the aquatic values, such as fish habitat, which serve to justify the establishment of water-quality criteria in the first place.

The Environmental Protection Agency, moreover, requires states to have an antidegradation policy as part of their water-quality programs. Washington's antidegradation provision, in turn, is aimed at protecting and maintaining existing stream uses. Thus, Washington argues that it had a legal duty, regardless of the specific scientific criteria that had been established, to set minimum stream flow requirements in order to protect the existing populations of salmon and trout in the Dosewallips River.

Finally, the Court may come to grips with the preemption argument pressed by Tacoma and PUD. How can the FERC have effective control over hydroelectric generation when state agencies, largely unconcerned with the production of power, are busy establishing stream flows for the purpose of environmental protection?

This preemption argument depends on making a distinction between water quality and water quantity. According to Tacoma and PUD, the former may be a shared responsibility, but the latter is completely reserved for the FERC. The difficulty with the distinction, however, is that the quality of an aquatic habitat is often directly affected by water-quantity issues. Dramatically reduced flows on the bypass stretch of the Dosewallips River, for example, will apparently damage salmon and trout fisheries. On the other hand, increased stream flows will certainly impact power generation. The Court, consequently, may have to examine the precise relationship between the FPA and the Clean Water Act when dealing with questions which combine water-quantity and water-quality problems.

Then, again, the Court may not have to address the issue of preemption at all. As the United States argues, there is no indication that Washington's minimum stream flow requirements would conflict with any eventual FERC action on the subject. Only if and when the FERC decides that a different flow regime is required would there be a controversy ripe for consideration, first by the FERC and then on a petition for review in the appropriate federal court.

Tacoma and PUD counter this contention by pointing out that the FERC has declared already that it lacks authority to reject or alter state-imposed conditions in a Section 401 certificate. Thus, the controversy, according to Tacoma and PUD, is just about as ripe as it will ever be. Notwithstanding this argument, any position that the FERC takes on state stream flow standards could be reviewed after the FERC makes a licensing decision in this case.

## ARGUMENTS

***For PUD No. 1 of Jefferson County and the City of Tacoma***  
(Counsel of Record: Howard E. Shapiro; Van Ness, Feldman & Curtis, 1050 Thomas Jefferson Street, NW, Seventh Floor, Washington, DC 20007; (202) 298-1800):

1. This case requires the construction and application of Sections 401 and 303 of the Clean Water Act in light of the comprehensive regulatory scheme presented by the Federal Power Act.
2. In the case of federally-licensed hydroelectric facilities, state water-quality certification authority under Section 401 of the Clean Water Act is limited to determining whether discharges from the facility comply with federally-approved, water-quality standards and other limitations enumerated in Section 401.
3. Under section 303 of the Clean Water Act, objective “criteria” rather than “uses” are the fundamental regulatory device.
4. The authority under Section 401(d) of the Clean Water Act to condition water-quality certificates on “any other appropriate requirement of state law” only allows states to impose conditions for discharges which fail to comply with the provisions enumerated in Section 401(a).
5. The Washington Supreme Court’s expansive reading of Section 401 of the Clean Water Act would subvert the Federal Power Act’s comprehensive licensing scheme.

***For the State of Washington, Department of Ecology, Department of Fisheries, and Department of Wildlife***  
(Counsel of Record: Jay J. Manning, Senior Assistant Attorney General, Office of the Washington State Attorney General, P.O. Box 40117, Olympia, WA 98504-0117; (206) 459-6158):

1. Section 401 of the Clean Water Act authorizes imposing conditions on a water-quality certificate, including minimum stream flows, whenever necessary to prevent violations of state water-quality standards.
2. Section 401 of the Clean Water Act also authorizes imposing conditions on a water-quality certificate to ensure compliance with “other appropriate requirements of state law.”

3. The Elkhorn Project will result in discharges causing water pollution and, without state-imposed minimum stream flow requirements, these discharges will violate state water-quality standards.
4. The Federal Energy Regulatory Commission’s licensing authority under the Federal Power Act does not affect state authority under Section 401 of the Clean Water Act to protect state water-quality standards.

## AMICUS BRIEFS

***In Support of PUD No. 1 of Jefferson County and the City of Tacoma***

Joint brief of the American Forest & Paper Association, American Public Power Association, Edison Electric Institute, and National Hydropower Association (Counsel of Record: John R. Molm; Troutman Sanders, NationsBank Plaza, 600 Peachtree Street, NE, Suite 5200, Atlanta, GA 30308-2216; (404) 885-3000);

Niagara Mohawk Power Corporation (Counsel of Record: Edward Berlin; Swidler & Berlin, 3000 K Street, NW, Suite 300, Washington, DC 20007; (202) 424-7500);

Northwest Hydroelectric Association (Counsel of Record: Richard M. Glick; Davis Wright Tremaine, 2300 First Interstate Tower, 1300 SW Fifth Avenue, Portland, OR 97201; (503) 241-2300);

Pacific Northwest Utilities (Counsel of Record: Jay T. Waldron; Schwabe, Williamson & Wyatt, Pacwest Center, 1211 SW Fifth Avenue, Suite 1600-1950, Portland, OR 97204; (503) 222-9981);

Western Urban Water Coalition (Counsel of Record: Benjamin S. Sharp; Perkins Coie, 607 14th Street, NW, Suite 800, Washington, DC 20005-2011; (202) 628-6600).

***In Support of the State of Washington, Department of Ecology, Department of Fisheries, and Department of Wildlife***

Joint brief of American Rivers and 17 other environmental and outdoor organizations (Counsel of Record: Paul M. Smith; Farr, Smith & Taranto, 2445 M Street, NW, Washington, DC 20037; (202) 775-0184);

The United States (Counsel of Record: Drew S. Days, III, Solicitor General, Department of Justice, Washington, DC 20530; (202) 514-22170);

Joint brief of the State of Vermont and 43 other states (Counsel of Record: Kathleen Liston Morrison, Assistant Attorney General for the State of New York, The Capitol, Albany, NY 12224; (518) 474-4819).